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THE
FEDERAL REPORTER.

VOLUME 103.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 103.

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³ Appointed July 26, 1900.

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CASES
ARGUED AND DETERMINED
IN THE
UNITED STATES CIRCUIT COURTS OF APPEALS AND THE
CIRCUIT AND DISTRICT COURTS.

WONG WAI v. WILLIAMSON et al.

(Circuit Court, N. D. California. May 28, 1900.)

No. 12,937.

1. INJUNCTION—GROUNDS—PROTECTION OF PECUNIARY RIGHTS.

A court of equity may properly grant an injunction restraining health officers of the United States or of a city from imposing or enforcing unlawful restrictions upon the right of a complainant, and others for whom he sues, to travel or to leave the city in which they are, in the pursuit of their lawful business, where such right has a pecuniary value, and the enforcement of the restrictions complained of will result in irreparable loss and injury to the complainants.

2. HEALTH—POWER OF HEALTH BOARD TO ESTABLISH RULES—SAN FRANCISCO CHARTER.

The charter of the city and county of San Francisco vests the legislative power of the corporation in a board of supervisors, and provides that every legislative act shall be by ordinance; and the board of public health thereby created, and charged with the duty of managing the hospitals, alms houses, etc., of enforcing the ordinances, rules, and regulations which may be adopted by the board of supervisors for the securing of good sanitary conditions and the protection of the public health, and of recommending such legislation, has no authority to itself enact legislation or establish rules and regulations for dealing with a supposed serious epidemic.

3. SAME—POWERS OF HEALTH OFFICERS—LEGALITY OF MEASURES ADOPTED.

Health officers of a city should be clothed with sufficient authority to enable them to deal with conditions affecting the public health and to meet emergencies in a prompt and effective manner, and they will be upheld in the exercise of a wide discretion in the execution of measures enacted to that end; but where the municipal authority has neglected to provide suitable rules and regulations upon the subject, and the executive officers are left to adopt such measures as they deem suitable for the occasion, their acts are open to judicial review, and, to be sustainable, their measures must respect the constitutional rights of individuals, be uniform in their operation, and reasonably adapted to secure the object in view.

4. SAME—REGULATIONS FOR PROTECTION AGAINST CONTAGIOUS DISEASES—CONSTITUTIONALITY.

The board of health of San Francisco adopted a resolution declaring its belief in the existence of bubonic plague in the city, and, in connection with the quarantine officer of the United States for the port, promulgated and enforced an order prohibiting any Chinese or Asiatic person from leaving the city without first submitting to inoculation with a serum supposed

to be a preventive, but the administration of which to a person who had been exposed to the disease was dangerous to life and contrary to medical authority. There were some 25,000 Chinese residents of the city, many of whom resided in the "Chinese quarter," and many others scattered throughout other parts of the city. The regulation applied only to the Asiatic or Mongolian race, but included them as a class, without regard to the previous condition, habits, exposure to disease, or residence of the individual; nor did it prohibit them from going anywhere within the city. It was not shown or claimed that the disease existed in the country anywhere outside the city, nor was any evidence offered that the Mongolian race, as a class, was more subject to the disease than others. *Held* that, conceding the power of the board to enact proper rules and regulations in the premises, the one in question had no reasonable relation to the protection of the health of the inhabitants of the city, and was illegal and void, as an unconstitutional invasion of the rights of the persons against whom it was directed.

5. SAME.

Such regulation, discriminating as it does against an entire class, whether native or alien, in violation of the constitutional guaranty of the equal protection of the laws, cannot be sustained by instructions from the supervising surgeon general of the marine hospital service of the United States, directing the health officer of the port to require transportation companies to refuse transportation to Asiatics except on his certificate; such order being based on regulations promulgated by the secretary of the treasury under Act March 27, 1890 (26 Stat. 31). That act provides that whenever it shall be made to appear to the satisfaction of the president that any one of certain contagious diseases exists in a state or territory, and that there is danger of the spread of such disease into other states or territories, he may cause the secretary of the treasury to promulgate such rules and regulations as in his judgment may be necessary to prevent the spread of such disease from one state or territory into another; but there is nothing in such provisions which justifies the promulgation of regulations in violation of constitutional rights, or the adoption and enforcement of such measures by subordinates in their execution.

In Equity. On order to show cause why injunction should not issue.

Reddy, Campbell & Metson (Maguire & Gallagher, Samuel M. Shortridge, John E. Bennett, and Robert Ferral, of counsel), for complainant.

Frank L. Coombs, U. S. Atty., and Marshall B. Woodworth, Asst. U. S. Atty., for defendant J. J. Kinyoun.

Charles L. Weller, Asst. Dist. Atty., for other defendants.

Before MORROW, Circuit Judge, and HAWLEY and DE HAVEN, District Judges.

MORROW, Circuit Judge. This action is brought by the plaintiff, a subject of the emperor of China, residing in the city and county of San Francisco, state of California, against John M. Williamson, Rudolph W. Baum, Louis Bazet, William D. McCarthy, Vincent Buckley, George W. Mendell, and William P. Sullivan, Jr., the acting board of health of said city and county, and J. J. Kinyoun, the acting quarantine officer of the United States government for the port of San Francisco, to restrain the defendants, and all persons acting in their behalf, from requiring the complainant, or any of the Chinese residents of said city and county, to submit to inoculation with the serum known as "Haffkine Prophylactic," and from imprisoning, restrain-

ing, or confining the complainant or any of said Chinese residents within the limits of said city and county until they have submitted to such inoculation, and from interfering with or restraining said Chinese residents in the exercise of their personal liberty to freely pass from said city and county to other parts of the state of California. It is alleged in the bill that on or about the 18th day of May, 1900, the defendants comprising the said board of health adopted and passed a resolution authorizing, directing, and requiring the inoculation of all the Chinese residents of said city and county with the said Haffkine Prophylactic; that the requirements of said resolution are now being enforced by said defendants, and the said Chinese residents are being restrained and imprisoned within the territorial limits of said city and county unless they submit to said inoculation. It is alleged that said Haffkine Prophylactic is a poisonous substance, made and compounded from living bacteria of the bubonic plague; that it is administered to human beings by hypodermic injection into the tissues of the body, and when so injected produces a severe reaction, and causes great pain and distress generally, a sudden and great rise of temperature, and great depression, which sometimes continues, increasing in severity, until it causes death; that the sole and only purpose for which such inoculation is claimed to be effective or useful is to prevent persons from contracting the bubonic plague if exposed thereto after having been so inoculated. It is also alleged that there is not now, and never has been, any case of bubonic plague in said city and county, or in the state of California, nor any germs or bacteria of said disease. The complainant avers that he has never had or contracted said bubonic plague, and has never been exposed to the danger of contracting it, and complains that the action of the said defendants in confining and imprisoning the said Chinese residents of said city and county is a wrongful and oppressive interference with their personal liberty and their right to the pursuit of their lawful business. It is further alleged that said resolution adopted by the defendants is wholly invalid, void, and contrary to the constitution and laws of the United States and of the laws of the state of California; that said resolution and order is not enforced against other residents of said city and county than those of the Mongolian race, and its enforcement deprives the said Chinese residents of said city and county of the equal protection of the laws, and of their rights and liberties under the constitution of the United States, and the laws and treaties passed and adopted pursuant thereto. The complainant brings this suit, also, in behalf of the 25,000 persons of the Chinese race now residing in said city and county. The prayer of the bill is that an injunction be granted enjoining and restraining the defendants, their agents, employes, and all persons acting in their behalf, from imprisoning, restraining, or confining the complainant, or any of the Chinese residents of said city and county of San Francisco, within the limits of said city and county, or otherwise interfering with or restraining the complainant, or any of said Chinese residents of said city and county, in the exercise of their personal liberty to freely pass from said city and county of San Francisco to other parts of the state of California, and from

requiring the complainant, or any of said Chinese residents of said city and county, to submit to inoculation with said Haffkine Prophylactic under penalty of being so confined or restrained or restricted in their right to freely pass from said city and county of San Francisco to other parts of the state of California. Among the affidavits in support of the bill is one by Louis Quong, who declares that he is a person of Chinese extraction, born in the state of California of Chinese parents; that he has been refused permission by the defendants to leave the city and county of San Francisco unless he first obtains a certificate from the board of health of the said city and county, countersigned by J. J. Kinyoun, quarantine officer of the United States for the port of San Francisco, to the effect that the affiant has been inoculated with the preparation known as "Haffkine Prophylactic."

Upon the filing of the bill of complaint, together with affidavits supporting the allegations therein contained, the court issued an order to the defendants to show cause why an injunction should not issue, restraining the defendants from committing the acts and carrying into execution the threats set forth in the bill of complaint. To the order to show cause no return has been made as required by the rules of practice in equity cases, but in lieu thereof the defendants John M. Williamson, Rudolph Baum, Louis Bazet, William D. McCarthy, Vincent Buckley, George W. Mendell, and William P. Sullivan, Jr., composing the board of health of the city and county of San Francisco, have produced a copy of a resolution adopted by the board on May 18, 1900, as follows:

"Resolved, that it is the sense of this board that bubonic plague exists in the city and county of San Francisco, and that all necessary steps already taken for the prevention of its spread be continued, together with such additional measures as may be required."

The defendant J. J. Kinyoun, the acting quarantine officer of the United States at the port of San Francisco, in response to the order has produced the following telegram:

"Washington, D. C., May 21, 1900.

"Surgeon Kinyoun, Angel Island, California: By direction of the president, secretary of treasury has promulgated the following regulations under act of congress March twenty-seventh, eighteen ninety: First, during the existence of plague at any point in the United States the surgeon general, marine hospital service, is authorized to forbid the sale or donation of transportation by common carriers to Asiatics or other races liable to the disease; second, no common carrier shall accept for transportation any person suffering with plague, or any article infected therewith, nor shall common carriers accept for transportation any class of persons who may be designated by the surgeon general of the marine hospital service as being likely to convey the risk of plague contagion to other communities, and said common carriers shall be subject to inspection. Inform transportation companies, and direct them, under above regulations, to refuse transportation to Asiatics, except on your certificate, and instruct bonded inspectors to inspect trains and prevent Asiatics leaving state without your certificate.

"Wyman, Surgeon General Marine Hospital Service."

No objections being offered to these documents as constituting the return of the defendants, they will be so considered.

The court suggested at the hearing the question whether, upon the facts stated in the bill of complaint, an injunction would lie. Thereupon a parol exception was taken to the bill. After further in-

vestigation, the court is of the opinion that it is the proper remedy. The cause of action is not merely that the complainant is deprived of his personal liberty. He and a number of others similarly situated are being deprived by the defendants of their right to travel from San Francisco to other parts of the state in the pursuit of lawful business, and this right, it is alleged, has a pecuniary value to the complainant in excess of the amount required to give this court jurisdiction of the case. The permission to travel being by the acts of the defendants coupled with an alleged unlawful condition or restriction, it is the province of the court to inquire into the facts, and remove the restriction, if found unlawful. This is undoubtedly the principle involved in the numerous cases where courts have granted injunctions to relieve parties from the restrictions and pecuniary injuries inflicted by boycotts, lockouts, and strikes. *Wire Co. v. Murray* (C. C.) 80 Fed. 811; *Mackall v. Ratchford* (C. C.) 82 Fed. 41; *United States v. Debs* (C. C.) 64 Fed. 724; *In re Debs*, 158 U. S. 573, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Beard v. Burts*, 95 U. S. 434, 24 L. Ed. 485. In our opinion, the bill is sufficient, and the parol exception must be overruled.

The defendants constituting the board of health of the city and county of San Francisco contend that they are justified in their action with respect to the matter in controversy under their authority as a board, acting pursuant to the resolution of the board of May 18, 1900. The charter of the city and county of San Francisco provides, in article 10, for a department of public health, under the management of a board of health, consisting of seven members. Section 3 of the article provides that the board of health shall have the management and control of the city and county hospitals, alms houses, ambulance service, municipal hospitals, receiving hospitals, and of all matters pertaining to the preservation, promotion, and protection of the lives and health of the inhabitants of the city and county. Section 4 provides, among other things, that the board shall enforce all ordinances, rules, and regulations which may be adopted by the supervisors for the carrying out and enforcement of a good sanitary condition in the city and county, and for the protection of the public health; and the board is required to submit to the supervisors, from time to time, a draft of such ordinances, rules, and regulations as it may deem necessary to promote the objects mentioned in the section. By section 1 of article 2 of the charter, the legislative power of the city and county of San Francisco is vested in a legislative body designated as the "Board of Supervisors," and in section 8 it is provided that every legislative act of the city and county shall be by ordinance. It thus appears that suitable provision has been made in the city charter for the necessary legislation providing rules and regulations to secure proper sanitary conditions in the city and for the protection of the public health, but we are not advised that the board of supervisors has taken any action whatever in that direction; and the resolution of the board of health furnished to the court fails to disclose the method it has adopted for that purpose, under the conditions it has declared to exist. We need not, however, dwell upon the manifest lack of legislative authority to enable the board

of health to deal with this important subject. It is sufficient for the present purpose to mention the fact, as one of the features of the situation to be considered in connection with the regulations which the complainant alleges have been imposed upon him and other Chinese residents of the city by the defendants.

It appears that there are about 25,000 Chinese residents in the city of San Francisco, and, while it is well known that a large number of these people are domiciled within the area designated as the "Chinese Quarter," nevertheless there are a great many scattered over the city, engaged in various employments. No restrictions have been placed upon any of the Chinese residents in passing from one part of the city to the other; nor has any house, block, or section of the city been declared infected or unsanitary. There is, therefore, no fact established by the board of supervisors or by the board of health from which an inference might be drawn that any particular class of persons, or persons occupying a particular district, were liable to develop, or in danger of developing, the plague. The restriction is that no Chinese person shall depart from the city without being inoculated with the serum called "Haffkine Prophylactic." The city has a population of about 350,000, but the restriction does not apply to any of the inhabitants other than Chinese or Asiatics, and the inhabitants other than Chinese or Asiatics are permitted to depart from and return to the city without being subject to the inoculation imposed upon the Chinese inhabitants. This restriction, it is alleged, discriminates unreasonably against the complainant and other Chinese residents, confines them within the territorial limits of the city and county, and deprives them of their liberty, causing them great and irreparable loss and injury.

The conditions of a great city frequently present unexpected emergencies affecting the public health, comfort, and convenience. Under such circumstances, officers charged with the duties pertaining to this department of the municipal government should be clothed with sufficient authority to deal with the conditions in a prompt and effective manner. Measures of this character, having a uniform operation, and reasonably adapted to the purpose of protecting the health and preserving the welfare of the inhabitants of a city, are constantly upheld by the courts as valid acts of legislation, however inconvenient they may prove to be, and a wide discretion has also been sanctioned in their execution. But when the municipal authority has neglected to provide suitable rules and regulations upon the subject, and the officers are left to adopt such methods as they may deem proper for the occasion, their acts are open to judicial review, and may be examined in every detail to determine whether individual rights have been respected in accordance with constitutional requirements. This proposition is too clear to require discussion. Indeed, the inquiry has been extended to acts of the legislature and city ordinances, for the purpose of determining whether they are appropriate to the end in view. In the recent case of *Blue v. Beach*, 56 N. E. 89, the supreme court of Indiana had under consideration a law of the state and an ordinance of the city of Terre Haute prohibiting persons from attending the public schools who had not been vaccinated. The court

sustained the validity of the measures, but in arriving at that conclusion it states very clearly the principles and limitations involved in such legislation. It says:

"As a general proposition, whatever laws or regulations are necessary to protect the public health and secure public comfort is a legislative question, and appropriate measures intended and calculated to accomplish these ends are not subject to judicial review. But nevertheless such measures or means must have some relation to the end in view, for, under the mere guise of the police power, personal rights and those pertaining to private property will not be permitted to be arbitrarily invaded by the legislative department; and consequently its determination, under such circumstances, is not final, but is open to review by the courts. If the legislature, in the interests of the public health, enacts a law, and thereby interferes with the personal rights of an individual,—destroys or impairs his liberty or property,—it then, under such circumstances, becomes the duty of the courts to review such legislation, and determine whether it in reality relates to, and is appropriate to secure, the object in view; and in such an examination the court will look to the substance of the thing involved, and will not be controlled by mere forms."

In the light of these well-established principles, the action of the defendants as described in the bill of complaint cannot be justified. The regulations they have adopted appear to be without legislative authority, but assuming that they have the sanction of a general authority under the resolution of May 18, 1900, still they cannot be sustained. They are not based upon any established distinction in the conditions that are supposed to attend this plague, or the persons exposed to its contagion, but they are boldly directed against the Asiatic or Mongolian race as a class, without regard to the previous condition, habits, exposure to disease, or residence of the individual; and the only justification offered for this discrimination was a suggestion made by counsel for the defendants in the course of the argument, that this particular race is more liable to the plague than any other. No evidence has, however, been offered to support this claim, and it is not known to be a fact. This explanation must therefore be dismissed as unsatisfactory.

There is, however, a further and a more serious objection to these regulations adopted by the defendants. It appears from the instructions of Dr. Walter Wyman, the supervising surgeon general of the marine hospital service, that the Haffkine Prophylactic is not designed as a preventive after a person has been exposed to the disease. On the contrary, its administration under such a condition of the human system is declared to be dangerous to life. It is administered for the purpose of preventing contagion from exposure after inoculation, and for that alone. A person about to enter an infected place should therefore secure this treatment, but a person departing from an infected place should not be so treated. For the latter contingency Dr. Wyman prescribes another and very different remedy, namely, inoculation with the "Yersin Serum." The two treatments are thus described in the instructions issued by the supervising surgeon general of the marine hospital service:

"The Haffkine material should not be used if the person has been definitely exposed to the plague, or is thought to be in the incubative period; for, if by chance he is already infected, the Haffkine injection may produce fatal results. Therefore the Haffkine material should be used as a preventive on persons before their exposure, while the Yersin treatment may be used either

before or after exposure, or while a person is suffering with the disease. [Note.] The Haffkine material should not be used on suspects held in quarantine, or on persons who have been definitely exposed to the plague, but is applicable to persons who are liable to be brought into contact with plague, and before such possible contact, as quarantine officers and attendants, health officers and employes, and persons in a community where there is danger of the introduction and spread of the disease."

It therefore appears that the administration of Haffkine Prophylactic to Chinese persons departing from San Francisco has no relation to the public health of the inhabitants of this city, and cannot be sustained by any such claim on the part of its board of health.

The defendant J. J. Kinyoun, as quarantine officer of the United States at the port of San Francisco, justifies his action upon the authority of the telegram received by him from Dr. Wyman, the supervising surgeon general, marine hospital service, dated May 21, 1900, and it is contended that the instructions contained in this telegram are based upon the provisions of the act of March 27, 1890 (26 Stat. 31). Section 1 of that act provides as follows:

"That whenever it shall be made to appear to the satisfaction of the president that cholera, yellow fever, small pox, or plague exists in any state or territory or in the District of Columbia, and that there is danger of the spread of such disease into other states, territories, or the District of Columbia, he is hereby authorized to cause the secretary of the treasury to promulgate such rules and regulations as in his judgment may be necessary to prevent the spread of such disease from one state or territory into another, or from any state or territory into the District of Columbia, or from the District of Columbia into any state or territory, and to employ such inspectors and other persons as may be necessary to execute such regulations to prevent the spread of such disease. The said rules and regulations shall be prepared by the supervising surgeon-general of the marine hospital service under the direction of the secretary of the treasury."

It will be observed that the statute is open to the interpretation that the promulgation of rules and regulations to prevent the spread of the diseases named in the statute is made to depend upon the fact that it has been made to appear to the satisfaction of the president that the diseases exist in the particular state or territory where the regulations are to be enforced. If this is the proper interpretation to be placed upon the statute, then the enforcement of any rules and regulations is open to the objection that it does not appear that the president has found that the plague exists in San Francisco or in California, or, indeed, anywhere else in the United States; nor does it appear that the supervising surgeon general has so found, or that he has prescribed any regulations requiring the administering of Haffkine Prophylactic under any conditions, or to parties seeking transportation from one place in the state to another place in the same state or from one state to another. The only restriction imposed by the surgeon general is that transportation companies shall refuse transportation to Asiatics unless provided with the certificates of the defendant Kinyoun. What examination or treatment is required to entitle a Chinese person to this certificate is not provided in the instructions of the supervising surgeon general. The instructions are therefore plainly insufficient, in these essential particulars, to justify the defendant Kinyoun in the restrictions and conditions he

has placed upon the complainant and those represented in the bill of complaint.

But, passing by these objections, we come again to the discriminating character of the regulations. They are directed against the Asiatic race exclusively, and by name. There is no pretense that previous residence, habits, exposure to disease, method of living, or physical condition has anything to do with their classification as subject to the regulations. They are denied the privilege of traveling from one place to another, except upon conditions not enforced against any other class of people; and this privilege is denied, it appears, to Chinese persons born in the United States as well as to those born elsewhere. As against this regulation, the complainant, on behalf of himself and others similarly situated, invokes the equal protection of the laws. As the case is here presented, how can the court deny them this right? In the case of *Ho Ah Kow v. Nunan* (before Mr. Justice Field in this court) 5 Sawy. 552, Fed. Cas. No. 6,546, the plaintiff had been convicted in a court in San Francisco, and sentenced to pay a fine of \$10, or, in default of such payment, to be imprisoned five days in the county jail. The defendant, as sheriff of the city and county of San Francisco, had charge of the jail, and during the imprisonment of the plaintiff cut off his queue, under the requirements of an ordinance of the city providing for the cutting or clipping of the hair of prisoners to a uniform length of one inch from the scalp. It was claimed on the part of the defendant that the ordinance was in the nature of a sanitary regulation, but the court found that its real purpose was directed against the Chinese, who regarded the deprivation of the queue as a mark of disgrace, and, according to their religious belief, attended with misfortune and suffering after death. The court held that this ordinance was in violation of the provisions of the fourteenth amendment to the constitution; that the equality of protection secured by this amendment to every one while within the United States implies not only that the courts of the country shall be open to him on the same terms as to all others, for the security of his person or property, the prevention or redress of wrongs and enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others, and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment. With equal force it may be said that he shall be subject to the same restrictions and conditions for the benefit of the public health. In the case of *In re Lee Sing* (C. C.) 43 Fed. 359, this court had before it an ordinance of the city and county of San Francisco prescribing a certain portion of the city for the residence of Chinese. It was objected there as here that the ordinance was a discrimination against the Chinese residents of the city, and contrary to the provisions of the fourteenth amendment to the constitution. Judge Sawyer, in commenting upon this ordinance, disposed of the question involved with this brief and pointed observation:

"That this ordinance is a direct violation of not only the express provisions of the constitution of the United States, in several particulars, but also of the express provisions of our several treaties with China and of the statutes of

the United States, is so obvious that I shall not waste more time or words in discussing the matter. To any reasonably intelligent and well-balanced mind, discussion or argument would be wholly unnecessary and superfluous. To those minds which are so constituted that the invalidity of this ordinance is not apparent upon inspection, and comparison with the provisions of the constitution, treaties, and laws cited, discussion or argument would be useless."

It was accordingly determined that the authority to pass the order was not within the legitimate police power of this state.

The observations of the court in these two cases are not entirely inappropriate to the regulations of the board of health and the instructions of the supervising surgeon general of the marine hospital service, offered by the defendants as authority for the regulations they are now engaged in enforcing against the Chinese inhabitants of this city. As said by the court of appeals of the state of New York in *Re Jacobs*, 98 N. Y. 108, speaking of the police power of the state:

"Under it the conduct of an individual and the use of property may be regulated so as to interfere to some extent with the freedom of the one and the enjoyment of the other; and in cases of great emergency, engendering overruling necessity, property may be taken or destroyed without compensation, and without what is commonly called 'due process of law.' The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges, and private persons; and, so far as it imposes restraints, the police power must be exercised in subordination thereto."

It follows from these considerations that the defendants have failed to justify their action in the premises, and that an injunction must issue as prayed for in the bill of complaint.

I am authorized to say that Judge HAWLEY, of Nevada, and Judge DE HAVEN, of California, who participated in the hearing of this cause, concur in this opinion.

JEW HO v. WILLIAMSON et al.

(Circuit Court, N. D. California. June 15, 1900.)

No. 12,940.

1. JURISDICTION OF FEDERAL COURTS—LIMITATION AS TO SUBJECT-MATTER IN CONTROVERSY.

Where a complainant invokes the jurisdiction of a federal court on the ground of diverse citizenship, the court has concurrent jurisdiction with a state court to determine all the questions involved in the case. The fact that the complainant raises a federal question, by asserting rights under the constitution of the United States, does not restrict the court in such case to a determination of that question alone.

2. HEALTH—VALIDITY OF REGULATIONS—POWER OF COURTS TO REVIEW.

A large discretion is necessarily vested in state or municipal authorities in determining what is a proper exercise of the police powers of the state for the protection of the public health, and what measures are necessary to meet particular conditions or emergencies; but their determination is not final, and is subject to supervision by the courts. They may not, under the guise of protecting the public, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful oc-

cupations, and whether they have done so in a particular case is a judicial question.

8. SAME—QUARANTINE REGULATIONS—VALIDITY.

The purpose of quarantine regulations in case of the existence of a contagious or an infectious disease is to limit the spread of such disease to the fewest possible number of persons, by isolating the persons already affected or exposed from communication with all others so far as possible. Where not exceeding 9 persons in a city were supposed to have died from the bubonic plague, and no living persons were known to have contracted the disease, a regulation establishing a general quarantine district, embracing a territory covering 12 blocks, in which more than 10,000 persons resided, which prohibits persons from entering or leaving such district, but permits free intercourse between all persons within it, cannot be upheld as a reasonable regulation for preventing the spread of the disease, but its effect must necessarily be, if the disease exists within the district, to facilitate its spread among all the persons confined within its limits.

4. SAME—CONSTITUTIONALITY OF QUARANTINE REGULATIONS—DISCRIMINATING ENFORCEMENT.

A law or municipal regulation, though fair and undiscriminating on its face, may be rendered invalid on constitutional grounds by the manner in which it is administered by the public authorities charged with its execution; and a municipal regulation establishing a quarantine district is void, as in violation of the constitutional guaranty of the equal protection of the laws, where it is shown that it is enforced against all Chinese persons within the district, and against the buildings occupied by them, while it is not enforced against persons of other races, or against their residences, although situated within the limits of the district as defined in the regulation.

5. SAME—REVIEW BY COURTS—QUESTIONS OF FACT.

In a suit to enjoin the enforcement of quarantine regulations adopted because of the supposed existence of a contagious disease in the locality quarantined, the court will not, under ordinary circumstances, undertake to review the finding of the proper health authorities that the disease exists and the quarantine is necessary.

In Equity. On order to show cause why an injunction pendente lite should not issue.

Reddy, Campbell & Metson, Maguire & Gallagher, Samuel M. Shortridge, and John E. Bennett, for complainant.

J. J. Dunne, for defendants.

Before MORROW, Circuit Judge, and DE HAVEN, District Judge.

MORROW, Circuit Judge (orally). Having reached a conclusion as to the disposition to be made of the order to show cause in this case, I deem the circumstances of such a character as to justify an announcement of that conclusion at this time, without the delay incident to the preparation of a written opinion, which will be filed hereafter.

On the 28th day of May, 1900, the board of health of the city and county of San Francisco adopted the following resolution:

"Resolved, that it is the sense of this board that, in consequence of the discoveries in the district bounded by Broadway, Stockton, California, and Kearney streets, of nine deaths due to bubonic plague, which were verified by microscopical and animal inoculation tests, this board fears that there is still danger of the spread of this disease over a larger area, and therefore requests the board of supervisors to declare said district infected, and authorize the board of health to quarantine said district."

Thereafter, on the said 28th day of May, 1900, said resolution was filed in the office of the board of supervisors, and thereupon the board of supervisors passed the following ordinance:

"Be it ordained by the people of the city and county of San Francisco, as follows:

"Section 1. The board of health of this city and county is hereby authorized and empowered to quarantine persons, houses, places, and districts within this city and county, when in its judgment it is deemed necessary to prevent the spreading of contagious or infectious diseases."

This ordinance was approved by the mayor of the city, and thereafter transmitted to the board of health; and immediately thereafter, on the 29th day of May, 1900, at a special meeting of the board of health, a resolution was passed, which, after stating the passage by the board of supervisors of the foregoing ordinance, provided as follows:

"And whereas, after a careful and minute investigation had during a period of three months last past, and from the result of investigation made by Drs. Kellogg, bacteriologist to the board of health, Montgomery, of the University of California, Ophulf, of the Cooper Medical College, and J. J. Kinyoun, of the U. S. marine hospital service, each and all of whom have reported to this board that bubonic plague has existed in the district hereafter mentioned, and that nine deaths have occurred within said period within said district from said disease; and whereas, this board has reason to believe and does believe that danger does exist to the health of the citizens of the city and county of San Francisco by reason of the existence of germs of the said disease remaining in the district hereafter mentioned: Now, therefore, be it resolved: That the health officer be and is hereby instructed to place in quarantine until further notice that particular district of the city bounded north by Broadway, northeast by Montgomery avenue, east by Kearney, south by California, and west by Stockton streets; and that the chief of police is hereby requested to furnish such assistance as may be necessary to establish and maintain said quarantine. These lines may be modified by the health officer, or the chief of police, health board to be notified of the same. This resolution to take effect immediately."

Thereafter, on May 31, 1900, the board of supervisors passed another ordinance, which, after reciting the filing in the office of the resolution of the board of health of May 28, 1900, provided for the establishment of quarantine regulations in the district named, and directed the chief of police to furnish such assistance as might be necessary to establish and maintain this quarantine.

The complainant in this case, Jew Ho, alleges, among other things, that he resides at No. 926 Stockton street, within the limits of said quarantined district, and is engaged in the business of conducting a grocery store; as the proprietor and manager thereof, at his said place of residence, and that a great number of the patrons and customers of his said business reside at various places in the city and county of San Francisco outside the boundaries of said quarantined district, and are now, and ever since the 29th day of May, 1900, have been, prevented and prohibited by the defendants from visiting, patronizing, and dealing with the complainant in his said grocery store; that the complainant has been prevented and prohibited since the said 29th day of May, 1900, from selling his goods, wares, and merchandise, and from otherwise carrying on the business in which he is engaged. The complainant also alleges that although the said

resolutions of the board of supervisors and the defendant board of health are in general terms, and purport to impose the same restrictions, burdens, and limitations upon all persons within the said quarantined district, the said resolution is enforced against persons of the Chinese race and nationality only, and not against persons of other races. In this behalf it is alleged that all stores, residences, and other buildings within the quarantined district as described in the resolution, occupied by persons of races other than Chinese, are not subjected to any of the restrictions or limitations provided for by said resolution, whereas those occupied by Chinese are subjected to said restrictions. It is also alleged that wanton and willful discrimination against the Chinese residents of said district by the defendants is shown by the exclusion from the limits of said districts of all physicians employed by Chinese residents, and by the free permission to other residents of said district to select physicians of their own choice, and the permission to all such physicians to enter and depart from all buildings occupied by persons of races other than Chinese within said quarantined district. The complainant alleges that there is not now, and never has been, any case of bubonic plague within the limits of said quarantined district, nor any germs or bacteria of bubonic plague, and that other diseases caused the illness and death of the persons claimed by defendants to have died of the bubonic plague within the 30 days next preceding the filing of this complaint. It is further alleged that the defendants have failed and neglected to quarantine the houses alleged to be so infected from the remainder of said quarantined district, and have wholly failed and neglected to quarantine or otherwise isolate from the other residents of said quarantined district the persons alleged to have been so exposed to the danger of contagion, and therefore likely to transmit the germs of said bubonic plague to others, but have included in said quarantined district an unreasonably large and populous district, namely, 12 blocks, containing a population of more than 15,000 persons, thereby increasing rather than diminishing the danger of contagion and epidemic, both to the people of said district and to the people of San Francisco generally, if there should be any epidemic disease existing in said district; that within said quarantined district are several blocks in which it is not claimed or asserted by the defendants that any case of bubonic plague has existed for 40 days and more next preceding the filing of the complaint, and in which there is not now, and never has been, any danger of contagion or infection. The complainant alleges that he has never had or contracted said bubonic plague; that he has never been at any time exposed to the danger of contracting it, and has never been in any locality where said bubonic plague, or any germs or bacteria thereof, has or have existed; that the action of the defendants in confining and imprisoning the complainant and other Chinese residents within the limits of said quarantined district is a purely arbitrary, unreasonable, unwarranted, wrongful, and oppressive interference with the personal liberty of the complainant and the said Chinese residents, and with their right to the pursuit of their lawful business; that said resolution providing for the said quarantine, and designating said quarantine district, is

wholly unauthorized, invalid, and void, and contrary to the constitution and laws of the United States, and contrary to and in violation of the laws of the state of California; that it is not enforced against other residents of said district than those of the Chinese race; and that by its enforcement the said Chinese residents of said district are deprived of the equal protection of the laws, and of their rights and liberties under the constitution of the United States, and the laws and treaties passed and adopted in pursuance thereof. The complainant brings this suit in behalf of the Chinese residents of said quarantined district, to the number of 10,000 and upward, as well as in his own behalf. The prayer of the bill is that an injunction be granted, enjoining and restraining the defendants from interfering with the personal rights and privileges of the complainant.

Upon the filing of this bill of complaint, together with affidavits supporting the allegations therein contained, the court issued an order to the defendants to show cause why an injunction should not issue to restrain them from committing the acts and carrying into execution the threats set forth in the bill of complaint. To this order, return has been made by answer. In this answer the defendants allege the organization of the board of health, the provisions of the charter of San Francisco, the authority of the board of health, and the authority of the board of supervisors, as derived from the provisions of the charter. They allege that the board of supervisors have passed certain resolutions, to which I have already referred, and that they have acted in pursuance of the authority conferred by the charter, and that in establishing this quarantine district the defendants have been acting under the authority of the resolutions passed by the board of supervisors, and their own resolution in pursuance thereof. As the answer was originally framed, it denied that the complainant was within the quarantine limits as prescribed. But by oral amendment to the answer it is alleged that the particular place of residence of the complainant is included within the quarantined district. The defendants deny that they or any of their agents, in the enforcement of said quarantine regulations, exempt or relieve from all or any restrictions of quarantine all or any store or residence or other building whatever within said district. With regard to the averment that the complainant has never had or contracted the bubonic plague, the defendants state that they have not knowledge, information, or belief sufficient to enable them to answer, but they deny that the complainant has never at any time been exposed to the danger of contracting said bubonic plague, and that he has never been in any locality where said plague, or any germs or bacteria thereof, has or have existed. On the contrary, the defendants state their belief that the complainant is a Chinese person, and a resident within said quarantined district, where said plague has had its existence.

To this answer the complainant excepted orally on the ground that it did not respond to the equities of the bill, in this: that, with respect to the charges of detention and restriction of the complainant, the defendants' answer is that they have no information or belief with respect to the matters upon which the restraint is made or effected. It is contended that, the defendants having failed to answer fully

and directly as to the cause of restraining the complainant of his liberty, the bill must be taken as confessed. The bill of complaint is not a bill of discovery, and cannot be treated in that light. It is true that, after stating the matters of complaint, it concludes with the prayer that a subpoena issue, and that the defendants be required to make full, true, direct, and perfect answer to the matters therein contained. But, under the equity practice, it is not required that the defendants in such a case shall do more than deny or answer the bill of complaint. They are not called upon to make a discovery, or to make specific disclosures concerning the matters therein contained. Moreover, the bill waived an answer under oath, but for the purpose of being used as an affidavit the answer is verified. In that form it has been introduced as a part of the return, in response to the order to show cause. There is some objection to the form of the answer as an affidavit, because, as an affidavit, it should be specific in reply to the matters charged in the bill of complaint. The equities of the bill are that the complainant is being unlawfully restrained of his liberty, and illegally deprived of the use of his property. The substantial answer to that charge is that the complainant is being restrained of his liberty and deprived of the use of his property by reason of certain quarantine regulations, and that, as to whether or not he has so exposed himself as to render himself personally subject to the restrictions of quarantine regulations, the defendants have no information or belief. Under the strict rules of equity practice, this answer, as an affidavit, would not be sufficient to meet the equities of the bill. But the court must take notice of the whole case, and it is evident therefrom that the answer of the defendants, averring that they have no knowledge or information or belief concerning the exposure of this complainant to this disease, is a difficulty or weakness that is inherent in the case, and not alone in the pleadings. We find from other portions of the pleadings that there are in this quarantined district some 10,000 people or more. It is quite likely that, with respect to such a large number, in a district of that character, there would be a great number, and perhaps the great majority, concerning which the defendants would have no knowledge, information, or belief. They could have no information concerning individuals upon which to found any belief, and therefore they have made denial in accordance with the circumstances of the case. Considering the pleading as dealing with a single case or a single fact, it would, of course, be insufficient. But, when it comes to dealing with a large population,—10,000 or more,—the court must recognize that the lack of information on the part of the defendants is an infirmity that belongs to their case on the merits. The court will therefore not sustain the objection to the answer upon the ground that there is a defect in the showing made in the answer, but will consider that the case is inherently weak in this respect upon the actual facts alleged.

The next objection that has been interposed by the complainant to the sufficiency of the answer is that it does not appear therefrom that the ordinance has been passed with the formality required by the charter. I have examined the evidence that has been furnished to the court by these affidavits, and I am unable to find any evidence

sufficient to justify the court in holding that this ordinance has not been passed with the requisite formalities. It may be that the requirements of the charter have not been complied with in every particular in the enactment of the ordinance upon which the complaint is founded. But that fact does not appear from the evidence submitted to the court, and the allegations are such that the court must indulge the presumption that the ordinance has been passed with the requisite formalities.

The next objection interposed on the part of the defendants is that this court has no authority to examine into the questions in controversy; that, it appearing from this return that a duly-constituted department of the municipality of San Francisco has made inquiry as to the situation attending an alleged epidemic of a contagious disease, and has adopted resolutions and taken such steps as it deemed necessary, such action is an adjudication on the part of a department having exclusive jurisdiction and authority over the subject, and this court has no jurisdiction to inquire into the reasonableness or propriety of the acts of the defendants. That objection I understand counsel to make not only to this court as a court of general jurisdiction, but also to this court as a court having jurisdiction to determine federal questions. I will consider the federal aspect of the objection first, namely, the jurisdiction of this court to determine other than federal questions.

The complainant alleges that he is an alien. He invokes the jurisdiction of this court on the ground of diverse citizenship. Where a cause is brought into this court upon that ground, the court has a concurrent jurisdiction with the state court to determine all the questions involved in the case. It has the same jurisdiction as the superior court of the state. It may inquire into the regularity and legality of proceedings of a municipality, or in any locality, precisely as would a state court. The cases to which counsel for defendants referred, wherein the federal court denied itself the right to inquire into the legislation of states or municipalities, have arisen where the jurisdiction of the federal court has been invoked on the sole ground that the controversy involved a federal question. In such cases the complainant states the federal question as the matter to be determined. If, for instance, in this case a citizen of the state of California should come into this court and invoke its jurisdiction on the ground that this action of the board of supervisors involved a federal question, and that it was contrary to the fourteenth amendment of the constitution, an allegation of that character would state the ground of jurisdiction and subject of controversy, and it would be the only question this court would be called upon to examine. The court would not, in such a case, enter into the question of whether or not the action of the board of supervisors was in conformity with the constitution of the state, or whether it was beyond the municipal powers of the city under its charter. All such questions would in that case be foreign to the investigation, and the court would be confined to the question as to whether or not it was contrary to the provisions of the fourteenth amendment to the constitution of the United States. But in the case at bar the complainant comes into court as an alien, and

invokes the jurisdiction of the court on the ground of diverse citizenship, and presents also the federal question. The court is therefore not restricted in its jurisdiction to the federal question, but may inquire into all matters relating to the legality of the restraint imposed upon the complainant.

It is next contended that the acts of the defendants in establishing a quarantine district in San Francisco are authorized by the general police power of the state, intrusted to the city of San Francisco. The defendants rely upon a number of cases in support of this asserted jurisdiction and authority,—among others, the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. In that case it appears that the constitution of Kansas provided “that the manufacture and sale of intoxicating liquors shall be forever prohibited in this state, except for medical, scientific and mechanical purposes.” The legislature of the state enacted a statute to carry this constitutional provision into effect. *Mugler*, the proprietor of a brewery, was indicted in one of the courts of the state for violation of this statute, and was tried and convicted and sentenced to pay a fine. The case was appealed to the supreme court of the state, and there affirmed. A writ of error took the case to the supreme court of the United States. The question was whether the prohibition by the state of Kansas, in its constitution and laws, of the manufacture or sale within the limits of the state of intoxicating liquors for general use in the state as a beverage, was fairly adapted to the end of protecting the community against the evils which result from excessive use of ardent spirits, and whether it was subject to the objection that under the guise of police regulations the state was aiming to deprive the citizen of his constitutional rights. The court, in passing upon this question, said:

“Power to determine such question, so as to bind all, must exist somewhere; else, society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the ‘police powers’ of the state, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.”

But the court did not stop with this declaration. It went further, and explained that the legislative authority was subject to limitations, and that it was for the courts to determine whether such limitations were exceeded when such legislative acts were called in question. The court said:

“It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (*Sinking-Fund Cases*, 99 U. S. 700, 718, 25 L. Ed. 496), the courts must obey the constitution, rather than the lawmaking department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. ‘To what purpose,’ it was said in *Marbury v. Madison*, 1 Cranch, 137, 176, 2 L. Ed. 60, ‘are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?’

The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

And in the case of *Chy Lung v. Freeman*, 92 U. S. 275, 280, 23 L. Ed. 550, the same court, speaking of the right of a state, in the absence of legislation by congress, to protect herself by necessary and proper laws, said:

"Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity."

In *Ex parte Whitwell*, 98 Cal. 73, 78, 32 Pac. 870, 19 L. R. A. 727, the petitioner was imprisoned by the sheriff of San Mateo county upon a charge of maintaining within the boundaries of that county a hospital for the treatment of insane persons, without having procured a license so to do, as required by an ordinance adopted by the board of supervisors of that county March 16, 1892. The ordinance referred to purported to be one—

"To license for purpose of regulation and revenue, the business of keeping * * * within the county of San Mateo * * * hospitals, asylums, homes, retreats or places for the care or treatment of insane persons or persons of unsound mind, or inebriates, or persons affected by or suffering from any mental or nervous disease, or who are suffering from the effects of the excessive use of alcoholic liquors."

The ordinance made it unlawful to maintain within the county of San Mateo any hospital, asylum, or place for the care or treatment, for reward, of any insane person, or persons belonging to either of the classes mentioned in the title of the ordinance, unless the keeper of such hospital or asylum should have first procured a license therefor. The ordinance provided, however, that no license should be granted unless the board was satisfied that the building was fireproof, by reason of being constructed of brick and iron or stone and iron; that the building should not be more than two stories in height, and that the same, and the land used in connection therewith, or such part of said land as any of the patients were to have access to, was surrounded by a brick or stone wall not less than 18 inches in thickness and not less than 12 feet in height, and in which wall there was to be one opening, which opening should be closed by a solid iron door, so constructed and fitted into said wall as that the same might be securely fastened by a combination lock, and said door furnished with a combination lock. The petitioner was a physician and surgeon, and directed his attention to the treatment of persons afflicted as described in the ordinance. He had purchased a tract of land in San Mateo county, and erected a building thereon, prior to the passage of this ordinance, for the accommodation of such persons during treatment, but this building was not of the character designated and required by the ordinance. It was claimed by the petitioner that the ordinance imposed unreasonable restrictions upon his right to prose-

cute a lawful business and to devote his property to a lawful use, and that such provisions were in conflict with the constitution of the United States and of the state of California, and for that reason void. Upon the other hand, it was contended that the ordinance was a police regulation, and that the court was not authorized to declare it invalid because in its judgment the ordinance might be deemed unreasonable. Discussing this question, the supreme court, speaking through Mr. Justice De Haven, said:

"The police power—the power to make laws to secure the comfort, convenience, peace, and health of the community—is an extensive one, and in its exercise a very wide discretion as to what is needful or proper for that purpose is necessarily committed to the legislative body in which the power to make such laws is vested. *Ex parte Tuttle*, 91 Cal. 589, 27 Pac. 933. But it is not true that, when this power is exerted for the purpose of regulating a business or occupation which in itself is recognized as innocent and useful to the community, the legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue such business or profession. As the right of the citizen to engage in such a business or follow such a profession is protected by the constitution, it is always a judicial question whether any particular regulation of such right is a valid exercise of legislative power. *Tied. Lim.* §§ 85, 194; *Pennsylvania Railroad Co. v. Mayor*, etc., of Jersey City, 47 N. J. Law, 286; *Com. v. Robertson*, 5 Cush. 438; *Austin v. Murray*, 16 Pick. 121. * * * And this necessary limitation upon the power of the legislature to interfere with the fundamental rights of the citizen in the enactment of police regulations was recognized by this court in *Ex parte Sing Lee*, 96 Cal. 354, 31 Pac. 245, 24 L. R. A. 195, in which case we said that the personal liberty of the citizen and his rights of property cannot be invaded under the disguise of a police regulation. This power of the courts, however, to declare invalid what they may deem an unreasonable legislative regulation of a business or occupation which the citizen has the constitutional right to follow, although undoubted, must, from the nature of the power, be exercised with the utmost caution, and only when it is clear that the ordinance or law so declared void passes entirely beyond the limits which bound the police power, and infringes upon rights secured by the fundamental law. The true rule upon this subject is thus expressed by the supreme court of the state of Missouri in the case of *City of St. Louis v. Weber*, 44 Mo. 547: 'In assuming, however, the right to judge of the reasonableness of an exercise of corporate power, courts will not look closely into mere matters of judgment, where there may be a reasonable difference of opinion. It is not to be expected that every power will always be exercised with the highest discretion, and when it is plainly granted a clear case should be made to authorize an interference upon the ground of unreasonableness.'"

It was held that the ordinance was unreasonable and void, and could not be sustained under the police power of the state.

In the case of Health Department of City of New York v. Rector, etc., of Trinity Church, 145 N. Y. 32, 39 N. E. 833, the question was with respect to the regulations concerning the introduction of water into tenement houses. The decision is by Judge Peckham, now of the supreme court of the United States. The ordinance was sustained by the court, but in doing so the court declared very clearly the limitation upon the police power of the state, as follows:

"It has frequently been said that it is difficult to give any exact definition which shall properly limit and describe such power. It must be exercised subject to the provisions of both the federal and state constitutions, and the law passed in the exercise of such power must tend, in a degree that is perceptible and clear, towards the preservation of the lives, the health, the morals, or the welfare of the community, as those words have been used and construed in many cases heretofore decided,"—citing a number of cases.

In the case of *In re Smith*, 146 N. Y. 68, 40 N. E. 497, 28 L. R. A. 820, there was involved the quarantine of a house in which a person was charged with being exposed to the smallpox. There the court said:

"I think no one will dispute the right of the legislature to enact such measures as will protect all persons from the impending calamity of a pestilence, and to vest in local authorities such comprehensive powers as will enable them to act competently and effectively. That those powers would be conferred without regulating or controlling their exercise is not to be supposed, and the legislature has not relieved officials from the responsibility of showing that the exercise of their powers was justified by the facts of the case. The question here is not whether the legislature had the power to enact the provisions of section 24 of the health law, but whether the respondent has shown that a state of facts existed, warranting the exercise of the extraordinary authority conferred upon him. Like all enactments which may affect the liberty of the person, this one must be construed strictly, with the saving consideration, however, that, as the legislature contemplated an extraordinary and dangerous emergency for the exercise of the power conferred, some latitude of a reasonable discretion is to be allowed to the local authorities upon the facts of a case."

The case of *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385, had relation to a regulation concerning the fisheries. The court said with respect to the police power of the state:

"The extent and limits of what is known as the 'police power' have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement by summary proceedings of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interment in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it; and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346. To justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

This I find to be the law as established in the various states of the Union, as well as by the supreme court of the United States. These cases determine that this is a subject for judicial investigation, and the question therefore arises as to whether or not the quarantine established by the defendants in this case is reasonable, and whether

it is necessary, under the circumstances of this case. As I had occasion to say in the former case (*Wong Wai v. Williamson* [C. C.] 103 Fed. 1), this court will, of course, uphold any reasonable regulation that may be imposed for the purpose of protecting the people of the city from the invasion of epidemic disease. In the presence of a great calamity, the court will go to the greatest extent, and give the widest discretion, in construing the regulations that may be adopted by the board of health or the board of supervisors. But is the regulation in this case a reasonable one? Is it a proper regulation, directed to accomplish the purpose that appears to have been in view? That is a question for this court to determine.

Affidavits have been filed on behalf of the complainant in this case,—one of them by Dr. J. I. Stephen, to which I will refer. Dr. Stephen says:

"I am a regular physician and surgeon, licensed to practice medicine and surgery in the state of California. I obtained my medical education and diplomas in London, England, and in Dublin, Ireland. I have been in the active practice of medicine and surgery for the past twenty years,—for several years, in London, England, where I held various official positions, such as surgeon to the police, medical officer of health, parish medical officer, and public vaccinator, and for the past thirteen years in the state of California. I have given much time and study to the literature of the bubonic plague, and am familiar with the nature, symptoms, and characteristics of said disease. * * * The bubonic plague is a virulent, contagious disease, and under favorable conditions spreads with great rapidity. Those conditions are overcrowding and unsanitary surroundings. The above defendants claim to have discovered since the said month of March, 1900, at varying intervals, seven, eight, or nine dead bodies of Chinese whose death said defendants attribute to said bubonic plague. Bearing in mind the nature, symptoms, and characteristics of said disease, and the conditions generally prevailing in said district known as 'Chinatown,' and now under quarantine, it is impossible to believe that these persons died of such disease. If said disease had existed in the form and under the conditions claimed by said defendants, hundreds, perhaps thousands, of cases would have developed, and many deaths ensued therefrom; for I further aver that no proper or scientific precautions have been taken by said defendants to prevent the spread of said disease. Assuming that the said deceased persons died of said disease, it is my opinion, and I further aver, that said defendants have proceeded from erroneous theories to still more erroneous and unscientific practices and methods of dealing with the same; for, instead of quarantining the supposedly infected rooms or houses in which said deceased persons lived and died, and the persons who had been brought in contact with and been directly exposed to said disease, said defendants have quarantined, and are now maintaining a quarantine over, a large area of territory, and indiscriminately confining therein between ten and twenty thousand people, thereby exposing, and they are now exposing, to the infection of the said disease said large number of persons. Notwithstanding said lack of proper quarantining and said exposure of over ten to twenty thousand persons to infection during a period commencing in the early part of said month of March, 1900, there has not been found a single living case of said disease."

I read that affidavit for the purpose of showing the method adopted by the board of health for the suppressing of this so-called plague, namely, the quarantining of a large territory in the city of San Francisco,—some 10 or 12 blocks,—in which there are located about 10,000 people. It must necessarily follow that, where so many have been quarantined, the danger of the spread of the disease would not diminish. The purpose of quarantine and health laws and regulations with respect to contagious and infectious diseases is directed prima-

rily to preventing the spread of such diseases among the inhabitants of localities. In this respect these laws and regulations come under the police power of the state, and may be enforced by quarantine and health officers, in the exercise of a large discretion, as circumstances may require. The more densely populated the community, the greater danger there is that the disease will spread, and hence the necessity for effectual methods of protection. To accomplish this purpose, persons afflicted with such diseases are confined to their own domiciles until they have so far recovered as not to be liable to communicate the disease to others. The same restriction is imposed upon victims of such diseases found traveling. The object of all such rules and regulations is to confine the disease to the smallest possible number of people; and hence when a vessel in a harbor, a car on a railroad, or a house on land, is found occupied by persons afflicted with such a disease, the vessel, the car, or the house, as the case may be, is cut off from all communication with the inhabitants of adjoining houses or contiguous territory, that the spread of the disease may be arrested at once and confined to the least possible territory. This is a system of quarantine that is well recognized in all communities, and is provided by the laws of the various states and municipalities: That, when a contagious or infectious disease breaks out in a place, they quarantine the house or houses first; the purpose being to restrict the disease to the smallest number possible, and that it may not spread to other people in the same locality. It must necessarily follow that, if a large section or a large territory is quarantined, intercommunication of the people within that territory will rather tend to spread the disease than to restrict it. If you place 10,000 persons in one territory, and confine them there, as they have been in prisons and other places, the spread of disease, of course, becomes increased, and the danger of such spread of disease is increased, sometimes in an alarming degree, because it is the constant communication of people that are so restrained or imprisoned that causes the spread of the disease. If we are to suppose that this bubonic plague has existed in San Francisco since the 6th day of March, and that there has been danger of its spreading over the city, the most dangerous thing that could have been done was to quarantine the whole city, as to the Chinese, as was substantially done in the first instance. The next most dangerous thing to do was to quarantine any considerable portion of the city, and not restrict intercommunication within the quarantined district. The quarantined district comprises 12 blocks. It is not claimed that in all the 12 blocks of the quarantined district the disease has been discovered. There are, I believe, 7 or 8 blocks in which it is claimed that deaths have occurred on account of what is said to be this disease. In 2 or 3 blocks it has not appeared at all. Yet this quarantine has been thrown around the entire district. The people therein obtain their food and other supplies, and communicate freely with each other in all their affairs. They are permitted to go from a place where it is said that the disease has appeared, freely among the other 10,000 people in that district. It would necessarily follow that, if the disease is there, every facility has been offered by this species of quarantine to enlarge its sphere and increase its danger

and its destructive force. I need not enlarge upon this feature of the case. It is set forth fully by the affidavits in the case, by the original complaint, and by the opinions of the physicians who have furnished evidence to the court. The court cannot ignore this evidence and the condition it describes. The court cannot but see the practical question that is presented to it as to the ineffectiveness of this method of quarantine against such a disease as this. So, upon that ground, the court must hold that this quarantine is not a reasonable regulation to accomplish the purposes sought. It is not in harmony with the declared purpose of the board of health or of the board of supervisors.

But there is still another feature of this case that has been called to the attention of the court, and that is its discriminating character; that is to say, it is said that this quarantine discriminates against the Chinese population of this city, and in favor of the people of other races. Attention is called to the fact that, while the board of supervisors has quarantined a district bounded by streets, the operation of the quarantine is such as to run along in the rear of certain houses, and that certain houses are excluded, while others are included; that, for instance, upon Stockton street, in the block numbered from 900 to 1,000, there are two places belonging to persons of another race, and these persons and places are excluded from this quarantine, although the Chinese similarly situated are included, and although the quarantine, in terms, is imposed upon all the persons within the blocks bounded by such streets. The evidence here is clear that this is made to operate against the Chinese population only, and the reason given for it is that the Chinese may communicate the disease from one to the other. That explanation, in the judgment of the court, is not sufficient. It is, in effect, a discrimination, and it is the discrimination that has been frequently called to the attention of the federal courts where matters of this character have arisen with respect to Chinese. The case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, arose in this state, out of the operation of an ordinance of this city respecting Chinese laundries. The supreme court in that case had been discussing cases where there were simply opportunities for discrimination, not an actual discrimination. The court points this out as not being a case where there was not merely opportunity for discrimination, but where there was an actual discrimination. The court says:

"In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford of unequal and unjust discrimination in their administration; for the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations, between persons in similar circumstances, material

to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court in *Henderson v. Mayor of City of New York*, 92 U. S. 259, 23 L. Ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550; *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676; *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567; and *Soon Hing v. Crowley*, 118 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145."

In the case at bar, assuming that the board of supervisors had just grounds for quarantining the district which has been described, it seems that the board of health, in executing the ordinance, left out certain persons, members of races other than Chinese. This is precisely the point noticed by the supreme court of the United States, namely, the administration of a law "with an evil eye and an unequal hand." Wherever the courts of the United States have found such an administration of the law, although it may be, upon the face of the act or of the ordinance, such a lack of discrimination as to otherwise justify the ordinance or the law, still, if the court finds that, in its practical operation,—in its enforcement by the state or the municipality,—there is that opportunity, and that it is the purpose to enforce it "with an evil eye and an unequal hand," then it is the duty of the court to interpose, and to declare the ordinance discriminating in its character, and void under the constitution of the United States. Therefore the court must hold that this ordinance is invalid and cannot be maintained, that it is contrary to the provisions of the fourteenth amendment of the constitution of the United States, and that the board of health has no authority or right to enforce any ordinance in this city that shall discriminate against any class of persons in favor of another.

There is one other feature of this case, and that is as to whether or not the bubonic plague has existed in this city, and whether it does now exist. The complainant alleges in his bill of complaint that it does not exist in San Francisco or in this quarantined district, and the bill is supported by the affidavits of a number of reputable physicians. Dr. J. I. Stephen says in this regard:

"I am the regularly appointed physician of the Chinese Empire Reform Association, which numbers several thousand Chinese residents in the state of California, and in the performance of my professional duties have made frequent visits to that portion of said city and county commonly known as 'Chinatown,' and which is now under quarantine by order of the above defendants, and am well acquainted with the sanitary condition of said district, and with the people who reside therein. I am aware of the allegation of the above defendants that bubonic plague has existed within said quarantined district since the month of March, 1900, and am of the opinion, based upon my knowledge of said disease, and familiarity with said district and the people residing therein, that said allegation is based upon totally inadequate evidence. The said defendants have formed their diagnosis upon the alleged recognition of bacilli found in the tissues of certain deceased Chinese persons, and upon incomplete animal experimentations, and have entirely ignored the clinical history of the disease. I further state that the post mortem appearances that the said defendants claim to have found in their autopsies of said deceased persons, and which said defendants claim to be diagnostic of the presence of said disease, are found in many other diseases. I would further state that the said Chinese are particularly subject to enlarged glands due to syphilis and scrofula, and that the enlarged glands which are claimed to have been found in said deceased persons are not due to bubonic plague, but to the constitutional effects of either syphilis or scrofula. From these reasons, and facts hereinbefore stated, I draw the conclusion, and therefore aver, that said disease has not at

any time since or during the said month of March existed, and that it does not now exist, within said district under quarantine, or elsewhere in the city and county of San Francisco."

Dr. E. S. Pillsbury, professor of pathology and bacteriology at the College of Physicians and Surgeons, states that he personally examined and diagnosed all bodies of deceased persons dying within the quarantined district between May 30th and June 7th, save one, and that he does not believe the bubonic plague now exists within the said district, or that it has existed there within the last four months. Dr. H. D'Arcy Power, employed by the Chinese Six Companies, visited the quarantined district during the 30th and 31st days of May and the 1st and 2d days of June, and saw all the sick persons and dead bodies then in said district. He states that none of the cases visited by him was a case of bubonic plague, and that he does not believe at the time of his visits there was a case of bubonic plague in said district, nor that one has since occurred. Dr. D. A. Hodghead testifies to the same effect. Dr. George L. Fitch states that he attended one of the Chinese persons said by the board of health to have died of the bubonic plague, but that in his opinion the said Chinese died of pneumonia. Dr. Fitch states that, from his knowledge, he does not believe there are now any cases of bubonic plague within the district of Chinatown. Dr. E. C. Atterbury was with him on this case, and gives the same testimony. Dr. Lydia J. Wyckoff states that she has practiced her profession during periods of epidemics of bubonic plague in other countries, and, from her knowledge of said disease, she is of the opinion that the cases which the board of health regard as having been bubonic plague were not in fact cases of true bubonic plague. Dr. George A. Cable testifies that he attended three of the cases in the quarantined district now suspicioned by the board of health to have been bubonic plague; that such cases were not, in his opinion, bubonic plague; and that, during the whole period of his practice within said district, he has never at any time seen a case resembling bubonic plague. He states it as his opinion that bubonic plague does not now exist, nor has it ever existed, within said Chinatown. Dr. Minnie G. Worley states that she attended the case of a Chinese girl on May 11th, who subsequently died, and which case the board of health have declared was bubonic plague; that she diagnosed the case as typhoid fever; that no other person, to her knowledge, has contracted the bubonic plague or any disease from the said case, and, in affiant's opinion, the girl did not die from bubonic plague.

The evidence of Dr. Stephen and these other physicians shows that, at most, there have been 11 deaths in the quarantined district which on autopsy have disclosed some of the symptoms of the bubonic plague. But there has been no living case under the examination of the physicians from which a clinical history has been obtained, and it does not appear that there has been any transmission of the disease from any of those who have died. From all of which the court infers that the suspected cases were not contagious or infectious, or, if contagious and infectious, they were but sporadic in their nature, and had no tendency to spread or disseminate in the city. If it were within the province of this court to determine this issue, I think, upon

such testimony as that given by these physicians, I should be compelled to hold that the plague did not exist and has not existed in San Francisco. But this testimony is contradicted by the physicians of the board of health. They have furnished the testimony of reputable physicians that the bubonic plague has existed, and that the danger of its development does exist. In the face of such testimony the court does not feel authorized to render a judicial opinion as to whether or not the plague exists or has existed in this city. Indeed, that is one of the questions that courts, under ordinary circumstances, are disposed to leave to boards of health to determine, upon such evidence as their professional skill deems satisfactory. If they believe, or if they have even a suspicion, that there is an infectious or contagious disease existing within the city, it is unquestionably the duty of such boards to act and protect the city against it, not to wait always until the matter shall be established to the satisfaction of all the physicians or all the persons who may examine into the question. It is the duty of the court to leave such question to be determined primarily by the authority competent for that purpose. So that in this case the court does not feel at liberty to decide this question, although, as I have said, personally the evidence in this case seems to be sufficient to establish the fact that the bubonic plague has not existed, and does not now exist, in San Francisco.

It follows from the remarks that I have made that this quarantine cannot be continued, by reason of the fact that it is unreasonable, unjust, and oppressive, and therefore contrary to the laws limiting the police powers of the state and municipality in such matters; and, second, that it is discriminating in its character, and is contrary to the provisions of the fourteenth amendment of the constitution of the United States. The counsel for complainant will prepare an injunction, which shall, however, permit the board to maintain a quarantine around such places as it may have reason to believe are infected by contagious or infectious diseases, but that the general quarantine of the whole district must not be continued, and that the people residing in that district, so far as they have been restricted or limited in their persons and their business, have that limitation and restraint removed. With respect to the examination of persons who have died, I have already issued a preliminary restraining order preventing the defendants from interfering with physicians attending upon persons claimed to be afflicted with this disease. It will result, probably, if other suspicious cases are found within San Francisco, in a quarantine immediately being imposed upon the proper locality or house or building. In such a case the physician who has been attending the person afflicted should be permitted to continue to attend, and, in case of a death, such physician as may be selected by the Chinese association mentioned in this case shall have a right to attend any autopsy that may be made. But, as before indicated to counsel, that privilege should not be abused. There should not be an effort on the part of everybody, out of curiosity and otherwise, to attend upon these autopsies. There should be some reasonable limit to such privilege. The board of health is charged with the responsibility of maintaining regulations for the protection of the health of

this city, and there should be no unreasonable interference with its authority in matters of that kind. The board will have the right to maintain special quarantines in places suspected of having disease, and it has the right to enforce such regulations as it may deem proper, in order to secure an absolute exclusion of such places from the remainder of the community.

I am authorized to say that Judge DE HAVEN concurs in the conclusions here reached.

CALDERHEAD v. DOWNING et al.

(Circuit Court, D. Washington, N. D. July 16, 1900.)

1. REMOVAL OF CAUSES—SEPARABLE CAUSES OF ACTION—SUIT FOR RECOVERY UPON STOCKHOLDERS' LIABILITY.

An action by the receiver of an insolvent bank against numerous stockholders for the recovery of an assessment made upon the several stockholders for each one's pro rata share of the deficiency of funds necessary to discharge the obligations of the corporation involves a separable controversy within the provisions of the removal act.¹

2. SAME—PETITION BY DEFENDANTS JOINTLY LIABLE.

Where an action is prosecuted in the state court against two persons as co-partners they must defend together, and, if the right to remove the cause to the federal court is lost by one of them, the other is subjected to the same disability.

3. SAME—EFFECT OF APPEARANCE TO INDIVIDUAL CLAIM.

Where one is sued in the same action in a state court upon an individual liability and also as a member of a co-partnership, the appearance of such defendant in the state court, to contest the validity of an attachment affecting his individual liability only, will not deprive him of the right, as a member of the partnership, to have a removal of the cause to the federal court on the ground that the action involves a separable controversy between citizens of different states.

Suit in equity by the receiver of an insolvent banking corporation of the state of Washington against its stockholders to enforce their statutory liability for the obligations and debts of the corporation. After an attempt by one of the nonresident defendants to remove the case from the state court, in which it was commenced, into the United States circuit court, on the ground that the case involved a separable controversy, and an order remanding the case because the petition for removal was not filed in time, the same defendant and another filed a second petition and bond for removal, and caused the case to be docketed a second time in the United States circuit court. Heard on motion to remand. Motion denied.

J. B. Howe, for complainant.

R. B. Albertson, for defendants.

HANFORD, District Judge. The order to remand this case to the superior court of the state of Washington for King county, in which it was commenced, was granted for the reason that the defendant Edward Bailey, who alone caused the case to be first docketed in this

¹ Separable controversies as ground for removal, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86, and *Mecke v. Mineral Co.*, 35 C. C. A. 155.

court, had, previous to the time of filing his petition and bond in the state court, lost his right of removal by lapse of time. A new transcript of the record has been filed, and the case has been docketed here a second time at the instance of the same Edward Bailey and William Hammond, who are made defendants in the case as co-partners under the firm name of Hammond & Bailey. The complainant moves again to remand the case on the ground that this court has no jurisdiction.

The material facts to be considered are as follows: The complainant sues as receiver of a local banking corporation, acting as such receiver under an appointment made by the superior court of the state of Washington for King county. The bill of complaint avers that said superior court, in due conformity to the constitution and laws of the state of Washington, ascertained and adjudged that, after exhausting all the assets and resources of said banking corporation other than the statutory liability of its stockholders, there remains a large deficiency of funds required to discharge the obligations and debts of the corporation, and thereupon ordered an assessment to be made upon each stockholder of his pro rata share of such deficit. This suit in equity was thereupon commenced by the receiver against all of the stockholders who have failed to pay their assessments, and the bill specifies the amount of assessment due and collectible from each defendant. The defendant Edward Bailey is charged individually with a particular amount as his share of liability for and on account of stock in the corporation held by him. The defendants Edward Bailey and William Hammond are alleged to be co-partners under the firm name of Hammond & Bailey, and said firm is also charged with liability for a specified amount for and on account of stock in the corporation held by said firm. The defendants Edward Bailey and William Hammond are both citizens of the state of Pennsylvania, and nonresidents of the state of Washington. The record shows that said defendants have not been personally served with process requiring them to defend the case, and they have not entered any appearance in the case, except specially for the purpose of disputing the jurisdiction of the state court to have cognizance of any proceedings against them, and to secure the removal of the case into this court. By service of a writ of garnishment certain shares of stock of a building corporation owned by the defendant Edward Bailey have been subjected to a lien for the amount of any judgment which may be rendered against him for and on account of his alleged individual liability, and service of a summons against several nonresident defendants, including Edward Bailey and Hammond, has been made or attempted by publication in a newspaper. The superior court, by denying a motion filed in behalf of the defendant Edward Bailey to quash the summons and the service thereof as to him, has decided in effect that the service of said writ of garnishment and the publication aforesaid constitute valid and sufficient service of jurisdictional process to bring said defendant within the jurisdiction of the court; and this court followed that decision in holding that the first attempt to remove the cause into this court by said defendant was too late. The record shows that the defendant took an exception to the ruling of the superior court in denying said

motion to quash the process, and that in the subsequent proceedings said defendant has continued to protest against the jurisdiction of the court. The first motion to remand was granted by this court on the 5th day of February, 1900. On the 13th day of the same month the second petition and bond for removal was presented to a judge of the superior court, and simultaneously therewith the petitioners filed a motion to quash the summons and the service thereof by publication. On the 17th of February the superior court entered an order denying the petition for removal. On the 27th of February the defendant Bailey filed in the superior court a demurrer to the bill of complaint, but the record shows that he had taken no steps to defend the action on the merits, or to place himself in an attitude inconsistent with his right to dispute the jurisdiction of the court until after the presentation to the superior court of the petition and bond for removal, pursuant to which the defendants Hammond & Bailey are now claiming that the case was in fact removed into this court; so that subsequent proceedings in the state court have no effect upon the questions to be considered by this court.

The liability of each stockholder in an insolvent corporation is so far distinct and several that in any form of proceeding, whether against all in one suit or by separate proceedings against each, it is necessary for the court to render judgment against each for a specific amount, and the judgment against each stockholder can only be enforced by a separate execution. Therefore it is plain that the case involves a separable controversy between the defendants Hammond & Bailey and the plaintiff, which can be fully and finally determined without in any way affecting the rights of other defendants. The separable controversy does not arise from any separate or independent defense pleaded by these defendants, but it appears by the bill of complaint that the case is one which can be divided into parts; in other words, there is a separate and distinct cause of action stated against each of the stockholders, which might be the subject of a separate and independent action, and the case is removable by these petitioners under the provisions of the removal statute.

The question whether the right of removal has been lost by proceedings prior to the filing by these defendants of their petition and bond for removal is somewhat perplexing. The suit against the defendants Hammond & Bailey is founded upon a joint liability. They must defend together, and, being placed in this position, if, by expiration of time, Bailey has lost his right of removal, Hammond is subjected to the same disability. 18 Enc. Pl. & Prac. 293; *Fletcher v. Hamlet*, 116 U. S. 408, 6 Sup. Ct. 426, 29 L. Ed. 679. Prior to joining with Hammond in filing the petition and bond under which the case is now to be considered, the defendant Bailey appears to have acted for himself alone, contesting, as he had a right to do, the proceedings affecting his stock in the building corporation. When property within the jurisdiction of a court is levied upon in an action against a nonresident defendant not personally served with jurisdictional process, the court acquires jurisdiction to deal with the property, but does not acquire jurisdiction of the person of the defendant, so as to render a judgment to be enforced otherwise than by dealing with the attached property.

An attachment suit without service of process upon the defendant, or a voluntary appearance by him, is in the nature of a proceeding in rem, though not strictly so; but, if the defendant enters a voluntary appearance, the case becomes mainly a suit in personam, with the added incident that the property attached may be held as security for any demand which may be established against the defendant by the final judgment of the court. 3 Am. & Eng. Enc. Law (2d Ed.) 185. The rules applicable to the case above stated would require me to hold that the defendant Bailey had lost his right to remove the case into this court by lapse of time if he had entered a general appearance, or taken any step which would change the proceeding from a suit in rem to an action against him in personam; but, as the facts appear by the record, the process of the state court is effective only to give that court authority to subject Bailey's stock in the building corporation to sale for the amount of his individual liability as a stockholder of the banking corporation. There has been no attachment of any property for the debt of Hammond & Bailey, and the court has not acquired jurisdiction to enforce their joint liability, either by the service of any process, or by the voluntary appearance of said defendants, or either of them. In his dual relationship to the case the defendant Bailey has rights which are as separable and distinct as if in fact the Edward Bailey sued as an individual stockholder in the banking corporation, and whose property is affected by the writ of garnishment, were an entirely different person from the Edward Bailey sued as a member of the firm of Hammond & Bailey. The firm of Hammond & Bailey was not disturbed by the garnishment proceedings, and Mr. Bailey, in contesting the proceedings affecting his property, levied upon for his individual debt, did not act for the firm, nor for himself as a member of that firm. A defendant has the right to remove a case from a state court into a United States circuit court, and require the United States circuit court to decide questions as to the validity of service upon him of the jurisdictional process issued out of the court of original jurisdiction. 18 Enc. Pl. & Prac. 358, 359; *Goldney v. Morning News*, 156 U. S. 518-526, 15 Sup. Ct. 559, 39 L. Ed. 517; *Railway Co. v. Brow*, 164 U. S. 271-280, 17 Sup. Ct. 126, 41 L. Ed. 431; *Cooper v. Newell*, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. Ed. 808.

The law relating to the removal of causes into United States circuit courts is in its application to particular cases often complex and difficult to reconcile with principles of good practice, and this case presents the anomaly of a case being removed from the court in which it was commenced into a federal court on the ground of a separable controversy, and upon assuming jurisdiction the court is obliged to deny that it has any jurisdiction of the separable controversy, for the reason that the particular defendants invoking its jurisdiction have not been and cannot be brought within the jurisdiction either of the court of original jurisdiction or the federal court; and, after calling a halt in the proceedings against the particular defendants responsible for the removal of the case, the court must proceed to adjudge as to the rights of other parties, neither of whom has ever voluntarily submitted to its jurisdiction, or else the cause must be remanded for want of jurisdiction. However, the court has no right

to make an evasive decision to avoid unhappy consequences. Since the law as it has been expounded by the supreme court gives to these nonresident defendants the right to require this court to determine for them the question as to the validity of the jurisdictional process against them, the court must assume the responsibility of deciding that question. Motion denied.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. CITY OF
RICHMOND.

(Circuit Court of Appeals, Fourth Circuit. July 9, 1900.)

No. 361.

1. FEDERAL COURTS—SCOPE OF POWERS—DETERMINING VALIDITY OF CITY ORDINANCES.

Where no federal question is involved, it is hardly within the province of a federal court to declare void a municipal ordinance, passed under a general grant of power from the legislature, on the ground that its provisions are unreasonable, and therefore in excess of the powers to be inferred from the grant.

2. TELEPHONES—RIGHT TO USE OF STREETS—CONSENT OF CITY.

The statute of Virginia (Code 1887, §§ 1287-1290) authorizes telegraph and telephone companies to construct, maintain, and operate their lines along any state or county roads or works, and over the waters of the state, and along and parallel to any of the railroads of the state, "provided the ordinary use of such roads, works, railroads and waters be not thereby obstructed; and along or over the streets of any city or town with the consent of the council thereof." *Held*, that as such statute does not define the conditions on which streets in cities and towns may be occupied, and requires the consent of the councils, not only to the construction, but also to the maintenance and operation, of telegraph and telephone lines thereon, it delegates to such councils the power to attach conditions to their consent, especially in case of a city whose charter gives its council general authority over the streets, and provides that no company shall occupy any street without its consent, and that a provision, in an ordinance of such city granting the right to a telephone company to use certain streets, reserving to the council the right of repeal, was valid, and, on the acceptance of the grant, became a condition binding on the company.

3. SAME—ACCEPTANCE OF ORDINANCE—CONDITIONS.

A telephone company which without objection accepts and acts upon a consent given by a city council to use the streets of the city under certain conditions is bound by such conditions, even though the council was not authorized under the statute to exact them, but was empowered only to give or refuse its unconditional consent, leaving the rights of the company, in case consent was given, to be determined by the statute.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

This case comes up on appeal from a decree of the circuit court of the United States for the Eastern district of Virginia. 98 Fed. 671. The bill was filed by the Southern Bell Telephone & Telegraph Company for the purpose of securing an injunction against the city of Richmond, in these words: "That said city, and all others, its agents and employés, may be restrained and enjoined from removing or interfering with its poles and wires in said city, and from interfering with the right of your orator to use said poles and wires, and that all proceedings by said city or its agents, and all others, to prevent your orator from continuing, renewing, repairing, and extending its lines, wires, and poles in, along, and over the streets and alleys of the said

city; and to inflict fines and penalties on your orator for so doing, may be restrained and enjoined; that the right of your orator to use said poles and wires, and to carry on its said business along and over the streets of the said city, be declared and defined; that the ordinance of the said city of the 14th of December, 1894, and of the 10th of September, 1895, so far as they undertake to prevent your orator from maintaining and using its lines, poles, and wires over and along the streets and alleys of the city of Richmond, from repairing, renewing, and extending its said poles, wires, lines, and routes as its business may require, may be declared null and void; that your orator may have such other, further, general, and complete relief as may be agreeable to equity and the nature of its case." The bill claimed that the complainant had entered upon and had secured the use of the streets and alleys of the city of Richmond for its poles and wires, under the authority of the act of congress July 24, 1866 (14 Stat. 221, c. 230), and that under this act it was and is entitled to maintain and operate its lines through and over the streets and alleys of the city of Richmond, without regard to the consent of the said city. The act of 1866 applies to telegraph companies, and the complainant claimed the privileges thereunder because a telephone company was embraced and included in the term "telegraph company." This contention was sustained by the circuit court, which, without passing upon the rights claimed by the complainant company under the laws of Virginia and the ordinances of the city of Richmond, adjudged that the complainant company had, in accordance with the terms and provisions, and under the protection of the act of congress of the United States approved July 24, 1866, which is an authority paramount and superior to any state or city ordinance in conflict therewith, the right to construct, maintain, and operate its line over and along the streets and alleys of the city of Richmond. Upon this ground the injunction prayed for was granted. The case then came up by appeal, with assignments of error, into this court, whereupon this court, concurring with the circuit court in the opinion that the complainant company was entitled to the privileges and was under the protection of the act of congress of 1866, after modifying the decree in certain particulars, not necessary to be mentioned now, confirmed its conclusion and sustained the injunction. The cause was removed by certiorari into the supreme court of the United States. That court reversed the conclusion reached by this court, declaring that the complainant company, being a telephone company, did not come within the provisions of the act of 1866, which granted privileges and protection to telegraph companies, because telephone companies were in no sense telegraph companies. The opinion filed by the supreme court ends thus: "What rights the appellee [the Southern Bell Telephone Company] had or has under the laws of Virginia and the ordinances of the city of Richmond is a question which the circuit court did not decide, but expressly waived. It is appropriate that that question should be first considered and determined by the court of original jurisdiction." 174 U. S. 778, 19 Sup. Ct. 784, 43 L. Ed. 1169. The decretal order is as follows: "The cause is remanded, with directions for such further proceedings in the circuit court as may be in conformity with this opinion and consistent with law." *Id.* The opinion of this court, while adjudging that the complainant company had all the privileges and protection granted by the act of 1866, had also adjudged that such rights and privileges were to be enjoyed in subordination to public use and private rights, and subject to any lawful exercise of the police power belonging to the state or one of its municipalities. This was approved and affirmed by the supreme court in its opinion. The cause, having been remanded, was heard in the circuit court. That court held that, under the laws of Virginia and the ordinances of the city of Richmond, the Southern Bell Telephone & Telegraph Company has no right to use the streets of that city. For this reason it denied the relief asked, dissolved the injunction theretofore granted, and dismissed the bill. Leave to appeal was granted upon assignments of error, and the cause is here upon these.

A. L. Holladay and Hill Carter (George H. Fearons, on the brief),
for appellant.

Henry R. Pollard, City Atty., for appellee.

Before SIMONTON, Circuit Judge, and BRAWLEY, and PURNELL, District Judges.

SIMONTON, Circuit Judge (after stating the facts as above). The question before this court is that sent down by the supreme court to the circuit court: What rights have or had the Southern Bell Telephone & Telegraph Company, under the laws of Virginia and the ordinances of the city of Richmond, to construct, maintain, and operate its lines in the streets and alleys of that city? The statute law of the state of Virginia in relation to telegraph and telephone companies is found in chapter 54 of the Code of 1887 (sections 1287, 1288, 1289, 1290). Section 1287 is as follows:

"Right of Telegraph and Telephone Companies to Construct and Operate Lines. Every telegraph and every telephone company incorporated by this or any other state, or by the United States, may construct, maintain and operate its line along any of the state or county roads or works and over the waters of the state, and along and parallel to any of the railroads of the state, provided the ordinary use of such roads, works, railroads and waters be not thereby obstructed; and along or over the streets of any city or town with the consent of the council thereof."

It may be noted in passing that when the legislature is granting the use of any of the state or county roads or works, and over the waters of the state, and along or parallel to its railroads, it states the conditions in full. When the legislature comes to the use of streets of a city or town, it refers these conditions to the council of such city or town. Section 1288 provides for contracts for rights of way. Section 1289 provides, when compensation cannot be agreed on, how ascertained; what title the company acquires. Section 1290 provides as follows:

"Right of Repeal by General Assembly. The three preceding sections shall be subject to repeal, alteration or modification, and the rights and privileges acquired thereunder shall be subject to revocation or modification by the general assembly, at its pleasure."

Sections 1291, 1292, 1293, and 1294 relate to the transaction of the business of telegraph and telephone companies after their lines are up.

Section 7 of the charter of the city of Richmond is as follows:

"To close or extend, widen or narrow, lay out and graduate, pave, and otherwise improve streets and public alleys in the city, and have them properly lighted and kept in good order; and they shall have over any street or alley in the city, which has been or may be ceded to the city, like authority as over other streets or alleys. They may build bridges in, and culverts under, said streets; and may prevent or remove any structure, obstruction or encroachment over or under, or in a street or alley, or any sidewalk thereof, and may have shade trees planted along the said streets; and no company shall occupy with its works the streets of the city without the consent of the council." Laws 1869-70, p. 124.

The Southern Bell Telephone & Telegraph Company is a corporation of the state of New York. On 26th June, 1884, the city council of Richmond passed the following ordinance:

"Granting the right of way throughout the city to the Southern Bell Telephone and Telegraph Company.

"Section 1. Permission is hereby granted the Southern Bell Telephone and Telegraph Company to erect poles and run suitable wires thereon for the purpose of telephonic communication throughout the city of Richmond, on the

public streets thereof, on such routes as may be specified and agreed on by a resolution or resolutions of the committee on streets, from time to time, and upon the conditions and under the provisions of this ordinance.

"Sec. 2. On any route conceded by the committee on streets, and accepted by the company, the said company shall, under the direction of the city engineer, so place its poles and wires as to allow for the use of the said poles by the fire alarm and police telegraph, in all cases giving the choice of position to the city's wires, wherever it shall be deemed advisable by the council or the proper committee to extend the fire alarm and police telegraph over such route.

"Sec. 3. The telephone company to furnish telephone exchange service to the city at a special reduction of ten dollars per annum for each municipal station.

"Sec. 4. No shade trees shall be disturbed, cut or damaged by the said company in the prosecution of the work hereby authorized without the permission of the city engineer and consent of the owners of property in front of which such trees may stand, first had and obtained; and all work authorized by this ordinance shall be, in every respect, subject to the city engineer's supervision and control.

"Sec. 5. This ordinance may at any time be repealed by the council of the city of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law."

And on 14th December, 1894, that ordinance was repealed, as follows:

"Repealing an ordinance approved June 26, 1884, concerning the Southern Bell Telephone and Telegraph Company.

"Be it ordained by the council of the city of Richmond, that the ordinance approved June 26, 1884, granting the right of way throughout the city to the Southern Bell Telephone and Telegraph Company be, and the same is hereby, repealed; that, in accordance with the fifth section of said ordinance, all privileges and rights granted by said ordinance shall cease and be determined at the expiration of twelve months from the approval of this ordinance by the mayor."

The appellants contend: That all their rights are derived from the legislative enactment. That they have no right to use the roads, etc., of the state, and the streets of the cities and towns, except by reason, primarily, of that enactment. That the consent of the council of the municipality must be had before the right to use the streets which is granted by the act of assembly can be exercised. But, such consent having been obtained, the right to use the streets is referred to the act of assembly, and not to the ordinance. So that the legislature reserved to itself the right to repeal, alter, and modify section 1287 and succeeding sections, and to revoke and modify the rights and privileges acquired thereunder. The rights and privileges of the complainant company, including that of constructing, maintaining, and operating their lines on the streets of Richmond, having been acquired under the act of assembly, cannot be revoked or modified except by the action of the general assembly; this right having been expressly reserved by it. This being so, the attempt of the city council, in the ordinance of 1884, to reserve to itself the right to repeal that ordinance and withdraw the privileges granted thereunder, is ultra vires and void.

The learning of the counsel for the appellant has brought to the attention of the court four decisions in cases of this character in courts of last resort in Pennsylvania, Connecticut, New Jersey, and Maryland. In *Appeal of City of Pittsburg*, 115 Pa. St. 4, 7 Atl. 778, an act of assembly gave the right to a corporation to enter upon any

public lane, street, alley, or highway for the purpose of laying down pipes, altering, inspecting, and repairing the same, in such way as to do as little damage as possible to the highway, and to impair as little as possible the free use thereof, and subject to such regulations as the councils of cities should by ordinance adopt. Another section of the act provided that new companies should not enter upon or lay down pipes in any streets, etc., of any borough or city, without the assent of the councils thereof, duly passed and approved. It was held that, inasmuch as the act of assembly gave detailed instructions as to the use of these pipes, the only thing the councils could do was to assent or dissent to the entry of a company on its streets, and that it must give such assent without conditions onerous in themselves and tending to defeat the benevolent purposes of the act, and that, having once assented, they could not revoke the consent.

In *State v. Mayor, etc., of City of Jersey City* (N. J. Sup.) 8 Atl. 123, the act of the legislature of New Jersey provided:

"That any telegraph company organized by virtue of this act [a general act] shall have full power to use the public roads and highways in the state on the line of their route for the purposes of erecting posts or poles on the same to suspend wires and other fixtures, upon first obtaining the consent in writing of the owner of the soil: provided, however, no posts or poles shall be erected on any street of an incorporated city or town without first obtaining from the incorporated city or town a designation of the streets in which the same shall be placed and the manner of placing the same."

In accordance with this act, Jersey City, on the application of the Hudson Telephone Company, designated certain streets in that city in which its poles could be placed, and the manner of placing the same. The company complied with the designation, and proceeded to place, and had placed, many poles in the streets designated. The city council then repealed the ordinance granting the permission. The court held that this repeal was ineffective; the company, under the act, having obtained a vested right, of which it could not be stripped by the ordinance.

In *Mayor, etc., of Baltimore v. Radecke*, 49 Md. 217, these were the facts: In 1866 Radecke applied to the city council for permission to erect and use on his premises a steam engine for the purpose of his business. This application was granted by the passage of a resolution containing a provision, in accordance with a city ordinance on the subject, that the engine was to be removed after six months' notice to that effect from the mayor. Radecke erected his engine and used it until some time in 1873. He then received a notice to remove it. He refused to do so, and suit was entered for the fine in such case provided. The court held that ample power had been given to the city council to legislate upon the subject of the erection and use of steam engines in the city; that, as to the necessity for municipal legislation on this subject, the mayor and city council are the exclusive judges, while the means and manner of enforcing such legislation are committed to their sound discretion; that this discretion, though broad, is not absolutely and in all cases beyond judicial control, for there may be a case in which an ordinance passed under a grant of power like this is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the legislature never intended to confer

the power to pass it, and to justify the courts in interposing and setting it aside as a plain abuse of authority; that the ordinance in question, requiring the removal of steam engines after notice from the mayor, did not prescribe regulations for their construction, location, or use, but committed to the unrestrained will of a single public officer a power over the use of steam within the limits of Baltimore practically absolute, so that he may prohibit it altogether; that this power may be exercised from enmity or prejudice, from partisan zeal or animosity, from favoritism, and other improper motives, easy of concealment and difficult of detection, hardly falls within the domain of law, and is void.

Southport v. Ogden, 23 Conn. 128, held that, when an act of assembly forbade the taking of oysters during certain months of the year in any of the waters of the state, a municipal ordinance forbidding the taking of oysters within the bounds of the municipality for certain months within the prescribed period, but for fewer months, is null and void, as in conflict with the act of assembly, and as making a party liable for two prosecutions for the same act.

It will be observed that in the *Pittsburg Case* the legislature dealt directly with the company, and prescribed its duties. But a single act was required from the municipal corporations. That was to consent or refuse. By consenting they admitted the company into their streets, and thenceforward they were under the provisions set out at large in the act of assembly. In the *New Jersey case*, also, but a single act was required of the city council,—the selection and designation of the streets in which, under the act of the legislature, the company set up its poles, strung its wires, and conducted its business. This the city council did do. Thenceforward the telephone company proceeded under the act of the legislature, and actually put up its poles. It was too late for the city council to recede. The *Connecticut case* has but a remote bearing on the case at bar. To say that there is a conflict between the state legislature and the city ordinance would be begging the question. The *Maryland case* will be commented upon hereafter.

It becomes necessary to inquire, what are the rights and privileges acquired by the *Southern Bell Telephone & Telegraph Company* under this act of the general assembly of Virginia? It has the right to construct, maintain, and operate its line along any of the state or county roads or works, and over the waters of the state, and along and parallel to any of the railroads of the state, upon one condition only; and that is that the ordinary use of such roads, works, railroads, and waters be not obstructed. Thus the exercise of the police power is expressly reserved. And it has the right to construct, maintain, and operate its line along or over the streets of any city or town upon one condition only,—that this right be exercised with the consent of the council thereof. So the entire exercise of the police power is delegated to the municipality. The consent of the council is an indispensable condition, as well to the construction as to the maintenance and the operation of the line. These words, "maintain and operate," include a series of continuous acts,—the constant and daily use, the keeping up of the efficiency, of the line. To all these the consent of

the council is necessary, and must always be given. Had the act of assembly simply required the consent of the council to the construction of the line, perhaps, the consent once having been given, the line could then have been maintained and operated under the act, subject only to the police power. But the condition requires the consent of the council, not only to the act of construction, but to the continuous and continuing acts of maintaining and operating the line. Nor is this inconsistent with prior legislative action. The charter of Richmond, for instance, had placed its streets and alleys under the sole control, regulation, and disposition of its city council. The legislature could not, without repealing this clause of its charter, have disposed of the use of the streets and alleys without its consent. It is true that the legislature, under section 1290, could have repealed, altered, or modified all the provisions relating to telegraph and telephone companies, and could have revoked or modified the rights and privileges acquired by them, and, it may be, can authorize the use of the streets and alleys without the consent of the council, although this would be an enlargement of the privileges of these companies, and not a modification. This word, properly, is to qualify or restrict. But to do this the general assembly must not only repeal, alter, or amend this act, but also the charter of the city. Nor can it be said that a telephone company owes its right to construct, maintain, and operate its lines, within the limits of a municipality, solely to the action of the general assembly. The condition precedent to its use of the streets and alleys of the municipality is the consent of the council. Without this consent it can do nothing. And the most reasonable construction is that, so far as the use of the streets and alleys is concerned, the legislature has delegated to the council the sole right of bestowing the right and privilege upon the company. When the company uses these streets and alleys, it does so, not because the general assembly authorized it, but because the council has consented to it. Without such consent, it can set up no authority under the act. The distinction between the cases quoted above and that before the court lies just here. In those cases but one thing was to be consented to by the municipality,—the laying of the pipes in the streets of Pittsburg; the designation of such streets for the erection of the poles in Jersey City. When consent for this was given, the condition of the act of assembly was fulfilled. In the case before the court the city council must consent not only to the construction, but to the maintenance and to the operation of the line,—a consent to the inception, the operation, the continuous existence of the line. The case of *Mayor, etc., of Baltimore v. Radecke*, 49 Md. 217, is very nearly on all fours with the case before the court. There the ordinance distinctly notified Radecke that he erected and kept up his steam engine subject to the right of the mayor to revoke the privilege. The court (a state court), construing an ordinance passed under the supposed authority of the legislature, declared the ordinance unreasonable and void. A state court may, perhaps, have the power to do this. We doubt very much if this lies within the province of a federal court. The construction of the ordinance in question here involves no federal question. Its validity is not attacked as repugnant to the construction or application of the

constitution of the United States. It would be a grave stretch of authority in a federal court to sit in judgment upon and criticise the motives of a body established purely for local government.

When the Southern Bell Telephone & Telegraph Company applied to the city council of Richmond for its consent to the construction, maintenance, and operation of its line in the streets and alleys of that city, the ordinance of 1884 was passed. This ordinance gave the consent desired, and expressed the terms on which such consent was granted. It is in five sections, and each section specifies the conditions on which the consent is given. These conditions were accepted by the telephone company in the most direct and satisfactory way. The company acted upon them, and under the ordinance constructed, maintained, and operated its line. No question is made as to the first four conditions. The fifth is in these words: "This ordinance may at any time be repealed by the council of the city of Richmond." Then are added words which are clearly a concession to the company: "Such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law." Under the act of the general assembly, the council could consent or refuse. It states to the company the terms on which it will give its consent. These terms were accepted by the company, and the ordinance discloses the contract between them. If the terms were distasteful to the company, it could have refused them, or, at the least, protested against them. It is contended that under the act of the legislature the city council could give only a categorical answer to the request for its consent, "Yes" or "No," without terms or conditions. But as the act itself expressed no regulations to be observed by a telegraph or telephone company in its use of the streets or alleys of a municipality, although it had done this as to the use of county and state roads, etc., clearly in referring such a company to a municipal council, it was intended that the council could state the proper measures for protecting the streets, alleys, and the public. Especially is this so when the consent must be obtained, not only to construct, but to maintain and operate, the lines. Again, it is contended that under the provisions of the act of assembly the city council of Richmond had authority only to consent or refuse permission to the Southern Bell Telephone & Telegraph Company to construct, maintain, and operate its line in that city, and that such consent or refusal must have been given without any qualification or condition, whatever. It must have been a categorical "Yes" or "No." But the city council did in fact express conditions and qualifications in giving its consent. It may safely be assumed that, without such qualifications and conditions, consent would not have been given; that they were the reasons and motive cause for the consent. Then, if the city council could not have given—had no authority to give—a conditional or qualified consent, its attempt to consent was unauthorized, ultra vires, and void, and in fact it never has consented in the only way in which complainants maintain it could consent. From this point of view, the condition precedent of the act of the general assembly has not been performed. In order to maintain and operate its line in Richmond, the telephone company is without the consent of the council, and must obtain it. We see no error in the judgment of the circuit court. Its decree is affirmed.

**MAXIM-NORDENFELT GUNS & AMMUNITION CO., Limited, et al.,
v. COLT'S PATENT FIREARMS MFG. CO.**

(Circuit Court, D. Connecticut. July 5, 1900.)

No. 940.

EQUITY—TAKING TESTIMONY—OBJECTIONS TO EVIDENCE.

A federal court will not pass upon questions of the relevancy or materiality of evidence during the examination of a witness before an examiner on a motion to compel an answer, but the proper practice is for the answer to be taken, and incorporated in the record, together with the objection thereto, which will be reserved for final hearing.

In Equity.

Simon Sterne, for complainants.

W. A. Redding, for defendant.

TOWNSEND, District Judge. On motion to compel witness for defendant to answer the following question on cross-examination, namely:

"X-Q. 246. Please point out which of these prior patents and publications, if any, exhibit, in your opinion, the structure which you find set forth in claim 10 of Maxim patent, No. 459,828?"

Counsel for defendant objects to said question as irrelevant and immaterial, and as not proper cross-examination. It is not the practice in this circuit, so far as is known to this court, to pass upon questions of this character in the course of the examination of the witness. The usual procedure is for the witness to answer the question, and to have such answer preserved, and to have the question of the relevancy thereof reserved for final hearing. In *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521, the court held that, while the examiner could not decide objections to testimony, he must take down the whole examination in writing and note all exceptions. In *Appleton v. Ecaubert* (C. C.) 45 Fed. 281, Judge Lacombe, in passing on a motion similar to that made in this case, says that no authority for such practice is shown, and that *Blease v. Garlington* condemns it. And in *Fayerweather v. Ritch*, 89 Fed. 529, Judge Lacombe held that, even if the circuit court, on such a motion, should deem certain testimony irrelevant, it should yet be incorporated in the record. In view of these decisions and the settled practice the witness should answer the question, and his answer and the objections should be noted by the examiner. This ruling is not intended to apply to questions of personal privilege which may be raised by a witness. The motion is denied.

HANDLEY et al. v. PALMER et al.

(Circuit Court of Appeals, Third Circuit. June 21, 1900.)

No. 26.

1. WILLS—VALIDITY—WHAT LAW GOVERNS.

Where a testator, having real and personal estate in Pennsylvania, and his domicile in that state, and having also real estate in Virginia and West Virginia, after certain specific bequests devises all the residue of his estate to a city in Virginia, the validity of such residuary devise, as

respects the real and personal property of the testator in the state of Pennsylvania, is to be determined by the law of that state.

2. SAME—DIRECTION TO EXECUTORS TO SELL REAL ESTATE—EFFECT.

A direction to executors, in a will, to sell all of the testator's real estate at the end of 20 years, works a conversion of the testator's real estate, wherever situated, into personality, as of the date of the testator's death.

3. SAME—CHARITY—ENFORCEMENT.

A devise of all the residue of a testator's estate, remaining after payment of certain specific bequests, to a city, "to be expended in said city in the erection of school houses for the education of the poor," is not void for indefiniteness.

4. SAME—CAPACITY OF CITY TO TAKE.

Under Code Va. c. 65, conferring on any board of education or other corporation power to take a gift, devise, or bequest for literary or educational purposes, a city whose charter provides that it shall have all such powers as are or may be conferred on the councils of cities and towns having a population of 5,000, by the constitution and general laws of the state, and that the administration and government of said city shall be vested in a board called the "common council," "and such other boards and offices as are now or hereafter may be provided for," and for which a special board of trustees is created by the legislature, to administer the trust created by the will under consideration, is competent to take a bequest for the erection of schools for the education of the poor.

5. SAME—BEQUEST IN BLANK—EFFECT ON RESIDUARY BEQUEST.

A will bequeathed "the following sums of money to each of the persons named in Schedule A," and the residue of the estate to a municipal corporation. A paper marked "Schedule A" was found and probated with the will, but was a blank, except as to the following caption: "List of persons to whom bequests in the following amount, and made and intended for Schedule A, mentioned in my last will." *Held*, that the residuary clause was not rendered uncertain because of the incomplete bequest to persons intended to be named in the schedule.

6. SAME—PERPETUITIES.

A devise to a municipal corporation for a public use, with direction that the same be sold, and the proceeds invested for a stated number of years, or until the principal, with the accumulations, amounted to a sum named, when it should be applied to the purpose specified in the will, is not invalid because in violation of the rule as to perpetuities, since the whole beneficial interest in the lands, before and after sale, is given directly to the devisee.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

W. H. Jessup and George H. Starr, for appellants.

Henry W. Palmer and Robert M. Ward, for appellees.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. This suit was instituted to test the validity of the residuary clause of the will of John Handley, who at the time of his death, February 15, 1895, was a citizen of the state of Pennsylvania, and a resident of the city of Scranton, in that state. He left to survive him neither wife nor descendants, and no relatives nearer than first cousins. These first cousins, or twelve of them, were the complainants in this suit. Seven of them live abroad, being residents in Ireland and England. The remaining five are citizens and residents of states in this country other than Pennsylvania. The case was twice argued in the court below, with the result that the decree dis-

missing the bill after the first hearing was affirmed and approved by the final order of the court at the second hearing. 91 Fed. 948. From this decree the complainants have appealed.

The subject-matter of the suit, briefly but sufficiently stated for our purpose, is this: John Handley died at Scranton February 15, 1895. He left a large estate, both personal and real. A great part of his real estate was situated in the city of Scranton, and elsewhere in the state of Pennsylvania; but a portion, consisting of about 15,000 acres of timber and coal land, was situated in the county of McDowell, in the state of West Virginia, and another portion, consisting of about 12,000 acres of land, was situated in Frederick county, in the state of Virginia. He left a will dated December 29, 1890, with a codicil attached thereto, dated July 31, 1893, which were duly probated after his death. By his will he disposed of his entire estate. He ordered and directed his executors to sell and convey all his real estate at the end of 20 years. Among a number of special bequests is one to the city of Winchester, in Virginia, of the sum of \$250,000, to be invested in the bonds of the state, at interest, until said sum amounted to \$500,000, when it was to be applied to the purposes of the erection and maintenance of a free public library for the people of said city. The other specific bequests made by the testator amount in the aggregate to nearly \$100,000. The residue of his estate, after the payment of the above-named specific bequests, was given to the city of Winchester by a clause of his will which reads as follows:

"All the rest and residue of my estate I give, devise, and bequeath to the city of Winchester, Virginia, to be accumulated by said city for the period of twenty years. The income arising from said residue estate to be expended and laid out in said city in the erection of school houses for the education of the poor."

The specific bequests are not controverted by the next of kin of the testator in this suit, who are the appellants here, except in so far as the disposition of the coal and mineral land made in items 14 to 18, inclusive, of the will, is claimed to be in violation of the rule as to perpetuities. The principal question, however, is as to the validity of the residuary clause just quoted, which complainants deny, and aver that the testator died intestate as to all of his estate not needful to carry out the specific bequests therein made.

There are 27 assignments of error, but the questions which underlie them all, and which are necessarily to be considered in the determination of this case, relate to the following contentions of the appellants: (1) That the city of Winchester has not the corporate capacity to take this residuary bequest, or to administer the same for the uses prescribed by the testator, because it is a municipal corporation, and the purpose to which the said residuary bequest is to be devoted is not germane to the functions of the said corporation, or to the objects for which it was created; (2) that the objects or purposes and the particular beneficiaries intended by the provisions of said residuary clause are so uncertain and undefined as to invalidate this bequest, even under Virginia law and decisions; (3) that the subject-matter of the residuary clause is rendered uncertain because of the effect upon it of item 9 of the will, which includes Schedule A; (4) that the dispo-

sition made of the coal and mineral lands in items 14 to 19, inclusive, and the disposition of the residuum of said estate made in the said residuary clause, is in violation of the rule as to perpetuities. These contentions were all considered and discussed by the court below, and decided adversely to the next of kin, the appellees in this case, and the validity of the will, as a whole, was sustained. At the threshold of the discussion of these contentions, it is necessary to inquire what law is applicable to their determination,—the law of Pennsylvania or the law of Virginia. As to this, we cannot do better than to quote the language of the learned judge of the court below:

"It is clear that, as respects all the testator's personal estate and his real estate situated in the state of Pennsylvania, the validity of the residuary clause is to be determined by the law of Pennsylvania; the testator's domicile having been there at the date of his will and at the time of his death. *Desesbats v. Berquier*, 1 Bin. 336; *Freeman's Appeal*, 68 Pa. St. 151; *Magill v. Brown*, 16 Fed. Cas. 408, *Brightly*, N. P. 347; *Jones v. Habersham*, 107 U. S. 174-179, 2 Sup. Ct. 336, 27 L. Ed. 401. In *Magill v. Brown*, supra,—a case relating to bequests to charitable uses under the will of Sarah Zane,—Mr. Justice Baldwin, sitting at circuit in this state, held that, the domicile of the testatrix being here, the law of this state governed her real estate situated here, and (curiously enough) sustained a bequest 'to the citizens of Winchester,' Virginia, to purchase a fire engine and hose, and a bequest 'to the select members belonging to the monthly meeting of women friends held at Hopewell, Frederick county, Virginia,' the interest to be applied 'towards the relief of the poor belonging thereto.' In *Jones v. Habersham*, supra, which involved charitable devises and bequests, the supreme court of the United States said that the validity of the devises, 'as against the heirs at law, depends upon the law of the state in which the land lies, and the validity of the bequests, as against the next of kin, upon the law of the state in which the testatrix had her domicile.' It is to be observed that under the will of John Handley no real estate anywhere is devised to the city of Winchester. By the express direction and order of the testator, contained in his will, his entire real estate, wherever lying, is to be sold by his executors. This direction, by the settled law of Pennsylvania, worked a conversion of the testator's real estate, wherever situated, into personalty, as of the date of his death. *Dundas' Appeal*, 64 Pa. St. 325; *Roland v. Miller*, 100 Pa. St. 47; *Miller v. Com.*, 111 Pa. St. 321, 2 Atl. 492; In re *Williamson's Estate*, 153 Pa. St. 508, 26 Atl. 246. The plaintiffs' counsel, as I understand them, concede that the power of sale given to the executors is mandatory, and worked an equitable conversion of the testator's real estate everywhere, if the residuary clause is valid. In their brief they say: 'The property which is subject to the residuary clause or gift [item 28 of will] is to be regarded as personal property, in order to determine the validity of the residuary bequest. * * * If the bequest be held valid, the fund is to be decreed personal property, and passes to the city of Winchester as such. If invalid or void, then, the purpose of the conversion having failed, the conversion of the real estate does not take effect, and the real estate retains its original character for the benefit of the heirs.' The plaintiffs' counsel further contends that 'the question of the validity of the residuary legacy is to be determined mainly by the laws of Virginia.'"

We do not find that the law of Pennsylvania differs from the law generally obtaining in regard to the competency of a municipal corporation to take property and act as trustee thereof. What may be said to be the common law of the states of this country, as well as of England, in this regard, is that a municipal corporation may take property in trust for purposes of a public nature germane to the objects of the corporation. Educational purposes are public purposes, and are not to be considered unrelated to the objects of a municipal corpora-

tion, unless made so by the general statute laws of the state, or excluded from the purposes for which the particular corporation was created by the law of its creation. That such is the law of Pennsylvania is abundantly established by the decisions of the supreme court of that state, which were cited, discussed, and approved by the learned judge of the court below. 2 Dill. Mun. Corp. (2d Ed.) § 437; *Philadelphia v. Fox*, 64 Pa. St. 169; *Mayor, etc., v. Elliott*, 3 Rawle, 170; *Cresson's Appeal*, 30 Pa. St. 437; *Vidal v. Girard*, 2 How. 127, 11 L. Ed. 205. Gifts for public uses, generally recognized as benevolent, have always been highly favored by the courts of the United States and the different states, without regard to the existence or nonexistence of statutes of charitable uses similar to that of 43 Eliz. Indeed, in all countries, as they have come under the influences of the Christian religion, there has been a recognition, to some extent, of the duty of fostering and protecting such gifts. What may be called the doctrine of charitable uses, as developed in the decisions of English and American courts, and by approved text writers, is familiar learning, and has settled with sufficient and admirable clearness the equitable grounds upon which such uses are sustained. Many testamentary provisions for benevolent purposes appeal only to the ordinary rules applicable to the creation and administration of trusts; "but a trust which, according to those rules, would fail for uncertainty, is upheld in chancery when the beneficiaries are objects of charity, and is then a charitable use." Bisp. Eq. 116. Since the great case of *Vidal v. Girard*, 2 How. 128, 11 L. Ed. 205, the peculiar chancery jurisdiction over such trusts has been generally recognized as owing its origin, not so much to the statute of 43 Eliz., known as the "Statute of Charitable Uses," as to an inherent power independent of that statute, the exercise of which was demanded by the humanity of an advancing civilization. The statute of 43 Eliz. c. 4, concerning charitable uses, was never adopted by either the colony or state of Pennsylvania; and, though no separate court of chancery has ever existed within that state, the doctrine of charitable uses is recognized in the jurisprudence of the state, and enforced when a devise or gift might otherwise fail by reason of the want of a trustee capable of taking, or by reason of the uncertainty of the objects of the testator's bounty. In *Domestic & Foreign Missionary Societies Appeal*, 30 Pa. St. 425, 535, the supreme court of Pennsylvania says:

"In the case of a will making a charitable bequest, it is immaterial how vague, indefinite, and uncertain the objects of the testator's bounty may be, provided there is a discretionary power vested in some one over its application to those objects."

Witman v. Lex, 17 Serg. & R. 88; *Pickering v. Shotwell*, 10 Pa. St. 23; *Magill v. Brown*, 16 Fed. Cas. 408; *Lawrence Co. v. Leonard*, 83 Pa. St. 206; *In re Trim's Estate*, 168 Pa. St. 395, 31 Atl. 1071; *Philadelphia v. Fox*, 64 Pa. St. 169.

Bispham, in his *Principles of Equity*, already referred to, in describing and seeking to define charitable uses, says:

"Uncertainty in the object is one of the characteristics of a true, technical, charitable use, because, if the beneficiaries are defined with precision, the ordinary doctrines of equity, which have been already referred to, would be sufficient to support it." Page 178.

And in *Philadelphia v. Fox*, 64 Pa. St. 169, the supreme court of that state, speaking in the same way of a charitable trust, said, "Indefiniteness is of its essence."

There can be no doubt that the gift in the residuary clause of John Handley's will is valid, so far as the ascertainment of the objects of his bounty is concerned. The thing to be done (the erection of school houses), and those for whom it is to be done (the poor), are not sufficiently indefinite and uncertain to invalidate the trust under the law of charitable uses obtaining in Pennsylvania. The gift is to the city of Winchester, and, as the fund is to "be expended and laid out in said city," "the poor" for whose benefit the gift is made are presumably the poor of that city.

The policy in respect to charitable bequests, so well established by the decisions of the courts, is emphasized by the act of the assembly of Pennsylvania of 1855, by which it is provided that "no disposition of property * * * for any charitable, educational," etc., "purpose, shall fail * * * by reason of the objects being indefinite or uncertain," etc. The subsequent acts of 1885 and of 1889 do not affect this policy, as declared by the statute of 1855, or the powers of the court, so far as they have any bearing on the present case.

This bequest, then, being valid in Pennsylvania, in so far as its objects and purpose are concerned, our next inquiry is as to the competency of the city of Winchester, Va., to take the property bequeathed, and administer the trust with which it is impressed. We have already seen that in Pennsylvania a municipal corporation may take property in trust for purposes of a public nature germane to the objects of its incorporation, and that educational purposes are public purposes. Are the general purposes of the municipality of Winchester, as existing under the laws of Virginia, such as to include or exclude the administration of educational charities or trusts? The court of appeals of Virginia, in the case of *City of Winchester v. Redmon*, 93 Va. 711, 25 S. E. 1001, has made this statement as to the powers of a municipal corporation:

"A municipal corporation has no powers except those conferred upon it, expressly or by implication, by its charter or the general laws of the state, and such other powers as are essential to the attainment and maintenance of its declared purposes."

Accepting this statement of the limitations of municipal power, we find that the legislature of Virginia, in the charter conferred on the city of Winchester, has provided, among other things, as follows:

"Sec. 2. The administration and government of said city shall be vested in * * * a board, called the common council, * * * and such other boards and offices as are now or hereafter may be, provided for." Laws 1874, p. 164.

In accordance with this section, and upon the recommendation of the common council, the legislature, by an act passed February, 1896, created the "board of Handley trustees," as a special department of the municipality of Winchester, to administer the trust contained in the residuary clause of John Handley's will. If the bequest contained in this residuary clause is, as to form and substance, valid under the laws of Pennsylvania, this act of the legislature of Virginia was op-

erative and efficient for the purposes for which it was passed. But, independently of this special act, section 9 of its charter provides that the council of the city of Winchester, in addition to many other powers, some of which would seem sufficiently broad to include the taking and administration of this trust, "shall have all such other powers as are or may be conferred on the councils of cities and towns having a population of five thousand, by the constitution and general laws of the state." Chapter 65 of the Virginia Code confers upon any "board of education, or any other corporation, or any county, or natural person," the power to take a gift, grant, devise, or bequest for literary or educational purposes. Further reference might be made to the constitutional and legislative provisions for the establishment and maintenance of free schools, which in some respects require and make use of the agency of the municipal corporations of the state in the administration of the free-school system. It is not necessary, however, to set out and consider in detail the legislation of Virginia, bearing on this subject. Sufficient has been said to indicate the ground of our opinion that under the laws of Virginia the city of Winchester was competent to take the bequest, and administer the trust set out in the residuary clause of the will before us.

The only remaining contention of appellants requiring serious consideration is that the subject-matter of the residuary clause is rendered uncertain, because of the effect upon it of item ninth of the will, which includes Schedule A. Item ninth of the will, referred to, is as follows:

"Item. I also give and bequeath the following sums of money to each of the persons named in Schedule A, which schedule is hereby made a part of this my will, the same as if the name of each person was named herein. And I direct my executors to pay the said several bequests to each person, if living at the time of my demise, or when such bequest shall fall due, within two years from the day of my death."

A paper marked "Schedule A" was found and probated with the will. It was never completed, and is a blank, except as to the caption, which reads as follows:

"Schedule 'A.' List of persons to whom bequests in the following amount, and made and intended for Schedule A, mentioned in my last will, dated the 29th day of December, A. D. 1890."

The substance of the argument of appellants in this contention is that the testator, by referring to a schedule which was to contain the names of legatees, and the amounts severally bequeathed to each, showed that he had in mind, when he drew his will, certain legacies which, in addition to those already specifically named, were to be subtracted from his estate before the "rest and residue" of the residuary clause could be computed and made available as a residuary bequest; that, in other words, this was a particular, and not a general, residuary bequest, and, as there was and could be no ascertainment of what was in his mind as to the amounts to be given under Schedule A, there could be no ascertainment of the particular residuum. It is well settled that where, after specific legacies of named amounts, a testator makes a particular residuary bequest, the failure of one or more of such specific legacies by reason of lapse, or for any reason, does not carry the amount of such bad legacy to the residuary legatee, but to,

the next of kin. And this should be so, because it is evident that the testator, when he carved out of his personality these legacies, made his residuary bequest with reference to them, and intended a particular residuum remaining after the deduction of the sums certain, as indicated by him. In the case before us, however, whatever may have been in the mind of the testator at the time he drew his will, he left Schedule A blank when he executed it. If he had intended to make the list of legatees and legacies alluded to in item ninth, he must afterwards have changed his mind, and, with only the specific legacies named to be taken from the corpus of his estate, gave the rest and residue as appears in the will. It is not the case of a named amount which the testator referred to in making a gift of the balance, and which therefore could not be incorporated in such balance, but a failure to name any amount in this paper, by which the residuum was to be diminished. Not only did the testator execute his will, leaving blank this paper called "Schedule A," but three years and a half after its execution he executed a codicil thereto, in which he changed one of the executors of his will, but in all other respects expressly confirmed the same. As the will stands, he has never said that he intended to take from the corpus of his estate any sum or sums, other than the specific bequests to named legatees, and for named amounts. Neither by reason nor by authority is the contention of the appellants in this regard sustained. "Plainly," in the language of the learned judge of the court below, "no effect whatever is to be given to this unfilled and unsigned separate sheet of paper, designated 'Schedule A.'" Taking the view that there was a general equitable conversion of all the testator's real estate into personality, for the purposes of the will, and therefore that the validity of the residuary clause of the will must be determined by the law of Pennsylvania, it will not be necessary to extend this opinion by an examination of the question, whether this gift of the residuum is valid by the law of Virginia. It suffices to say that, after a careful consideration of the decisions of the Virginia courts, and the legislation of the state bearing upon the question, and the argument of counsel thereon, we have no doubt of the validity of the bequest when considered with reference to the law of either state.

Finally, as to the objection that the disposition of the mineral and timber lands in items 14 to 18, inclusive, as well as the disposition of the residuum, is in violation of the rule as to perpetuities, we have only to say that the whole beneficial interest in the lands, before and after the sale, is given directly to the city of Winchester. It is only the enjoyment of the fund arising from the sale of the corpus of the gift that is postponed for 20 years. There is no intermediate beneficial interest or estate, and after the vesting of a charitable use the rule as to perpetuities does not apply. We agree with the court below in saying that "we are not able to see that there is anything in the will of John Handley in unlawful restraint of alienation, or any trust for forbidden accumulations," and that "with these questions, however, the heirs and next of kin have no concern." The decree of the court below is affirmed.

ENOS v. NEW YORK & O. R. CO.

(Circuit Court, S. D. New York. July 2, 1900.)

RECEIVERS—APPOINTMENT—EXHAUSTING LEGAL REMEDIES.

Decree appointing receiver will not be set aside on motion of a creditor because the creditor applying for the appointment had not had an execution issued and returned unsatisfied, no objection on this account having been made by the corporation to the application.

Motion by a judgment creditor, whose judgment was entered subsequent to the appointment of a receiver, to be allowed to intervene and set aside the decree appointing the receiver.

Frank E. Smith, for the motion.

Arthur H. Masten, R. Burnham Moffat, and Henry L. Stemson, opposed.

LACOMBE, Circuit Judge. This application must be denied. The decree of the court is in entire accord with the practice laid down by the supreme court in *Hollins v. Iron Co.*, 150 U. S. 380, 14 Sup. Ct. 127, 37 L. Ed. 1113. That case holds distinctly that the defense and objection to an application for the appointment of a receiver that execution upon a judgment in favor of the creditor has not been issued and returned unsatisfied is one which must be made in limine, and which may be waived by the defendant corporation. When it is waived, and it is apparent to the court that the corporation is insolvent, and that, to save the property from wreck and secure equality of distribution of the assets among the creditors, it is necessary to appoint a receiver, such a decree may be entered upon the application of a creditor whose claim is in judgment, and even, as it would seem from the opinion in the *Hollins Case*, upon the application of a simple-contract creditor, without express lien. In that cause plaintiffs were simple-contract creditors, whose claims had not been reduced to judgment, and who had no express liens by mortgage, trust deeds, or otherwise. The court says:

"Suppose the corporation and other defendants had made no defense, and, without expressly consenting, had made no objection to the appointment of a receiver under subsequent distribution of the assets of the corporation among its creditors; it cannot be doubted that a final decree providing for a settlement of the affairs of the corporation and a distribution among creditors could not have been challenged on the ground of a want of jurisdiction in the court, and that notwithstanding it appeared upon the face of the bill that the plaintiffs were simple-contract creditors. The course of the administration of the assets of an insolvent corporation is within the function of a court of equity, and, the parties being before the court, it has power to proceed with such administration. If there was a defense existing to the bill as framed, and objection to the right of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted, it was a defense and objection which must be made in limine, and does not of itself oust the court of jurisdiction."

Of course, if the defense of a failure to exhaust the legal remedies were interposed by the corporation to the application of the creditor, the situation would be different; but no such objection was made in the case at bar, and the decree was one which the court was entirely competent to enter. The application is denied.

**CREW-LEVICK CO. v. BRITISH & FOREIGN MARINE INS. CO.,
LIMITED, OF LIVERPOOL.**

(Circuit Court of Appeals, Third Circuit. June 19, 1900.)

No. 20.

INSURANCE—CONSTRUCTION OF POLICY—GOODS IN TRANSIT.

A policy of insurance which was in form a marine policy contained a printed provision in which it was stated that the insurance should "continue and endure until said goods and merchandise shall be safely landed at — as aforesaid." None of the blanks in said provision intended to show the name of the vessel and the ports of shipment and destination were filled. The policy had stamped thereon a statement that the special terms and conditions governing the insurance were set forth in a rider attached, the contents of which should supersede anything to the contrary in the printed body of the policy, and the rider stated the insurance to be upon "oil in tank cars in transit." *Held*, that the printed provision set out was intended, when properly filled out, to be applicable only to sea carriage, and was no part of the contract made by the policy in question, and that when a tank car of oil, covered by the policy, had been delivered by the railroad which transported it to the insured, by being placed by its direction upon its private siding alongside its warehouse, the oil was no longer "in transit," within the terms of the policy.

Acheson, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Theodore F. Jenkins, for plaintiff in error.

Henry N. Paul, Jr., for defendant in error.

Before **ACHESON** and **GRAY**, Circuit Judges, and **BRADFORD**, District Judge.

GRAY, Circuit Judge. This was an action on a policy of insurance, to recover the value of oil destroyed by fire on December 10, 1895, while in tank cars on a siding alongside of the plaintiff's warehouse. The action was brought in the court of common pleas No. 4 of Philadelphia county, and on the application of the defendant was transferred to the circuit court of the United States for the Eastern district of Pennsylvania. The tank cars containing this oil had been transported (five of them by the Pennsylvania Railroad, and one of them by the Baltimore & Ohio Railroad) from the Pennsylvania oil regions, under six separate bills of lading or contracts of carriage, in each one of which the oil was stated to be consigned to "Crew-Levick Company, Swanson and Jackson streets, Philadelphia." In detail, the facts, which are wholly undisputed, are these: At the corner of Swanson and Jackson streets, Philadelphia, the Crew-Levick Company at this time had an oil warehouse, surrounded by quite a yard, inclosed by a fence, containing, besides the warehouse, a cooper shop and some sheds and stables, all belonging to the Crew-Levick Company. On one side of this yard or inclosed area was Swanson street, along which ran the track of the Pennsylvania Railroad Company, and on the opposite side of the yard ran Meadow street, along which ran the track of the Baltimore & Ohio Railroad, so that the inclosed yard of the plaintiff company was situated directly between the tracks of these two railroad companies. The private siding of the Crew-Levick Company was situated within this yard, alongside of the oil warehouse. It connected, through gates in the fence on either side, with both railroads,—on the Swanson street side with the Pennsylvania Railroad, and on the

Meadow street side with the Baltimore & Ohio Railroad. In the regular course of business the Pennsylvania Railroad Company, from its Washington Avenue Station, which is not far from the corner of Swanson and Jackson streets, makes its delivery of car loads of merchandise consigned to its regular customers, who have their own private sidings, by placing the cars containing the merchandise on the customer's private siding, and leaving them there for their customer to unload at his convenience; the railroad company making no charge for the use of the car, unless detained over 48 hours. In the regular course of business, car loads of merchandise arriving at the Washington Avenue Station of the Pennsylvania Railroad, and consigned to any of the customers of the railroad having their private siding, are kept by the railroad company while notice of their arrival is sent by a messenger to the consignee. The consignee, at his convenience, notifies the railroad company when he desires to have what is called "a shift"; that is, when he desires the railroad company to send an engine to remove from the customer's private siding any unloaded cars, and to substitute in their place loaded cars, of the arrival of which notice has been given. Some time on December 9, 1895, the day before the fire, two of the six car loads of oil which were destroyed by the fire had been placed upon the private siding of the Crew-Levick Company at Swanson and Jackson streets, alongside its warehouse; one having been placed there by the Pennsylvania Railroad, and one having been placed there by the Baltimore & Ohio Railroad. The next day, December 10th, at about noon, the two cars just mentioned being still unloaded, the Crew-Levick Company sent word to the Washington Avenue Station of the Pennsylvania Railroad that it wished a shift that afternoon, and gave directions to have four more loaded cars placed upon its siding. As a consequence of these orders, between 4 and 6:15 o'clock of that afternoon the remaining four of the six loaded oil cars were placed on plaintiff's private siding and left there. About 9 o'clock in the evening a fire occurred, which destroyed the warehouse, and with it six of the loaded tank cars, two of which had been left there the day before, and four that afternoon. Of the four others which were on the siding, two were hauled off at the Baltimore & Ohio end, and two at the Pennsylvania Railroad end (including the one which had projected through the gate), and were not burned.

The policy on which the suit is brought is irregular, in that it is a printed marine policy form, with many of the blanks unfilled, and to which is attached a so-called "paster," which contains the substance of the real contract of insurance. A policy framed throughout to express the meaning and intention of the parties would have avoided the difficulties out of which this litigation sprang. The transaction was an unbusinesslike and careless one, and has brought to the parties unnecessary trouble and expense. To arrive at the agreement between the parties to this contract, we are referred to a long printed form, containing a number of blanks, and evidently intended to be used in the writing of marine insurance alone; the defendant being a marine insurance company. This printed policy is, in its ordinary form, and as we have said, was meant to cover exclusively a marine risk, as a perusal will make obvious. It begins as follows:

"(Cargo)

(No. 638,003.)

"A.

"The British and Foreign Marine Insurance Company, Limited, of Liverpool.
New York Branch.

"Crew-Levick Company, on account of whom it may concern.

"In case of loss, to be paid in funds current in the United States to them.

"Do make insurance and cause to be insured, lost or not lost, at and from October 10, 1895, at noon, to October 10, 1896, at noon, as per form attached herein.

"Upon all kinds of lawful goods and merchandise, laden or to be laden on board the good —, whereof — is master, for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

"Beginning the adventure upon the said goods and merchandise from and immediately following the loading thereon on board of the said vessel at — as aforesaid, and so shall continue and endure until the said goods and merchandise shall be safely landed at — as aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any port or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said goods and merchandise hereby insured are valued at —, as per form attached herein —, including premium; such valuation being represented by the assured as not exceeding invoice cost and — per cent. thereof."

Following this are many printed stipulations defining or limiting the obligation of the company, most of which are expressly and in terms applicable to a seaborne cargo. Only one of these, in addition to what has already been quoted, is claimed to have any bearing on this litigation. It occurs after many printed provisions and conditions of the policy, and is as follows:

"This insurance warranted to be in all cases null and void to the extent of any insurance with any fire insurance companies directly or indirectly covering upon the same property, whether prior or subsequent hereto in date."

The following was stamped in red ink on the face of the policy:

"The special terms and conditions governing this insurance are set forth in the contract form which is attached within and signed by L. A. Wight, attorney, and the contents of same shall supersede anything to the contrary in the printed body of this policy."

Attached to and forming a part of policy No. 638,003, signed by L. A. Wight, attorney, the "contract form" hereto referred to is pasted on the back of the policy, and is as follows:

"New York, October 24, 1895.

"In consideration of \$12.50 additional premium, this policy is hereby made to cover under the following form, and not as heretofore, to wit:

"Crew-Levick Company, for account of whom it may concern. Loss, if any, payable to them.

"\$2,500. On oil contained in tank cars in transit, principally from oil regions in Pennsylvania and New York to various places, and to Seaboard Oil Works, South Chester, Pa., and from Seaboard Oil Works to various places.

"It is the true intent and meaning of this policy to fully indemnify the assured for each and every loss by or in consequence of fire, derailment, or collision, not exceeding, however, the sum hereby insured, anything contained in the printed conditions of this policy to the contrary notwithstanding.

"\$2,500, 1 year from October 10, 1895, at 10 per cent. per annum. Premium, \$2.50.

"Attached to and forming part of policy No. 638,003, of British and Foreign Marine Insurance Company, Limited."

The case was submitted to the jury by the learned judge of the court below, with instructions to return a verdict for the plaintiff for the amount claimed, reserving the question as to the points submitted by counsel for the defendant. 98 Fed. 71. The jury rendered a verdict accordingly. The points reserved were as follows:

"(1) Under the evidence in this case the oil which was destroyed by fire, and for which the plaintiff claims to recover, was not 'in transit,' and therefore was not within the terms of the defendant's policy in suit. Consequently your verdict must be for the defendant. (2) The policy in suit provides, 'This insurance warranted to be in all cases null and void to the extent of any insurance with any fire insurance companies directly or indirectly covering upon the same property, whether prior or subsequent hereto in date.' Under the uncontradicted evidence in this case, the plaintiff was carrying, at the time of the fire, insurance with a number of fire insurance companies, to the extent of \$15,500, 'on merchandise, consisting chiefly of oils in barrels and tanks, and barrels for same, their own, held in trust or on consignment, and sold, but not removed, contained in brick warehouse building and in tank cars on siding adjoining premises.' The oil, to recover for which this suit is brought, was in tank cars on siding adjoining the premises of the Crew-Levick Company. Consequently, if the policy in suit covered the oil after it was placed by the Pennsylvania Railroad Company upon the siding adjoining the premises of Crew-Levick Company, the insurance was null and void, and your verdict must be for the defendant."

Afterwards, the court being moved for judgment in favor of the defendant non obstante veredicto, these points were affirmed, and judgment entered for defendant as prayed. Upon the assignments of error to this judgment the contention of appellant is that inasmuch as the form attached to the policy states that "it is the true intent and meaning of this policy to fully indemnify the insured for each and every loss by or in consequence of fire, derailment, or collision, * * * anything contained in the printed conditions of this policy to the contrary notwithstanding," the words of said form, "on oil contained in tank cars in transit," must be given a meaning broad enough to cover the oil in the cars after they had been delivered by the transportation company in the yard and alongside the warehouse of the appellant. To do this, we must ignore the interpretation uniformly given to such contracts for inland transportation, in the absence of any express language to the contrary. We, however, think such interpretation is the sound one, and applicable to the facts in this case. The transit of both cars and oil was completed when the delivery was made by the railroad companies into the yard and alongside the warehouse of appellant. That this is true as between the transportation companies and appellant, there can be no question. Their responsibility for the safe conveyance of the merchandise was at an end upon its delivery, as stated. It was then in the control of the consignee, the appellant in this case, and out of the control of the transportation companies; and we think there is nothing in the language of the attached form relied upon by appellant, and quoted above, that ought, in reason, to change this well-settled interpretation to one in favor of the appellant. No authority has been cited, or business usage shown, to warrant this being done.

But the appellant further contends, independently of the force and effect claimed by it for the language in the form, which we have

quoted, that the printed words in the beginning of the marine policy to which said form is attached require that the transit should not be considered as ended and complete until the oil was unloaded from the cars into the warehouse or receptacles of appellant. This so-called stipulation is found in the beginning of the printed marine policy, as hereinbefore set out. As much stress is placed upon this language, it may be again quoted:

"Upon all kinds of lawful goods and merchandise, laden or to be laden on board the good —, whereof — is master, for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

"Beginning the adventure upon the said goods and merchandise from and immediately following the loading thereon on board of the said vessel at — as aforesaid, and so shall continue and endure until the said goods and merchandise shall be safely landed at — as aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed," etc.

As we have already remarked, it is obvious that this whole printed policy is a marine one, and the contract set out, or to be set out when the blanks are filled, refers exclusively to sea, and not to land, carriage. The words relied upon by appellant to modify the meaning and change the interpretation that would ordinarily be given to the words "in transit" in the substantive contract for land carriage, attached, are, "and so shall continue and endure until said goods and merchandise shall be safely landed at — as aforesaid." It is perfectly clear, when read with the context, that these words refer to a cargo to be carried by sea, and not to land carriage. The subject-matter, then, being entirely different, it is hard to see how a stipulation, made expressly as to one kind of service should be made applicable to one entirely different. But, more than this, it is impossible to avoid the conclusion that the language of the clause just quoted, with the blanks unfilled, is absolutely insensible. The words are unmeaning, so far as this contract goes, and can lend no aid in interpreting completed stipulations. Whether we consider the word "landed" as applicable in ordinary parlance to goods or passengers discharged from land vehicles, or as exclusively appropriate to the discharge of a cargo or passengers from a ship, we are clearly of opinion, for the reasons stated, that the clause in question cannot help us in the interpretation of the real contract contained in this policy. We quite agree that in the case of a deed or other contract, where the language used in any particular is doubtful or of difficult interpretation, it must be taken most strongly against the one who offers the deed or employs the language, and that this rule is applicable in certain cases to the interpretation of insurance policies, as being the language of the insuring company, and not of the insured. This is not true in a case like the present one, where the insured has voluntarily accepted an imperfect document, containing obviously uncompleted and inapplicable stipulations. We think that both parties must be taken to have intended, by leaving the blanks referred to unfilled, that the clauses in which they occur should be nugatory. The doctrine of *contra proferentem*, so strongly invoked by appellant, cannot, therefore, apply here. In respect to these clauses, no deed is proffered, and no language is

employed by either party to create a contract, or special stipulation in a contract. As said by the court below:

"The object [of the contract] was to protect property on land, not at sea. The word 'landed' had, therefore, no appropriateness. It is impossible to suppose that this was not as apparent to the one party as to the other, or that either of them did not comprehend that the language which really limited the continuance of the risk was that contained in the 'form attached,' viz. 'on oil contained in tank cars in transit.'"

The view taken of this first point reserved and passed upon by the court below renders it unnecessary to consider the second point. For the reasons above stated, the judgment of the court below should be, and is, affirmed.

ACHESON, Circuit Judge (dissenting). To cover a land transportation risk on oil contained in tank cars, the insurance company chose to adopt a form of policy ordinarily used for marine risks. Stamped across the face of the policy, as issued, are the words:

"The special terms and conditions governing this insurance are set forth in the contract form which is attached within, and signed by L. A. Wight, attorney, and the contents of the same shall supersede anything to the contrary in the printed body of this policy."

The policy is numbered 638,003. It has the heading, "Cargo." Some of the blanks (for example, the time limit) are appropriately filled by writing, and it is signed at the foot. Attached within is the "contract form," recited at length in the opinion of the majority of the court. Stamped on the face of this form are the words, "Attached to and forming part of policy No. 638,003," with the underwritten signature, "L. A. Wight, Attorney." It also concludes with the words, "Attached and forming part of policy No. 638,003 of the British & Foreign Marine Insurance Co., Limited." It thus indisputably appears that the policy which the insurance company prepared and issued consisted of the "printed body" and the attached "contract form," the two together constituting the insurance contract. As we have seen, however, from the recited face memorandum, the contents of the attached "contract form" are to supersede "anything to the contrary in the printed body of the policy." The plain intent is that the provisions of the "printed body" of the policy and those of the attached "contract form" are both to stand, and effect be given to each, unless there is an inconsistency between them, in which case, to the extent of such inconsistency, "the printed body" shall give way to the attached "contract form." By that attached "contract form" the policy is made to cover loss "on oil contained in tank cars in transit, principally from the oil regions in Pennsylvania and New York to various places, and to Seaboard Oil Works, South Chester, Pa., and from Seaboard Oil Works to various places." The reasonable view, I think, is that the transit here contemplated begins when the oil is run into the railroad company's tank cars at the place of shipment, and ends upon its discharge therefrom, without unusual delay, at the place of destination. The tank car is a huge vessel moving on wheels, and the actual delivery of the oil does not occur until it is removed therefrom. The trans-

ported oil bears the same relation to the tank car as the cargo does to the carrying ship. The analogy is so close that the insurance company here used a marine form of policy, and the settled rule with respect to such a policy is that the risk continues until the goods are landed at the usual place. *Gracie v. Insurance Co.*, 8 Cranch, 75, 83, 3 L. Ed. 492; 2 Pars. Mar. Ins. 62; 1 Phil. Ins. § 970.

The case, however, does not rest simply upon the contents of the attached "contract form." In the "printed body of the policy" is this provision:

"Beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board of the said vessel at — as aforesaid, and so shall continue and endure until the said goods and merchandise shall be safely landed at — as aforesaid."

The parties left this duration clause standing in the body of the policy. Is it for the court to strike it out? Doubtless in the first instance it was framed with reference to a marine risk. The insurance company, however, has seen fit to apply the policy to a case of land transportation. As already shown, the contract of insurance is to be found in the printed body of the policy and the annexment taken together. The language of the duration clause in the body of the policy is fairly applicable to "oil contained in tank cars in transit." That clause is not at all inconsistent with anything contained in the attached "contract form." The two can be read together, and effect given to each. Why should the duration provision in the body of the policy be ignored? It alone expressly defines the beginning and the ending of the risk. There is no warrant that I can see for disregarding it. It is a cardinal rule of construction that effect should be given, if possible, to every part of an instrument. Moreover, it is well settled that, if a policy is so drawn as to be susceptible of two interpretations, that one should be adopted which is the more favorable to the insured. *First Nat. Bank v. Hartford Fire Ins. Co.*, 95 U. S. 673, 24 L. Ed. 563; *Thompson v. Insurance Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Insurance Co. v. Cropper*, 32 Pa. St. 351. I am of opinion that the court below should have decided the question involved in the defendant's first point in favor of the insured.

Upon the question raised by the defendant's second point, no opinion is expressed by the majority of this court. My own judgment is that this question, also, should have been ruled in favor of the insured. The clause in the printed body of the policy here relied on by the insurance company is this:

"This insurance warranted to be in all cases null and void to the extent of any insurance with any fire insurance companies directly or indirectly covering upon the same property, whether prior or subsequent hereto in date."

But the attached "contract form" declares thus:

"It is the true intent and meaning of this policy to fully indemnify the assured for each and every loss by or in consequence of fire, derailment, or collision, not exceeding, however, the sum hereby insured, anything contained in the printed conditions of this policy to the contrary notwithstanding."

It seems to me clear that, under the terms of the contract as expressed in the stamped memorandum on the face of the policy, this special attached provision superseded the clause in the printed body

of the policy touching insurance against fire. I dissent from the judgment of affirmance. I would reverse, and direct entry judgment on the verdict in favor of the plaintiff.

McGHEE et al. v. McCARLEY.

(Circuit Court of Appeals, Fifth Circuit. May 22, 1900.)

No. 763.

WRONGFUL DEATH—PUNITIVE DAMAGES—ALABAMA STATUTE.

Under the statutes of Alabama (Code, §§ 26, 27), the personal representative of a deceased minor child, in an action against the receivers of a railroad to recover for the death of his intestate through the wrongful act or negligence of defendants, or their servants, may recover punitive damages.

Pardee, Circuit Judge, dissenting.

On Rehearing.

Milton Humes and Paul Speake, for plaintiff in error.

H. K. White, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge. This cause was fully stated when it was first passed upon by this court. See 91 Fed. 462. An application for rehearing having been made by the defendant in error, and the same having been granted, the cause has been fully reargued, and the court has again carefully considered it. The single error heretofore found by this court in the cause was that the trial court refused to charge the jury that only compensatory, and not punitive, damages were recoverable in the cause. On the first hearing of this cause the argument and the briefs treated very imperfectly, and in an unintentionally misleading manner, the matter of the statute law upon which this cause was based. Assisted by the argument and briefs on the rehearing, the court has carefully re-examined the point upon which it ordered this cause to be remanded, and has concluded that the statute law of Alabama permits a personal representative to recover punitive damages in such a cause as the one at bar, and that therefore it is not within the doctrine of *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97. See, specially, *Tiff. Death Wrongful Act*, §§ 130, 154; also, *Id.* § 35. The court has also re-examined the other questions involved in this cause, and finds no error in the cause. It is therefore ordered that the former order of this court, reversing the judgment of the lower court and remanding this cause for a new trial, be, and the same is hereby, annulled and set aside. It is further ordered that the judgment of the lower court be, and the same is hereby, affirmed.

PARDEE, Circuit Judge (dissenting). When this case was first presented in this court, it was represented by counsel, and argued and considered, as an action brought under section 26 of the Code of Alabama, which is as follows:

"26 (2588). Suits for Injuries Causing Death of Minor Child. When the death of a minor child is caused by the wrongful act, or omission, or negli-

gence of any person or persons, or corporation, his or their servants or agents, the father, or the mother, in the cases mentioned in the preceding section, or the personal representative of such minor, may sue and recover such damages as the jury may assess; but a suit by the father or mother, in such case, is a bar to a suit by the personal representative."

Under that statute the court held, following the decision of the supreme court of Alabama in *Williams v. Railroad Co.*, 91 Ala. 635, 9 South. 77, and *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, that no exemplary or punitive damages could be recovered, and reversed the judgment of the circuit court because the trial judge had refused to charge the jury to that effect. See *McGehee v. McCarley*, 33 C. C. A. 629, 91 Fed. 462. After this decision was rendered, counsel discovered that the suit was not brought under section 26, but under section 27, of the Code of Alabama, which is as follows:

"27 (2589) (2641, 2642, 2643) (2299, 2300) (1940, 1941). Action for Wrongful Act, Omission, or Negligence Causing Death. A personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death; such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for such wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distribution. Such action must be brought within two years from and after the death of the testator or intestate."

—and which section the supreme court of Alabama has construed as allowing punitive damages. Accepting this change of front, this court granted a rehearing, and directed argument upon all the points involved in the case, and now reverses the former ruling, and directs that the judgment of the circuit court be affirmed. From this judgment I am compelled to dissent, on several grounds.

The complaint in the case contains four counts, the first of which is as follows:

"The plaintiff claims of the defendants ten thousand (\$10,000) dollars as damages, for that heretofore, to wit, on December 1, 1893, the defendants were operating a line of railroad from the city of Memphis, in the state of Tennessee, to the town of Stevenson, in the state of Alabama, which said line of railroad ran through, and was operated by the defendants in, the counties of Morgan and Limestone, in the state of Alabama, and on said December 1, 1893, the mother of plaintiff's intestate purchased transportation for herself and four minor children (among them, plaintiff's intestate, who was a minor child about seven years old) from Decatur, Ala., to some point in Texas unknown to plaintiff, over the line of railroad operated by defendants from Decatur to Memphis, and on said date said mother of plaintiff's intestate and said intestate, Zuma Allred, were misdirected by the agent of defendants at Decatur, Ala., as to the train they should take, and they boarded the passenger train, operated by defendants, going east. At Belle Mina, in Limestone county, Ala., they were put off said train by the conductor thereof, to await the arrival of the west-bound train on said road. Said passenger train was due going west at about 12 o'clock at night. The plaintiff's intestate, Zuma Allred, and her mother, with three other minor children, the oldest of whom was nine years of age, and the youngest a nursing baby, remained in the wait-

ing room at defendants' depot at Belle Mina for the arrival of said west-bound train for several hours. Said night of December 1, 1893, was dark, and the platform around the waiting room was dark; there being no lights furnished by defendants on the platform, or on the railroad track beside it. Shortly before the arrival of the west-bound train, the depot agent in the employ of the defendants at Belle Mina came into said waiting room with a lantern on his arm, and commenced talking to the mother of plaintiff's intestate, and soon tried to induce her to go into an adjoining room with him; and, upon her refusal to do so, laid hands upon her for the purpose of inducing or compelling her to go into said room. This conduct on the part of said agent of defendants frightened the mother of plaintiff's intestate, who was alone with her four small children, and wholly unprotected, whereat she screamed, and tried to make her escape from said depot waiting room out onto the platform. Said four children had been sleeping, and were awakened by the screams of their mother, and, in their fright, ran out of the waiting room with their mother. It was dark on the outside of the waiting room, and plaintiff's intestate, Zuma Allred, ran out of said room and across the platform, and down onto the tracks of defendants' railroad, and was run over, cut bodily in two, and killed by a passenger train going west on said road. Plaintiff avers that his intestate, Zuma Allred, was run over and killed by said train by reason of the unlawful and wrongful conduct and assault by said agent of defendants, whose name is unknown to plaintiff, upon the mother of plaintiff's intestate, which assault was committed while he was at said depot as the agent of defendants, charged by law with the duty of protecting plaintiff's intestate and her mother from all assaults, and even indecent or offensive words, on the part of any person whatsoever. The said assault by the agent of defendants caused the mother to scream or cry out and awaken the child, Zuma Allred, who, in her dazed and startled condition, due to the sudden fright caused by said agent's assault on her mother, ran out of the said waiting room, across the platform, and down onto the tracks of railroad, where in the darkness she was run over, cut bodily in two, and killed by a passenger train going west on said road. The plaintiff's intestate was a little child, and incapable of acting with the judgment and discretion of a person of older and maturer years."

The second count charges negligence of the station agent at Belle Mina in not assisting Mrs. Allred and her children, whereby, etc.; the third count charges negligence of the defendants in not providing the proper lights at the station and on the tracks at Belle Mina; and the fourth count charges negligence of the engineer of the train, in that he did not keep a proper lookout, so as to enable him to stop the train in time, whereby, etc. In my opinion, the evidence in the case wholly failed to sustain the third and fourth counts, and the trial court erred in refusing to charge the jury that, if they believed the evidence, their verdict must be for the defendants under the third and fourth counts.

The thirty-first, thirty-second, and thirty-seventh assignments of error are as follows:

"(31) The court erred in refusing to give special written charge No. 25 requested by defendants, viz.: 'Under the evidence in this case, A. J. McCarley is not, and was not when this suit was brought, the administrator of Zuma Allred, deceased, and is not entitled to recover any damages for the death of said Zuma Allred.' (32) The court erred in refusing special written charge No. 27 requested by the defendants, viz.: 'Where the father or mother or personal representative of a deceased child sues to recover damages for an alleged wrong or negligence causing the death of such child, the damages recoverable, if any, are compensatory, and not punitive, and are solely for the benefit of the parents, to compensate them for the loss of the services of the child.' " (37) The court erred in refusing to give special written charge No. 12, requested by defendants, viz.: 'This is not an action for damages or injury to Mrs. All-

red by reason of the alleged assault of the depot agent, but is, under the Alabama law, for the death of the child, Zuma; and unless you are satisfied from the evidence that said alleged assault was the proximate cause of the death of the child, and that its death could not have occurred but for said assault, the plaintiff cannot recover under the first count of the complaint."

The questions made by these assignments of error are properly raised in the record, and, in my opinion, they are well taken. In this opinion, however, I do not care to discuss any of them except the thirty-second, which relates to punitive damages. The defendant receivers are not charged, either in pleading or proof, with any personal misconduct or with any personal responsibility in respect to the matters complained of, but, as receivers, are to be held responsible for the wrongful acts of their inferior servants and agents. Any punishment, therefore, inflicted upon the defendants by way of damages, will be vicarious in what may be called the second degree, in that the amount recovered will be made a charge—First, upon the receivers; and, second, upon the owners of the Memphis & Charleston Railroad Company, who are innocent of all management and control of the property. As there was no evidence to support the second and third counts of the complaint, the receivers in this case cannot be held liable for any wrongful act or omission of their servants or employes in directly managing and operating the railroad property in their possession. If the receivers are at all liable for the killing of Zuma Allred, it must be because at the time and under the circumstances the receivers, as such, were under obligation to protect her from the wrongful assault and unlawful conduct of persons who were in their employment and service. Mrs. Allred and her children were, by implication, at least, passengers over the lines operated by the defendants, and who had regularly contracted for their passage. The liability of the receivers, therefore, must be deduced from, and be founded upon, the contract of carriage of passengers for hire, and the implied obligations resulting therefrom, to the effect that the carrier must protect the passenger from assault, indignity, insult, and abuse, especially on the part of the agents, employes, and servants of the carrier. In relation to the carrier's contract and the obligation resulting, the supreme court of the United States, in *Railway Co. v. Prentice*, supra, has declared:

"This question, like all others affecting the liability of a corporation as a common carrier of goods or passengers, is a question, not of local law, but of general jurisdiction in which this court, in the absence of an express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of courts of the several states."

And the same case is distinct, direct, and positive authority that, in the absence of an express statute, punitive damages cannot be allowed against a railway corporation for the negligence and wrongful conduct of its inferior servants and employes.

If there is any express statute of the state of Alabama which authorizes punitive damages against a common carrier of passengers, not itself in fault, for the negligent acts of its agents and servants, it has not been pointed out. It is claimed that section 27, which authorizes a verdict for such damages as the jury may assess, is an express statute on the subject; but this has not been the view of the supreme court of Alabama, if I read its decisions intelligently. Since the original en-

actment of the statute in 1872, and from 58 Ala. down to 112 Ala., lately issued, the right to the recovery of punitive damages under this statute has been contested, and in no case has it been held that the statute expressly allowed them. While it may be true that the construction of the statute has uniformly been that exemplary damages may be allowed thereunder, the right to them has been deduced from the alleged intent of the law as deduced from its original title. I can do no better than quote from *Railroad Co. v. Freeman*, 97 Ala. 292, 294, 11 South. 801:

"The statute referred to as originally enacted February 5, 1872, was construed by this court in the cases of *Railroad Co. v. Shearer*, 58 Ala. 672, and *Railroad Co. v. Sullivan*, 59 Ala. 272, in respect to the measure of damages recoverable under it. In the former of these cases it was said: 'Lacerated feelings of surviving relatives, and mere capacity of deceased to make money if permitted to live, do not constitute the measure of recovery under the act of February 5, 1872. Prevention of homicide is the purpose of the statute, and this it proposed to accomplish by such pecuniary mulct as the jury "deem just." The damages are punitive, and they are none the less so in consequence of the direction the statute gives to the damages when recovered. They are assessed against the railroad "to prevent homicide."' *Railroad Co. v. Shearer*, supra. And in the latter case the court, after restating with approval the substance of what was said in *Shearer's Case*, and quoted above, proceeds: 'It [the act of February 5, 1872] is punitive in its purposes,—punitive of the person or corporation by which the wrong is done, to stimulate diligence and to check violence, in order thereby to give greater security to human life; "to prevent homicide." * * * The damages, 'tis true, go to the estate of the party slain, and, in effect, are compensatory; but this does not change the great purpose of the statute,—"to prevent homicide." Preservation of life—prevention of its destruction by the wrongful act or omission of another—is the subject of the statute, and all its provisions are but machinery for carrying it into effect.' *Railroad Co. v. Sullivan*, supra. Neither of these cases involved facts which, aside from the purely punitive character of the statute as construed in them, would have authorized the imposition of exemplary damages as the law in that regard has been declared by this court. *Railway Co. v. Lee*, 92 Ala. 262, 9 South. 230. That the court did not reach its conclusion as to the nature of the damages recoverable from any conviction that the defendants were guilty of such gross negligence, as that term has come to be understood in our books, as amounted to willfulness, wantonness, or the like, is, we think, clear on the language employed. The conception of a recovery of damages as a pecuniary mulct—a punishment of the wrongdoer as a retribution for the wrong and deterrent of its repetition—is the leading, indeed the sole, idea upon which the conclusion was reached. Compensation is referred to only as a fortuitous result of the imposition of the punishment,—a thing which ensued, not because of any intent of the lawmakers that it should ensue, and not because a predicate for it was necessary to the assessment of damages, or exerted any influence in the determining the amount of the verdict, but only because, the damages having been assessed alone upon a consideration of the culpability of the defendant's act or omission, wholly regardless of the actual loss or injury suffered thereby, they constituted a fund which the statute distributed to the next of kin of the deceased; and this whether or not his next of kin would have been at all benefited by his continued life, or were to any extent damnified by his untimely death. That this was the view actuating the court to the conclusion in *Shearer's* and *Sullivan's Cases* is further demonstrated by the language of the judge who wrote the opinions in those cases in the subsequent case of *Railroad Co. v. King*, 81 Ala. 177, 183, 2 South. 152. * * * The damages recoverable being punitive and exemplary in all cases under the statute,—punitive of the act done, and intended by their imposition to stand as an example to deter others from the commissions of mortal wrongs, or to incite to diligence in the avoidance of fatal casualties,—the purpose being the preservation of human life, regardless of the pecuniary value of a particular life to next of kin under statutes of distribution, the

admeasurement of the recovery must be by reference alone to the quality of the wrongful act or omission, the degree of culpability involved in the doing of the act or in the omission to act as required by the dictates of care and prudence, and without any reference to, or consideration of the loss or injury, the act or omission may occasion to the living. Such is the construction given by this court to the act 'to prevent homicide,' and, as thus construed, it is manifest that the charge set out above is a sound exposition of the elements and measure of damages recoverable under the act, unless there has been such modification of the statute, in its recent codification, as necessitates a different interpretation, or unless the act as thus construed is violative of the organic law, as counsel insist. Has the statute been changed in the respect under consideration since the decision in the Shearer and Sullivan Cases? We think not. It has not in the present Code the title which it bore as an original enactment,— 'to prevent homicide.' But in the codification of statutes it is usual to omit their titles, and such omissions have never been supposed to alter their meaning. Moreover this title was omitted from the Code of 1876, and the statute without it, and considered only as a section of codified laws with an index headline, was, as we have seen, given the same interpretation as has been put upon it when its purpose was blazoned in its caption. *Railroad Co. v. King*, *supra*. And, if the title served in this first instance to fix the intent of the lawmakers, it is a fair presumption that this intent follows the statute in all subsequent codifications, so long as the words employed by the legislature to effectuate that intent are not materially changed."

This does not read as though the court was construing an express statute authorizing the allowance of punitive damages against employers not themselves in fault, and for the negligent acts of inferior employes in carrying out the express and implied obligations of the common carrier's contract. The words "such damages as the jury may assess" ought not to be held as expressly allowing punitive damages, because, it is not the fair import of the words, particularly in a statute providing for a remedy to be given in a court of law, where well-defined rules and usages ought to be applied. The very same words ("such damages as the jury may assess") are used in section 26, *supra*, and under that statute punitive damages are not allowed against an innocent employer for the negligent acts of his inferior servants. See *Williams v. Railroad Co.*, *supra*. The difference in construction in the matter of damages of section 26, *supra*, and section 27, *supra*, is justified by the fact that section 26 was originally enacted for the purpose, in part, at least, of taking the negligent killing of minors out of the common-law rule as expressed in the maxim, "*Actio personalis moritur cum persona*," and to permit a survival of the cause of action where a minor was killed through negligence; and section 27 was enacted in aid of the criminal laws of the state, "to prevent homicide," in line with oriental methods to prevent crime by putting to death all the relatives of a criminal,—the idea evidently being, as to section 27, that, rather than see his corporation employer suffer, the careless employé will reform himself.

There is another feature as to damages in this case which is worthy of consideration. The defendants are receivers and mere stakeholders, acting under orders of court. They are themselves without blame, and cannot be held personally responsible, even to further the legislative intent imputed to section 27 of the Code of Alabama. Any smart money they are compelled to pay because of the alleged wrongful conduct of one of their inferior servants must be paid out of a trust fund in the hands of the court, belonging to parties from whom the court

has taken away the administration of their own property. The court seems to occupy the controlling position in relation to the management of the railroad which is usually ascribed to the more or less much-abused corporation. In *Railroad Co. v. Lansford* (recently decided) 102 Fed. 62, this court approved an instruction to the jury to the effect that, under section 27 of the Code of Alabama, if the jury found the corporation negligent (of course, through its servants), it was the duty of the jury to impose such damages, by way of punishment, as would, in their judgment, prevent all railroad corporations from being guilty of negligence which would cause the death of their passengers. I indulge in the hope that such a rule may not be applied to the courts and their receivers in operating railroad property. Under the circumstances of this case, the allowance of punitive damages can have no good or wholesome effect. Calling damages herein "punitive damages" is but giving another name to what is in reality a donation to lawyers and a solatium to relatives. While there is no answer or plea in this case to the effect that the defendants, as "court receivers," are not within the purview and intention of said section 27, Code Ala., on which this case is said to be based, yet it seems that a very grave question arises, as to whether the said section does apply to receivers, who are officers of the court, and mere stakeholders of property in the possession of the court,—at least, so far as the section is penal in its purpose, and permits the assessment of punitive damages. The section, in terms, provides a remedy for the "wrongful act, omission or negligence of any person or persons, or corporations, his or their servants or agents, whereby the death," etc. Court receivers are not expressly mentioned in this statute, and it may well be that, in omitting to expressly include them, the legislature intended to leave them subject to the control and direction of the court whose officers they are. A very interesting case in support of this view is *U. S. v. Harris* (recently decided; not yet reported) 20 Sup. Ct. 609, Adv. S. U. S. 609, 44 L. Ed. —, wherein it was held that receivers were not liable for penalties imposed by the statutes of the United States for not watering live stock in transit. In *Turner v. Cross*, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262, it is well said:

"A receiver is an officer of the court that appoints him, through whom the law takes possession of the property to which the receivership relates; and in cases of receiverships of railway property, under the orders of the court appointing them, receivers often operate railways, and assume the duties, burdens, and liabilities ordinarily imposed by law upon common carriers, in addition to the ordinary duties attaching to the position; but at all times they are only the agencies of the court, subject to its orders, and having no personal interest in the property in their hands resulting from the existence of the receivership, though responsible officially for the proper management and custody of property confided to their care, and, as other persons, personally responsible for their own unlawful acts working injury to others, but not so responsible for the negligent or wrongful acts of servants that they may be compelled to employ in the business confided by the court to their management and control." Page 224, 83 Tex., page 579, 18 S. W., and page 264, 15 L. R. A.

SEATTLE NAT. BANK v. PRATT.

(Circuit Court, N. D. New York. July 10, 1900.)

1. CORPORATIONS—ACTIONS TO ENFORCE STATUTORY LIABILITY OF STOCKHOLDERS—LIMITATIONS.

Gen. St. Kan. c. 23, § 44, provides that if a corporation be dissolved, leaving debts unpaid, suits may be brought against stockholders. Id. par. 1200, provides that, as to creditors seeking to enforce additional liability of stockholders, the corporation shall be deemed dissolved if it has suspended business for more than one year. *Held*, that limitations against the enforcement of such liability begin to run at the expiration of a year from such suspension, whether the claim against the corporation has been reduced to judgment or not, since the creditor may immediately proceed against the stockholders on the dissolution of the corporation, without waiting to obtain a judgment against the corporation.

2. SAME.

Code Civ. Proc. N. Y. § 394, providing that an action against a stockholder to enforce a statutory liability must be brought within three years after the cause of action accrues, applies to an action against a stockholder of a corporation of another state to enforce a liability imposed by the statutes of such state.

At Law.

L. A. Stebbins and George Lawyer, for plaintiff.

Charles E. Patterson and Charles C. Van Kirk, for defendant.

COXE, District Judge. This is an action to recover of the defendant, who was a stockholder of the Western Farm Mortgage Trust Company, a Kansas corporation, the additional liability created by the constitution and laws of that state. The only defense, necessary to consider, is the statute of limitations. The plaintiff recovered a judgment against the trust company January 18, 1897, upon a debt which matured prior to March, 1893. Execution was returned nulla bona on the same day. An alias execution was issued and returned nulla bona April 15, 1897. A receiver was appointed for the trust company in Colorado, February 6, 1892, and in Kansas, March 5, 1892. No business was transacted by the trust company after the appointment of these receivers. An attempt was made to show that its business career did not end at this time, but it was not successful. There can be no doubt that the commercial life of the company terminated when the title to its property, of every name and nature, vested in the receiver. It was stricken with financial coma and, though not legally dead, it was as incapable of conducting business as is a general parietic for whom a committee has been appointed by the court.

In determining whether or not the action is barred it is necessary to answer the following questions: First. When did the cause of action against the defendant accrue? Second. Does the statute of limitations of Kansas or of New York apply?

In *Cottrell v. Manlove*, 49 Pac. 519, the supreme court of Kansas has construed sections 32 and 44 of the Kansas statute (Gen. St. c. 23) prescribing the manner of enforcing the liability of stockholders. Section 44 provides that if the corporation "be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution." The court holds that this

remedy is open to creditors immediately upon the dissolution of the corporation, without awaiting the recovery of a judgment against the corporation, and that the statute of limitations starts to run at the date of dissolution. The remedy under section 32, giving the creditor the right to pursue the stockholder upon the judgment against the corporation, cannot operate, says the court, to extend the period of limitation. In the case of a dissolved corporation section 44 gives an immediate right of action, and the creditor cannot extend the limitation upon that right by adopting the slower process of obtaining a judgment against the corporation. The right of action was complete the moment the corporation was dissolved. This decision was pronounced in an action in which the Kansas statute of limitations was a defense, but it cannot be considered as construing that statute. It is a construction of the foregoing sections of the corporation law of Kansas and, as such, is binding upon this court. If it construed the Kansas statute of limitations, and that only, it would not conclude this court, unless that statute is applicable as a defense.

At what date was the corporation dissolved? Paragraph 1200 of the General Statutes of Kansas provides that, as to creditors seeking to enforce the additional liability of stockholders, the corporation shall be deemed dissolved if it has suspended business for more than one year. It is not necessary that there should be a formal judgment of dissolution. The statute begins to run after the expiration of a year from the date of suspension. *Bank v. King*, 60 Kan. 733, 57 Pac. 952; *Crocker v. Ball* (Kan. App.) 59 Pac. 691. As the receiver in the case at bar was appointed in Kansas, March 5, 1892, the statute began to run March 6, 1893. The cause of action would, therefore, be outlawed on the 7th of March, 1896, if a three-years statute of limitation applies. This action was begun September 3, 1898. Section 394 of the Code of Civil Procedure of New York provides that an action against a stockholder to recover a penalty or forfeiture or to enforce a liability created by statute "must be brought within three years after the cause of action has accrued." That this statute applies to the present situation was held by the circuit court of appeals of this circuit upon facts, which, from a legal point of view, are identical. *Hobbs v. Bank*, 37 C. C. A. 513, 96 Fed. 396; *Id.* (C. C. A.) 101 Fed. 75. The learned counsel for the plaintiff contend that an analysis of the four opinions delivered in the *Hobbs Case* leads to the conclusion that the Kansas and not the New York statute was held to be applicable. The court cannot accept this view though it be pressed with earnestness and ingenuity. There can be no question that the defense of the statute of limitations was sustained, and it is difficult to perceive how this result could have been reached under the Kansas statute when section 21 of the Code of that state expressly provides that the period of limitation does not run in favor of a person who is "out of the state." It is said that this point was not argued and may have escaped the attention of the court, but this is hardly probable in view of the fact that the record necessarily disclosed the citizenship and residence of the defendant in this district, and in view of the further fact that a similar provision is found in the Code of almost every state of the Union, New York included,

refusing the benefit of the statute of limitations to persons not actually within the state. But in any event this court interprets the decisions in the Hobbs Case as holding that section 394 of the New York Code is a bar to an action brought in this state to enforce the stockholder's liability created by the laws of Kansas, if not commenced within three years after the cause of action accrued. It follows that the complaint must be dismissed, with costs.

In re PIERCE.

(District Court, N. D. New York. July 20, 1900.)

No. 80.

1. BANKRUPTCY—DISCHARGE—FRAUDULENT CONCEALMENT OF PROPERTY.

Under Bankr. Act 1898, § 29b, authorizing the discharge of a bankrupt unless he knowingly and fraudulently conceals any of the property belonging to his estate while a bankrupt, the mere concealment of property by the bankrupt is not ground for denying a discharge, if it was not done knowingly and fraudulently.

2. SAME—OBJECTIONS BY CREDITORS—SPECIFICATION.

A specification, in objections to the discharge of a bankrupt, that the latter has concealed property belonging to his estate in bankruptcy, but not charging that it was knowingly and fraudulently done, does not present any issue on the bankrupt's application for discharge.

3. SAME—AMENDMENTS.

Where the specifications in objections to the discharge of a bankrupt are defective, in not charging that a concealment of property by the bankrupt was knowingly and fraudulently done, the same may be amended by the insertion of such allegation after the evidence is in.

4. SAME.

Objections to the application of a bankrupt for a discharge cannot be amended so as to present a new issue, as the failure to keep books, after the evidence is in and the objections have been overruled.

5. SAME—RECOVERY OF PROPERTY BY TRUSTEE.

The discharge of a debtor in bankruptcy in no way precludes the trustee from recovering property of the bankrupt's estate which has been fraudulently transferred.

In Bankruptcy.

George H. Cobb, for bankrupt.

David Bearup, for creditor.

COXE, District Judge. After a careful examination the referee has found that the evidence is insufficient to warrant a finding that the bankrupt knowingly and fraudulently concealed property from his trustee. I incline to the opinion that the conclusion of the referee in this regard is correct. If criticism of this condition of affairs is to be indulged in it should be directed not against the judicial but the legislative branch of the government. It cannot be disputed that the present act permits a discharge no matter how preferential and fraudulent have been the transfers of the bankrupt so long as his acts do not amount to a fraudulent concealment from his trustee of property belonging to his estate. Whether this should be so there may be serious doubt, that it is so there is no doubt. The proof here

fails to establish a case under section 29b, subd. 1, Bankr. Act. The specification filed by the objecting creditor, now opposing the discharge, is, in my judgment, insufficient to present this issue, or any issue. The objection charging concealment omits the essential and fundamental allegation that the acts were done "knowingly and fraudulently." The objection that the bankrupt failed to keep books is not mentioned at all. Should the objecting creditor desire to proceed further in this matter he may amend the objections numbered 1 and 2 by inserting the necessary allegation as above indicated and he may verify the specification nunc pro tunc. No hardship can result as the evidence has been taken and considered upon the theory that the specification was sufficient. It would be unfair, however, to permit an objection presenting the issue as to the failure to keep books to be made at this late day. The discharge will in no way preclude the trustee from recovering property fraudulently transferred. The report of the referee is confirmed and the discharge is granted.

In re BRINCKMANN.

(District Court, D. Indiana. July 9, 1900.)

No. 594.

BANKRUPTCY—INVOLUNTARY PROCEEDINGS—WHO ARE CREDITORS.

Under Bankr. Act 1898, § 1, subd. 9, and section 63b, defining a creditor as one who owns a demand or claim provable in bankruptcy, and providing that unliquidated claims may be proved and allowed only after being liquidated, one having an unliquidated demand against an insolvent debtor is not such a creditor as is entitled to institute involuntary proceedings to have his debtor adjudged a bankrupt.

In Bankruptcy.

Forrest E. Hughes and Edwin J. Bower, for petitioner.

James F. Gallaher and Smith, Duncan, Hornbrook & Smith, for respondent.

BAKER, District Judge. On May 3, 1900, George P. Chadwick, of Laporte county, Ind., filed a petition in involuntary bankruptcy against Robert Brinckmann, of the same county and state. The petition alleges that Chadwick is a creditor of said Brinckmann, having provable claims amounting in the aggregate, in excess of securities held by him, to the sum of \$500, and that the creditors of said Brinckmann are less than 12 in number. The petitioner alleges that the debt owing by the alleged bankrupt to himself is a judgment rendered January 29, 1900, by the circuit court of Marshall county, Ind., for \$1,250, for a willful and malicious injury to the person of the petitioner committed by said Brinckmann on July 15, 1899. He alleges that there is interest due on said judgment from the date of its rendition, and costs of suit taxed in said cause, amounting to \$140.20. The petitioner alleges that said Brinckmann is insolvent, and that within four months next preceding the date of the filing of his petition said Brinckmann committed acts of bankruptcy, in that he did on January

3 and 15, 1900, convey, mortgage, and transfer all of his real and personal property to Louisa Brinckmann, William Brinckmann, Herman Brinckmann, and James F. Gallaher, with intent to prefer them as creditors over his other creditors, and especially the petitioner, and that said Brinckmann also conveyed, transferred, and concealed his property with intent to hinder, delay, and defraud his creditors. Said Brinckmann filed an answer putting in issue all the material averments of the petition. The court has heard the evidence adduced by the respective parties, and is of opinion that the petitioner was not a creditor of the alleged bankrupt at the time that the acts of bankruptcy were committed. It is shown by the evidence, without dispute, that the case of the petitioner against the alleged bankrupt for the recovery of damages for the malicious and wrongful assault and battery was not tried until January 13, 1900, on which day the jury returned a verdict in his favor for \$1,250, on which verdict on January 29, 1900, a judgment was rendered for the amount of the verdict and costs by the circuit court of Marshall county, Ind. No one except a creditor can maintain a petition in involuntary bankruptcy. The petitioner in this case at the time of the commission of the alleged acts of bankruptcy was not a creditor having a provable claim against the alleged bankrupt. Section 1, cl. 9, of the bankruptcy act defines a "creditor" as follows:

"(9) Creditor shall include any one who owns a demand or claim provable in bankruptcy and may include his duly authorized agent, attorney or proxy."

Section 63, cl. "b," provides as follows:

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against his estate."

The petitioner's claim at the time the alleged acts of bankruptcy were committed was unliquidated. He had not at that time reduced his claim for damages for a tort into judgment. It remained an unliquidated claim until judgment was rendered on the verdict. In the case of *Beers v. Hanlin*, 3 Am. Bankr. R. 745, 99 Fed. 695, it is held that an unliquidated claim is not a provable debt in bankruptcy, and one arising out of tort must first be reduced to judgment, or, pursuant to application to the court, be liquidated, as the court shall direct, in order to be proved; and it is further held that where the only alleged creditor is one who had an unliquidated claim for tort, not reduced to judgment at the time of an alleged preferential transfer, he is not a creditor who can insist that such transfer is an act of bankruptcy. The case of *Ex Parte Charles*, 14 East, 197, 16 Ves. 256, is a much stronger case against the petitioning creditor than the case last cited. The case was sent by Lord Chancellor Eldon to the court of king's bench. The facts stated by the chancellor for the opinion of the court were that an action upon the case was brought by Mary Howell against one John Charles for breach of promise of marriage, in which she obtained a verdict on December 5, 1808, for £150, in damages. On December 25, 1808, the act of bankruptcy was committed by an assignment by the alleged bankrupt of all of his effects. Judgment on the verdict was entered January 31, 1809. On February 4, 1809, Mary Howell petitioned for a commission of bankruptcy, which is

sued on February 21, 1809, upon the debt evidenced by her judgment. The case was elaborately argued before the entire court on the certificate sent to it by the chancellor; the question being whether or not Mary Howell, at the time of the commission of the alleged act of bankruptcy, owned a provable debt, and was a creditor, within the true construction of the bankruptcy act. The court unanimously certified to the chancellor that the debt was not a sufficient debt to support a commission. Afterwards, in the sittings after Trinity term, 1812, upon the petition of the bankrupt, the commission was superseded, with costs. In *Scott v. Ambrose*, 3 Maule & S. 327, Lord Chief Justice Ellenborough said that all the courts in Westminster Hall had concurred in the doctrine of the case of *Ex parte Charles*. The petitioner, not having been a creditor owning a provable claim at the time of the commission of the alleged acts of bankruptcy, cannot maintain his present petition. It will therefore be dismissed at the costs of the petitioner.

In re CASHMAN.

(District Court, S. D. New York. July 17, 1900.)

1. **BANKRUPTCY—DISCHARGE OF BANKRUPT—CONCEALMENT OF ASSETS.**

Where, after allowing a bankrupt every possible credit, his schedule of assets shows a shrinkage in his property of from ten to thirteen thousand dollars in nine months, which is unaccounted for, the presumption of fraudulent concealment of assets will prevent his receiving a discharge in bankruptcy.

2. **SAME—FAILURE TO KEEP BOOKS OF ACCOUNT.**

Where a considerable shrinkage of assets within a short period is accompanied by the bankrupt's failure to keep a book of entries or any cash book, and an alleged payment of \$6,000 borrowed money shortly before his failure is not entered in any book, and the account given thereof by the bankrupt is so dubious and imperfect as to be insufficient as a substitute for book entries, the inference is warranted that the failure to keep books was with the intent on the part of the bankrupt to conceal his money and prevent the true state of his business being shown.

In Bankruptcy.

Nathan, Leventritt & Perham, for bankrupt.

Black, Olcott, Gruber & Bonyng, for opposing creditors.

BROWN, District Judge. The referee gives no explanation of the evidence justifying his conclusion in favor of the bankrupt's discharge. The case is one of presumptive fraud and concealment of assets from the bankrupt's own statements. Deducting \$5,019.70 of accounts, which presumably include all his old bad debts, there remains over \$29,000 shrinkage in assets in nine months to be accounted for. The bankrupt's accounting for it is most lame and impotent, beyond \$15,000 or possibly \$20,000, allowing for evident exaggerations and mere general statements under the lead of counsel to which little credit can be given. Even allowing \$3,000 loss by fire over insurance received, \$6,000 on goods replevied, and those sold on execution, \$2,500 more on machinery, and \$5,000 for living expenses and loss by his salesmen

(this latter not very credible), and not reckoning profits, which the bankrupt says were something, there would still be a deficiency of from \$10,000 to \$13,000. The credits claimed by his counsel for amounts paid to business and confidential creditors, cannot be reckoned in this statement, since, if reckoned as a credit, they must be added to the debit side, requiring added explanation; if those notes represent money or goods, they are so much added means to be accounted for.

This large deficiency in accounting for assets is, as usual, accompanied by a failure of book entries to justify the bankrupt's explanation. He says he paid about \$6,000 borrowed money shortly before his failure, taking up notes therefor. Nothing of this is entered in any books. He says he kept no cash book; and the testimony he gives as to the persons whom he thus paid, their addresses and the amounts paid them, is so dubious and imperfect as to be insufficient as a substitute for the book entries which the law contemplates should be made. The only rational inference is that of intent to conceal the bankrupt's money and to prevent the books showing the true state of his business; and on both grounds the discharge should be denied.

In re TOBIAS.

(District Court, W. D. Virginia. July 7, 1900.)

1. BANKRUPTCY—HOMESTEAD IN PERSONAL ESTATE—SUFFICIENCY OF CLAIM.

A writing filed by a bankrupt with the referee in bankruptcy, claiming the "exemptions allowed a householder under the state law" in the property surrendered, and referring therein to the inventory made of said property by the trustee, wherein a cash valuation is affixed to each parcel or article, which writing is followed by the filing of a homestead deed, is a sufficient designation of the property claimed by the bankrupt to meet the requirements of Code Va. 1887, § 3639, providing that a homestead in personal estate shall be set apart in a writing signed by the householder, which shall designate and describe with reasonable certainty the estate so selected, and affix to each parcel or article the cash valuation thereof.

2. SAME—EXEMPTION IN PROPERTY NOT PAID FOR—IDENTIFICATION.

Since, under Code Va. 1887, § 3630, the householder's right of exemption in personal property does not hold as against any execution or demand for the purchase price, a bankrupt, who has purchased goods and commingled them in a common stock, in making a claim for the homestead exemption in personal estate under the state law must designate the goods for which the purchase price has not been paid, and if he is unable to do this, because of their having been intermingled with goods paid for, he cannot claim an exemption as to any part thereof.

3. SAME—RIGHT OF HOUSEHOLDER AS AGAINST MERCANTILE CREDITORS.

Since the right to a homestead exemption in personal estate holds against all claims except those for the purchase price, rent, and taxes, a bankrupt is entitled to a homestead, as against mercantile creditors, out of a stock of merchandise that has been surrendered in bulk to his trustee in bankruptcy.

4. SAME—GOODS PAID FOR FROM PROCEEDS OF PROPERTY NOT PAID FOR.

Where the goods surrendered by a bankrupt were honestly acquired in the regular course of business, he is entitled to a homestead exemption in same, although they were paid for out of the proceeds of goods not paid for.

5. SAME—FRAUD—PLEADING—EVIDENCE.

A general allegation in exceptions to a bankrupt's claim for homestead exemption out of the personal estate surrendered, that the excepting creditors were induced to give up their goods by the fraud and misrepresentation of the bankrupt, and that the claim of a homestead is part of a scheme on the part of the bankrupt to hinder, delay, and defraud his creditors, cannot defeat the homestead claim, where the evidence fails to show that credit was given because of any false statement or misrepresentation of the bankrupt.

Micajah Woods, for bankrupt.

D. Harman, J. E. Edmunds, and C. W. Allen, for creditors.

PAUL, District Judge. In this case the referee certifies to the court for decision certain questions raised by exceptions taken to the bankrupt's claim of homestead. The first question is:

"When a bankrupt in his schedule says, 'I claim the exemptions allowed a householder under the state law,' and afterwards files a homestead deed, is this sufficient compliance with the law to entitle him to the exemption?"

The exemption claimed by the bankrupt under the provisions of the homestead law of Virginia is a stock of merchandise surrendered in his schedules. Section 3639, Code Va. 1887, provides how a homestead shall be set apart in personal estate. Section 3639:

"Such personal estate shall be selected by the householder and set apart in a writing signed by him. He shall, in the writing, designate and describe, with reasonable certainty, the estate so selected and set apart, and each parcel or article, affixing to each his cash valuation thereof; and the said writing shall be admitted to record, to be recorded as deeds are recorded, in the county or corporation wherein such householder resides."

The bankrupt on the 9th of April, 1900, after being adjudged a bankrupt, filed with the referee a writing claiming his homestead in the personal property surrendered, referring therein to the inventory made of the same by the trustee. In this inventory each parcel or article has affixed a cash valuation. The referee holds this designation and description of the property claimed by the bankrupt as a homestead to meet the requirements of the statute. The court sustains this finding of the referee.

The second question is thus stated:

"Where goods can be identified as not paid for, and the exemption is claimed in them, if the vendors fail to identify them will the exemption be allowed?"

This interrogatory arises on two exceptions filed by creditors of the bankrupt to the assignment of homestead made by the trustee. The second exception states:

"There is no evidence in this case that the stock of goods claimed as exempt has been paid for. The creditors cannot distinguish which of the goods have been paid for. * * *"

The third as follows:

"The articles specified as not being exempt are confined to such articles as the bankrupt claims to have been purchased from the creditors who have proved their claims. He admits that there are other articles in the stock which have not been paid for. It is insisted that none of the goods which have not been paid for can be claimed as exempt, whether the debt is due to the creditors proving their claims or others."

These exceptions are based on the following provision of the homestead law (section 3630, Code Va. 1887):

"Provided, that such exemption shall not extend to any execution order or other process issued on any demand in the following cases. First. For the purchase price of said estate, or any part thereof. * * *"

It is agreed in this case that some of the goods claimed by the bankrupt as exempt under the homestead law have not been paid for. The evidence shows that the goods were purchased at various times between the months of January, 1899, and February, 1900, from different merchants in New York, Philadelphia, and other places; that these goods were commingled in a common stock. Some of the creditors from whom these goods were purchased have proved their debts in bankruptcy, others have not. On behalf of the bankrupt it is insisted that the creditors whose debts are still due them, in whole or in part, for the goods claimed under the homestead exemption, must identify in the general stock the goods sold by them, and for which they have not been paid, and that unless they do so identify the goods the bankrupt is entitled to claim them as exempt under the homestead law. The referee sustained this contention. On the other hand, it is claimed on behalf of the creditors that it is the duty of the bankrupt to identify and designate the goods on which, in whole or in part, he still owes the purchase money, in order that the trustee may set apart as exempt such as have been paid for. The court sustains this position of the creditors. In a case like this, where the evidence shows that many of the tags and marks on the goods have been removed,—where the goods have been purchased from many sellers and intermingled in a common stock,—it would be well-nigh impossible for the creditors to make the separation and identification. The hardship and injustice of such a requirement are increased where, as in the case before us, the creditors are numerous, living at great distances from the domicile of the bankrupt, and most of their claims being for small amounts. To impose upon them, under such circumstances, the burden of identifying their goods, would be practically a denial of justice. On the other hand, it imposes no hardship on the bankrupt to require him to designate to the trustee what property is not exempt because the purchase price, or some part thereof, is not paid. He is the person seeking a benefit, often amounting to a considerable estate; and when he comes into a court of justice, asserting his claim to this property, he should come prepared to show a clear title to it under the requirements of the homestead law. If he is unable to do this, or has so intermingled the goods for which he has not paid with others that have been paid for as to make it impossible to designate the class for which he still owes, no homestead can be set apart in any of the goods. *Rose v. Sharpless*, 33 Grat. 158. The holding of the referee that the burden of designating the goods that have not been paid for rests upon the creditors from whom the same were purchased is erroneous, and must be reversed.

Third question:

"Can a stock of merchandise be set aside as a homestead against the mercantile creditors?"

Fourth question:

"Can a bankrupt claim his exemption in goods that have been paid for, if it be proven that they were paid for with the proceeds from the sale of goods that were unpaid for?"

The third and fourth questions will be considered together. They are based on the fourth exception to the assignment of homestead. Following is the exception:

"The stock of merchandise cannot be set aside as homestead against the mercantile creditors. The money due to exceptants is for the value of goods gotten from them by the bankrupt. If it is true that any portion of the goods have been paid for, such payments were made with the proceeds of the sales of their goods which have not been paid for, and what is due them therefor is in effect the purchase money for the goods now claimed as exempt."

A sufficient answer to the third question is found in the language of the statute allowing a homestead exemption. It provides that the debtor shall "be entitled to hold exempt from levy, seizure, garnishment or sale under any execution, order or process issued on any demand for any debt or liability or contract his real and personal estate, or either, to be selected by him, including money and debts due him, to the value of not exceeding two thousand dollars." Then follows a list of certain debts, such as the purchase price of the estate, rent, taxes, etc., against which the exemption cannot be claimed. Section 3630, Code Va. 1887. Debts due mercantile creditors are not embraced in this class, and they have no higher standing, as against a claim of homestead exemption, than has any other debt not within the list of excepted debts. The argument that a homestead cannot be claimed against a debt due a mercantile creditor is based on a query in *Rose v. Sharpless*, supra; the court saying:

"The question whether a householder is entitled to have a homestead in a shifting stock of goods, used in the way of trade, ever liable to change, so that it is not the same yesterday and to-day, is a question of grave importance, but not necessary now to be decided."

However this question might be determined in a controversy between execution creditors and the debtor, where the latter claimed a homestead in a shifting stock of goods, that necessarily changed its character from day to day, the doctrine contended for is not applicable in a case of bankruptcy. Here the goods have been surrendered in bulk. The title to them has, by operation of law, vested in the trustee, and he must dispose of them as the bankrupt law directs. The goods in his hands cannot be said to be a shifting stock of goods, in the sense in which the supreme court of appeals of Virginia used the term in *Rose v. Sharpless*. The law is plain in the language employed. It allows a homestead exemption in real or personal estate, or either, including money and debts due the householder. As to the manner in which the bankrupt may dispose of his homestead exemptions, and reinvest the proceeds, under the provisions of section 3645, Code Va., is not a matter before this court. As to the question, can the bankrupt claim his exemption in goods that have been paid for out of the proceeds of goods not paid for? The answer to this question is, if the goods surrendered by the bankrupt were honestly acquired in the regular course of business, though paid for out of the proceeds of the sale of other goods that were not paid for, he can

claim a homestead exemption in the goods surrendered. It is the purchase price due the vendor of the goods claimed as a homestead that must be paid, and it is only the purchase price of the goods so claimed that can be enforced against the homestead. The purchase price of other goods cannot be so collected. There are numerous cases, and counsel have referred to some of them, where an insolvent has invested goods unpaid for in a homestead, with the purpose of defrauding his creditors, in which the purchase money due on the goods has been enforced against the homestead. But such is not the case here.

The only remaining question certified by the referee is thus stated:

"Is the claim of homestead by the bankrupt a part of a scheme to hinder and defraud creditors?"

The allegations charging fraud on the part of the bankrupt are made in a general way. They state that:

"The amounts due to exceptants are for goods obtained from them by the bankrupt by fraud and misrepresentation, by which they were induced to give up their goods, and the falsity of which were not known to them until he petitioned to be adjudged a bankrupt, and the exemption cannot be claimed against a liability for fraud. The claim of a homestead is a part of a scheme on the part of the bankrupt to hinder, delay, and defraud his creditors, and should not, therefore, be allowed."

The charges of fraud contain no specifications or details showing in what the false representations consisted, whereby the complaining creditors were deceived. 9 Enc. Pl. & Prac. 686. Nor does the evidence show that any statement made by the bankrupt as to his financial condition was communicated to any of his creditors, and that they were induced to give him credit by reason of his alleged false statements and misrepresentations. The court sustains all the findings of the referee, except that arising under the second question.

GOETZE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. June 14, 1900.)

No. 3,076.

1. UNITED STATES—EXTENSION OF CONSTITUTION OVER NEW TERRITORY—MILITARY OCCUPATION.

The boundaries of the United States can be enlarged, and the operation of its institutions and laws extended over new territory, only by the treaty-making power or the legislative authority. The occupation of territory conquered in war, by the military forces of the United States, while it gives the United States title to such territory as against foreign nations, does not change the status of its inhabitants, who remain foreigners so far as regards their relation to the United States and its laws.

2. SAME—TERRITORY ACQUIRED BY CESSION—STATUS.

A treaty ceding territory to the United States, in order to have the effect of incorporating such territory as an integral part of the United States, under the constitution, and of giving its inhabitants the status of citizens thereof, must do so by express provision or by necessary implication. Whether a treaty stipulation alone is sufficient, without supplementary legislation, is not clearly established; but the mere fact of acquiring title to the soil, and dominion over it, cannot change the constitutional status of the inhabitants.

3. TREATIES—RULES OF CONSTRUCTION.

A treaty is not only a law, but also a contract between two nations; and, under familiar rules, it must, if possible, be so construed as to give full force and effect to all its parts.

4. UNITED STATES—STATUS OF PORTO RICO—CUSTOMS LAWS.

The provision of the treaty of Paris, by which Spain ceded to the United States Porto Rico and other islands, that "the civil rights and political status of the native inhabitants of the territories hereby ceded shall be determined by the congress," which was made to apply, also, to the native Spaniards residing in the ceded territory who failed to elect to retain their allegiance, must be given effect as a condition on which the cession was made and accepted. If within the constitutional power of the United States to accept the cession of territory on such condition, the effect of the treaty was to vest the title to the soil of the ceded islands in the United States, but to postpone any change in the relations of the inhabitants to the United States to await the action of congress. If the United States was without such power, the treaty was unconstitutional; but in no event could it have the effect of making the islands a part of the United States, and bringing them within the operation of its constitution, contrary to the clearly-expressed intention of the treaty-making power. Hence in either case the ceded territory remained a foreign country, within the meaning of the customs laws; and merchandise imported from Porto Rico into the United States after the signing of the treaty, but before any action by congress, was subject to the same duties as importations from other foreign countries.

5. SAME—POWER TO ACQUIRE AND GOVERN FOREIGN TERRITORY—CONSTITUTIONAL LIMITATIONS.

The United States, in common with all other sovereign nations, has the power to acquire dominion over new territory by cession, and to govern the same without incorporating it as an integral part of itself under its organic law. Such power is an ordinary and important attribute of sovereignty, which was possessed by the independent states, and which on the formation of the Union they denied to themselves in express terms and delegated to the federal government, in the treaty and war making powers; otherwise, the United States would be without the full sovereignty as a nation which is essential to enable it to assume and fulfill the international duties and obligations which must necessarily devolve upon it in some cases, as the result of successful war, without injustice to its own citizens. Nor could the United States, if the mere act of cession brings the ceded territory within the operation of the constitution, grant to the inhabitants of such territory the right to form an independent government, or relieve them from federal taxation, without entirely renouncing its own sovereignty.

6. SAME.

The argument in favor of the possession of such power by the United States is strengthened by the historical facts that the treaty of cession of Louisiana expressly provided that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States," and the subsequent treaties ceding Florida, California, and Alaska contained substantially similar provisions, and that in each case the cession was supplemented by an act of congress extending the customs laws of the United States over the ceded territory. In the cases of Louisiana and Florida, also, the treaties gave France and Spain special trade advantages in the ceded territory for a term of years, which would render such treaties unconstitutional if the act of cession ipso facto brought the territory ceded within the full operation of the uniformity clause of the constitution.

7. SAME.

The denial of the power of the United States to govern territory over which the constitution does not extend cannot be deduced from the fact that this is a republic, founded on the principle that all governments derive

their just powers from the consent of the governed, and bound to establish and maintain a republican form of government throughout its dominions, since such a form of government can as readily be established and maintained in territory outside the sphere of the constitution as within it, and the same civil and political rights given to its inhabitants. The fundamental principles of our government and the negative provisions of the constitution in favor of personal rights may well be held, by inference and the general spirit of the constitution, to limit the powers of congress in the government of any territory.

8. SAME—ACQUISITION OF NEW TERRITORY—VALIDITY OF CONDITIONS OF TREATY.

The United States, having power to acquire territory by cession without incorporating it fully under its organic laws, may make such treaty stipulations in regard to the constitutional status of the inhabitants of ceded territory as are deemed for the best interests of such inhabitants and its own citizens, and the provision of the treaty of Paris leaving the status of the inhabitants of the islands ceded by Spain to be fixed by congress is valid.

Appeal by the importers from a decision of the board of general appraisers which sustained the assessment of duty by the collector upon the merchandise in question.

Everit Brown and Edward C. Perkins, for appellants.
Henry L. Burnett and Henry C. Platt, U. S. Attys.

TOWNSEND, District Judge. On June 6, 1899, John H. Goetze & Co. imported from Porto Rico into the port of New York 100 bales of leaf or filler tobacco, upon which duty was assessed at 35 cents per pound, as "filler tobacco not specially provided for," pursuant to the provisions of paragraph 213 of the tariff act of July 24, 1897, commonly known as the "Dingley Act." The importer protested, claiming that the merchandise was not subject to duty, because Porto Rico was not a foreign country, and because, therefore, the "imposition of duties on goods brought from a place within the territory of the United States into a port of the United States is not lawful and valid under the constitution." There is no dispute as to the classification of the tobacco or as to the rate of duty, provided the imposition is lawful.

A preliminary question of jurisdiction has been disposed of in the suit of *Lascelles v. Bidwell*, 102 Fed. 1004, recently brought to enjoin the collector from collecting the duties. Judge Lacombe denied the motion of the complainants therein for an injunction, on the ground that they "have an adequate, summary, and expeditious remedy at law, under the customs administrative act."

The tariff act of July 24, 1897, provides "that on and after the passage of this act, unless otherwise specially provided for in this act, there shall be levied, collected and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed." 30 Stat. 151. The constitution provides that "all duties, imposts, and excises, shall be uniform throughout the United States." Article 1, § 8. Before the war with Spain, Porto Rico was a foreign country. It did not cease to be a foreign country when it was occupied by the military forces of the United States. Its status at that time is settled by the decision of the supreme court in *Fleming*

v. Page, 9 How. 603, 13 L. Ed. 276. The port of Tampico had been wrested from Mexico, and was held by the United States until the final treaty of peace. During that time duties on goods imported from that port were protested on the ground that Tampico was part of the United States. Chief Justice Taney, in writing the decision to the effect that Tampico was a foreign country, says:

"The country was in the exclusive and firm possession of the United States, and governed by its military authorities, acting under the orders of the president. But it does not follow that it was a part of the United States, or that it had ceased to be a foreign country, in the sense in which these words are used in the acts of congress. * * * By the laws and usages of nations, conquest is a valid title while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries. But yet it was not a part of this Union."

The conquest of Porto Rico under authority of the executive made it ours by military title. But the president's "conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power." Our boundaries could not "be regulated by the varying incidents of war, and be enlarged or diminished, as the armies on either side advanced or retreated." *Fleming v. Page*, supra. In this sense, therefore, our constitutional boundaries do not "follow the flag." An extension of the boundaries of the United States can be made "only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the president by the declaration of war." *Id.*

The conquest of Porto Rico did not incorporate the island within the United States. Did the treaty of cession accomplish that result? What action on the part of the treaty-making power is essential in order to effect a complete incorporation of new territory, and whether this result can be accomplished at all without supplementary legislation, is by no means settled. In the treaty of cession of Louisiana it was provided that:

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States." Article 3.

Whether this provision brought the new territory within our boundaries is a question which has not arisen. Congress, shortly after the ratification of the treaty, passed acts providing for the extension of our customs and other laws over Louisiana. 2 Stat. 245, 251, 283. The treaty which ceded Florida contained an almost identical provision for the incorporation of the inhabitants of that territory. Of this treaty Chief Justice Marshall said:

"This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States." *Insurance Co. v. Canter*, 1 Pet. 542, 7 L. Ed. 255.

Whether they would be admitted independently of this stipulation, he refuses to discuss. Congress, however, deemed it necessary to pass

special enactments in order to extend our revenue and other general laws over the new territory. 3 Stat. 637, 657. In the treaty of 1848 with Mexico, providing for the cession of California, it was stipulated that Mexicans remaining in the ceded territory who did not elect to retain their former citizenship "shall be incorporated into the Union and be admitted at the proper time (to be judged of by the congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution." Article 9, Treaties and Conventions, 686 (9 Stat. 930). Congress, within a year from the treaty of cession, extended our revenue laws to California. 9 Stat. 400. All the laws of the United States not locally inapplicable were extended by special enactment to California a few weeks after she had been admitted as a state. *Id.* 521. Of this treaty Mr. Justice Wayne said, "By the ratification of this treaty California became a part of the United States." *Cross v. Harrison*, 16 How. 197, 14 L. Ed. 903. But, as will be shown, it is probable that Justice Wayne was referring to the relations of California and the United States as regards other nations, and not as to its internal, organic connection with the sovereign nation, so that these words cannot be taken as determining that supplementary legislation is not necessary to complete incorporation. In the cession of Alaska it was provided that the inhabitants who remained three years, with the exception of uncivilized native tribes, "shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States." Article 3 (15 Stat. 542). About a year later congress extended our customs and navigation laws to the new territory. 15 Stat. 240. Thus we see that in all previous cession of territory there has been a special provision in the treaty for incorporating the inhabitants within the United States. Whether a treaty stipulation alone would be sufficient to incorporate the territory into the Union is not clearly established. The statement of Chief Justice Marshall, *supra*, would lead to the conclusion that such stipulation is sufficient to secure citizenship. Congress, however, has always deemed it necessary to put our customs laws in force by supplementary legislation. This uniform course of treaty and legislative provisions shows that the incorporation of new territory into our body politic is not to be readily inferred from a treaty, but results only from express stipulations in or necessary implication therefrom. Before the date of this importation the island had been ceded to this country by the treaty of Paris, which went into effect on April 11, 1899. Article 2 of that treaty provided that "Spain cedes to the United States the Island of Porto Rico." Article 9 provided that the "civil rights and political status of the native inhabitants of the territories hereby ceded shall be determined by the congress." 30 Stat. 1754. The treaty further provided that "Spanish subjects, natives of the peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty," may declare their intention to retain their allegiance, "in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside." Article 9 (30 Stat. 1759). There is no stipulation for the incorporation of the inhabitants within the Union, as there has always been in prior

treaties. On the contrary, their "civil rights and political status * * * shall be determined by the congress." Spaniards who renounce their allegiance have the same status as natives. In the determination of "civil rights and political status" must be comprehended the determination of the internal relationship of the Porto Ricans to our organic law. Before cession, under conquest, Porto Rico was a part of the United States as to foreign nations. The *de facto* title to the soil was in the United States, but its inhabitants were foreigners to the constitution, and the provision for uniformity of duties had no application there. *Fleming v. Page*, *supra*. By cession the title became *de jure*, but in the status of the islanders as foreigners, and so in the status of Porto Rico as a foreign country, no change was to be made until congress should determine its character. The treaty vests the sovereignty over the island in the United States, but postpones changes in the relations of its people, and in its relations to the body politic, until congress shall determine what relations shall be best suited to the conditions of its inhabitants and to the welfare of the United States. Since congress at the time of this importation had not performed this condition of incorporation, the status of Porto Rico, except as to other nations, remains unchanged.

Counsel for the appellants, however, interpret the treaty as having effected a complete incorporation of Porto Rico with the United States. They reject the provision which leaves the civil rights and political status of the inhabitants to be determined by congress as an unlawful attempt to grant to congress certain powers over the territory after it has become incorporated in our Union, and therefore as immaterial and ineffectual for any purpose. Taking the phrase, "Spain cedes Porto Rico to the United States," as making Porto Rico part of the United States under the constitution, they contend that the provision that "the civil rights and political status of the inhabitants shall be determined by congress" is either an attempt to grant congress unconstitutional rights, or "is merely harmless and superfluous, as it certainly is so far as political status is concerned, for it only declares what would be the law without it."

The treaty is a contract between two nations, and, under familiar rules, it must, if possible, be so construed as to give full force and effect to all its parts. "It is a rule in construing treaties as well as laws, to give sensible meaning to all their provisions, if that be practicable. 'The interpretation, therefore,' says Vattel, 'which would render a treaty null and inefficient, cannot be admitted;' and, again, it ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory." *Geofroy v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642. The construction contended for by the appellants not only fails to give sensible meaning to all the provisions of the treaty, but does violence to the natural and ordinary meaning of its language. When one nation "cedes" territory to another, it hands over the title and sovereignty, good as against all the world. But this does not necessarily determine in what way it shall be held by the new sovereign. As was said by Chief Justice Marshall in *Insurance Co. v. Canter*, 1 Pet. 541, 7 L. Ed. 254:

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of acquired territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose."

In determining the meaning to be attributed to the words "cede" and "foreign" herein, we must not confuse the principles of international and constitutional law. From the standpoint of international law, as regards other nations Porto Rico is annexed to the Union, and has become fully a part of the United States. The title to the soil is in us as exclusively as is that to any portion of this continent. Its political status is determined by the treaty. It is now a part of our dominion, undistinguishable from any other part of the United States, so far as other powers are concerned. But this international relation does not affect the status of the island from the standpoint of constitutional law. The soil became part of the United States by conquest. The treaty of cession only confirmed on the part of Spain a title already good against all the rest of the world. We have the authority of *Fleming v. Page* that acquiring the title to soil, making it part of the United States as regards foreign nations, does not bring it within the sphere of the constitution. If, then, it is not acquisition of soil which extends our constitutional boundaries, what does accomplish this result? In order to extend boundaries recognized by other nations, the extension of dominion by conquest is sufficient. To extend constitutional boundaries, there must be some extension of organic law to the inhabitants, or of institutions over the territory. The sphere of application of the constitution is determined, not by considerations of title to land, but by recognition of the status of its inhabitants. New territory is not brought under the constitution by acquisition of the soil; otherwise, *Fleming v. Page* could not have been decided as it was. This is done either by an incorporation of the inhabitants into the Union, or by an extension of our laws and institutions throughout the territory. This cannot be done by conquest, but only by legislation or treaty. *Fleming v. Page*. Here the treaty recognizes and makes complete the *de facto* title gained by conquest. The island is not thus brought under the constitution unless the treaty supplements the confirmation of title by an incorporation of the inhabitants into the Union under the constitution, or by the extension of our institutions. This the treaty fails to do. Instead of providing that Spanish residents who renounce their allegiance shall be incorporated as citizens,—the uniform course pursued hitherto when it has been desired to bring new territory into the Union,—the treaty stipulates that, in default of a declaration of allegiance to Spain, "they shall be held to have renounced it, and to have adopted the nationality of the territory in which they may reside." Thus they and the native inhabitants, practically the whole people of the island, are left to find a determination of their status in congressional action. The people of Porto Rico, instead of being incorporated into the Union by the treaty, are left in *statu quo*. Nor has there been any extension of our laws or institutions to the island. But at least one of these acts, brought about either by treaty or legislation, is necessary before any

change of status, before any application of the constitution, in Porto Rico. Until then the island remains, to use the language of the supreme court, "part of the United States, but still a foreign country."

It is strongly urged, by way of objection to effectuating the language and real intent of the treaty, that the United States has no constitutional authority to hold sovereignty over subject territory which it does not make part of itself under the constitution. This principle is attempted to be deduced, not from any general impossibility of owning territory without incorporating it as a part of the sovereign nation, but from the peculiar limitations claimed to exist upon our own sovereignty. Other nations rule and exercise full sovereignty over lands which they in no way annex to themselves as an integral part under their organic law. If the United States is to be denied this common attribute of sovereignty, it must be admitted that the treaty of Paris is so far forth unconstitutional. But, if our nation has this power in common with other nations, then the treaty is valid. We have seen that, before the treaty of Paris, Porto Rico was a foreign country, and that by the treaty of Paris its political status was to remain unchanged until congress should act. Until congress fixes its status otherwise, Porto Rico, so far as regards our constitution, is a foreign country. That it was so at the time of the treaty cannot be denied without running counter to the authority of the decision of the supreme court in *Fleming v. Page*, supra. That the treaty, if valid, left the constitutional status of the island unchanged, cannot be denied without doing violence to the meaning of its express terms, and adopting a construction which fails to give effect to all parts of the instrument.

The only remaining ground upon which it can be urged that Porto Rico's status has been changed is that the treaty is unconstitutional. Thus far in the history of our country no treaty has ever been adjudged invalid on this ground. A treaty is not only the law of our land, but also a contract of the United States with another nation. A court would not be justified in overruling the act of the treaty-making power unless the reasons for so doing were strong and imperative. The sole constitutional question is this: May our government by treaty accept the title and sovereignty over territory, and at the same time preserve its status as a foreign country, so far as its internal relation to us is concerned? Can we, in other words, hold sovereignty over territory without incorporating it into the United States? Counsel for appellant, in arguing that Porto Rico is a portion of this nation, rely chiefly on the case of *Cross v. Harrison*, 16 How. 164, 14 L. Ed. 889. They claim that it was there decided "not only that territory ceded by a treaty of peace becomes a part of the nation to which it is annexed, but that it ceases to be a foreign country, within the meaning of the tariff act, so that duties accrue under such an act upon goods brought into it from abroad." It is extremely doubtful whether any such doctrine can be deduced from that case. If it were to be assumed that such might be the effect of an unqualified cession, this principle would not apply in testing the constitutionality of a treaty which modifies the cession, and preserves the status of ceded territory as foreign. The contract between the United States and Spain in ex-

press terms qualifies what the appellants claim is the usual legal effect of cession. The opinion in *Cross v. Harrison* does not contain any discussion of this, the only question before us. Indeed, the constitutional questions which were discussed were not involved in the decision, because the only controversy was as to the authority of the military governor, after cession, to collect the regular duties in force throughout the United States without authority from congress, and congress had ratified his action. This alone would have been decisive. Beyond this, the only question involved in the discussion was the right of the collector under the military governor, during the interregnum, to levy on goods coming into the ceded territory the same duties as were enforced elsewhere in the United States. In what sense California was a part of the United States is not made clear. Justice Wayne indeed said:

"By the ratification of treaty, California became part of the United States. And as there is nothing stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which congress had passed to raise a revenue from duties on imports and tonnage." *Cross v. Harrison*.

But the suit related to the claims of foreign importers; the right claimed by them was to land goods free from duty in territory under the sovereignty of the United States, and so a part of the United States as to all foreigners; no question of the internal relation of California and the United States was raised; and it is not at all certain that these words of Justice Wayne do not mean simply that, as to foreign nations, California had become a part of the United States by perfected title, and therefore foreigners could not violate there the law allowing them liberty to trade with the United States under specified conditions. But, even if these words of the court were intended to describe the internal relation of the new territory, they were used in reference to the treaty by which California was ceded. That treaty not only did not negatively qualify the cession, but, on the contrary, contained such phrases as these: "Territories previously belonging to Mexico and which remain for the future within the limits of the United States as defined by the present treaty." Article 7. "In consideration of the extension acquired by the boundaries of the United States as defined in the 5th article of this treaty" (article 12), and "considering that a great part of the territories which by the present treaty are to be comprehended for the future within the limits of the United States" (article 11),—besides the general provision for the incorporation of inhabitants as citizens already mentioned (article 9, 9 Stat. 930). Apparently the intent of that treaty was to include California within the United States. Whatever is said in *Cross v. Harrison* on the relation of the ceded territory to the United States, so far as it is not merely obiter, serves simply to fix the effect of that and similar treaties of cession. But there is nothing in all this from which we can derive any authority to declare unconstitutional a treaty of cession which postpones the incorporation of the ceded territory as an integral part of the United States. The only phrase at all bearing on that issue is, "Inasmuch as there is nothing stipulated in the treaty with respect to commerce, it became instantly bound and privileged by existing tariff laws." This indicates that a treaty may make

provisions for tariff regulations not uniform with those existing throughout the Union, thus postponing the complete annexation of the territory under the uniformity clause in the constitution. *Cross v. Harrison*, therefore, upon the authority of which the appellants chiefly rely, does not bear at all upon the constitutionality of this treaty. The discussion of the constitutional question simply assumes that California had become part of the United States. The references to and interpretations of said decision in subsequent decisions of the supreme court show that the only point decided there was, as stated by Mr. Justice Bradley, "that the president, as commander in chief, had power to form a temporary civil government for California, as a conquered territory, and to impose duties on imports and tonnage for the support of the government and for aiding to sustain the burdens of war, which were held valid until congress saw fit to supersede them; and an action brought to recover back duties paid under such regulation was adjudged to be not maintainable." *Hamilton v. Dillin*, 21 Wall. 87, 22 L. Ed. 531. "It was held in the case of *Cross v. Harrison* that the sovereignty of California was in the United States, in virtue of the constitution, by which power had been given to congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,"—to show power of congress to govern it. *Catron, J., in Scott v. Sandford*, 19 How. 523, 15 L. Ed. 691.

The other case emphasized by appellants as bearing on this point is *Loughborough v. Blake*, 5 Wheat. 319, 5 L. Ed. 98. Reliance is placed on the following language of Chief Justice Marshall:

"It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, to levy and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States. Does this term [i. e. the "United States"] designate the whole or any portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia or the territory west of the Missouri is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of the constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States."

Inasmuch as the District of Columbia was carved out of states which were under the constitution, it has been strongly urged that these statements are mere dicta. Mr. Justice Marshall's proposition is that, since the power to levy taxes may and must be exercised throughout the United States, the limitation of the power must cover an equal area. But in no event could it be necessarily decisive as to whether we can hold the title to territory without making it a part of the United States.

No other decision of the supreme court has been cited as furnishing any authority to support the claim that this treaty is unconstitutional. The question is therefore an open one. On the one side it is contended that the United States may hold title to territory without incorporating it fully under its organic laws; on the other, that when it accepts

sovereignty the ceded territory at that instant becomes fully a part of the United States, without possible qualification or limitation. If the character of the acquisition may be limited, the attempt to preserve the foreign status of the island until congress shall determine the extent to which it is to be incorporated is constitutional. If cession, ipso facto, accomplishes an unqualified incorporation, Porto Rico is no longer foreign. If we cannot hold ceded territory without bringing it under the constitution, as an integral part of the United States, then we cannot give to Porto Rico practical independence,—a constitution and laws of her own, taxes of her own,—and hold merely the sovereignty, confined, perhaps, to control of foreign relations. If Porto Rico is still a foreign country, we might adopt that course. The treaty, if valid, leaves such a policy open to us. If it is a part of the United States, in the sense that appellants urge, we cannot grant independence unless we entirely renounce our sovereignty; for otherwise, under their contention, the island would be under the uniformity clause of the constitution, and we should be compelled to tax it uniformly with our own nation. Such a view of our constitutional limitations would make it impossible for us to accept from another nation a cession of territory on the condition that we should not tax it for a number of years. If cession works incorporation, and its effect cannot be limited, we cannot stipulate to hold the ceded territory without imposing upon it at once the burden of our excise laws and our tariff. Can we not, in acquiring territory, provide for free trade with its former sovereign for a time? Counsel for appellants contend that we cannot, and that such a provision would be unconstitutional. If this contention is well founded, if such territory is at once necessarily incorporated, then the stipulation in the treaty of Paris that the Philippines are to have free trade with Spain for 10 years is void, because in violation of the uniformity clause in the constitution. Then the treaty which ceded Louisiana was unconstitutional, as some of its opponents urged at the time, in its attempt to limit the incorporation of that territory to the extent of admitting to its ports certain Spanish and French ships on payment of smaller tonnage duties than would be required in other ports of the United States. Here, to this extent, Louisiana was kept apart from full union with our nation, that in this respect it was not bound by the uniformity clause in the constitution. A similar provision secured privileges for Spanish ships for 12 years in the ports of Florida when that territory was ceded, thereby granting that territory commercial advantages not in harmony with a full incorporation under the constitution. Are we to declare these treaties unconstitutional? Are we to say that the United States, as a sovereign nation, exercising full power to make war and treaties, is to be so limited that it cannot accept sovereignty without unconditional incorporation? This is what we must decide if we are to declare the treaty before us unconstitutional. If the treaties with France and Spain, sanctioned in the former by congressional resolution unquestioned in our courts and acquiesced in all these years, are valid precedents; if the treaty of Paris, giving Spain free trade with the Philippines, is constitutional,—then the treaty clause in question is not unconstitutional and void, and Porto Rico

is still, in its constitutional relations to us, a foreign country, until congress shall otherwise determine. It may be argued, however, that, as the treaty-making power has not stipulated as to rates of duty for the ceded territory, this power is not included in the subjects left to congressional discretion. But it is difficult to conceive any general language more apt to express an intention to leave to congress the determination of all such matters, than that used in the treaty. Porto Rico was a foreign country, and its inhabitants were foreigners, prior to the treaty. The treaty virtually provided either that the status of the island as a foreign country should continue, or that the status of its inhabitants as foreigners should continue, until the essentials of a change of condition should be determined by congress. No suggestion has been made as to how the treaty can have changed the status of the island as a foreign country, when it expressly provides that the inhabitants shall retain their foreign status. If this treaty must be so construed that the territory is incorporated into the United States, while the inhabitants are denied the political status and civil rights of citizens, the treaty must be declared unconstitutional, and in that case Porto Rico remains a foreign country, and the duties were properly assessed. But such a construction is not to be adopted if the language used will reasonably admit of any other interpretation. The natural and apparent meaning of the language of the treaty is that the territory is acquired, but not incorporated, and that it therefore remains foreign, with respect to customs duties, until further legislation. This is in accordance with the provisions of prior treaties. Therefore the uniformity clause of the constitution does not yet apply.

It has been assumed throughout this discussion that if Porto Rico was a foreign country, in the sense that the constitutional provision for uniform duties does not apply to it, it was a foreign country within the meaning of the tariff law. The term "foreign" is used in various senses. Thus, the different states are usually held to be foreign to each other, except as concerns international relations. Sister state judgments are for most purposes foreign judgments, and generally, for all purposes other than those specifically mentioned in the constitution, our states are foreign to each other. On the same principle Porto Rico remains foreign to the United States, except as provided by the treaty. As it has not yet been domesticated under the constitution, its status continues unchanged, except as to its relations with outside nations. While the term "foreign countries," as used in our tariff law, has not yet been judicially passed upon, it may fairly be presumed that, if the makers of that law could have foreseen the present conditions, they would have intended that the former relations of Porto Rico to the United States, as regards customs duties, should continue until changed by act of congress. The power to hold territory without incorporating it as an integral part under its organic law is an ordinary attribute of sovereignty. The independent states possessed it before the formation of the Union. This attribute of sovereignty they delegated to the federal government in the treaty and war making powers, and denied to themselves, in express terms. As was said by Mr. Justice Bradley in the *Legal-Tender Cases*, 12 Wall. 554, 20 L. Ed. 313:

"The constitution of the United States established a government, and not a league, compact, or partnership. It was constituted by the people. It is called a 'government.' In the eighth section of article 1 it is declared that congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or office thereof. As a government, it was invested with all the attributes of sovereignty. * * * The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country,—war, peace, and negotiations and intercourse with other nations,—all which are forbidden to the state governments. * * * Such being the character of the general government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which at the time of adopting the constitution were generally considered to belong to every government as such, and as being essential to the exercise of its functions. If this proposition be not true, it certainly is true that the government of the United States has express authority, in the clause last quoted, to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the government as constituted, and vindicating its authority and existence."

And again, in *Mormon Church v. U. S.*, 136 U. S. 42, 34 L. Ed. 491:

"The power to make acquisitions of territory by conquest, by treaty, by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government in its diplomatic negotiations had seen fit to accept relating to the rights of the people then inhabiting those territories."

The power exercised in this treaty, then, as an ordinary attribute of sovereignty, was granted by the states to the nation which was to represent them as independent in foreign affairs. Opposed to this view is the contention that, while the power to hold subject territory is an attribute of most sovereigns, it is not one of a republic. This argument is not drawn from a historic discussion of the question of the exercise of such power by republics (a ground from which it might, perhaps, be answered), but on the general principle that a government based upon the consent of the governed has the right to govern citizens, but no right to rule subjects; that the very purpose of such a government is to secure political and civil liberty, not to deny it. Conceding the full force of this contention, does it bear on the question? Even if we grant that our republic must insure throughout all territory under its dominion a republican form of government, does this prevent our holding territory without incorporating it into the United States? Cannot such territory, which is not given the political status of membership in our Union, be governed on purely republican principles? Could not its inhabitants have the same civil and political rights as those of the existing territories? It is answered that there would be no guaranty of these rights if this territory is not annexed to the United States under the constitution. But, even if the express guaranties did not apply, would those rights be of necessity entirely unprotected? The argument starts from the position that a republic cannot be allowed to govern without any restraint. In this very principle we may find the safeguard of such territory. If the United States tried to govern any territory in violation of the spirit pervading republican institutions, such action might be held illegal by courts

on the basis of this principle. It may be admitted that the constitutional guaranties of civil rights would apply to territory under the sovereignty, but not a part, of the United States. Certain civil rights which we believe belong to every one, are crystallized into the negative provisions of our constitution, in order to prevent any wrongful and improper use of our power, and these may well be held to control our power wherever it reaches. These considerations may be found to limit us in governing any territory. Whether they do or not, it is not necessary here to decide. If they do, it will be because we cannot violate the principles of government imbedded in our institutions, not because Porto Rico is a part of the American nation. It will be for the reason thus stated by Mr. Justice Bradley in *Mormon Church v. U. S.*, *supra*:

"Doubtless congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the constitution, from which congress derives all its powers, than by any express and direct application of its provisions."

The treaty cannot be considered unconstitutional, therefore, on the ground that we have no right to govern territory without any restraint, and perhaps cannot violate anywhere the negative provisions of the constitution against infringement upon ordinary civil rights. If the treaty-making power acquires territory, and congress wishes to hold and govern it in accord with constitutional principles, yet without bringing it into membership in the Union and without subjecting it to our national taxation, there seems no valid constitutional reason why this cannot be done. It may be best for us not to make its citizens fully our citizens. It may be more just towards it not to subject it to paying its share of taxation. In the case of Porto Rico, with her tobacco and rum industries, such share would probably be out of all proportion to that paid by other districts. Unless we tax her for national purposes, there is no just claim on her part for the protection of the constitutional provision for uniform taxation. If we consider it for our and her best interest to keep her apart from the land which must bear the burden of taxation, why should we not have the power to do so? It may be the only just course to pursue. Thus wisest statesmanship and highest consideration for the rights of people under our charge may influence us to refrain from making ceded territory part of our nation. Twice before in our history have we found it necessary to qualify and postpone complete incorporation into the Union. It would be a narrow construction of the constitution which in such a case would find in some "underlying principles" a veto upon an attempt to act for the highest interest of our nation and the people intrusted to its care. The question to be decided is, not what is expedient, not what the people of the United States may desire, not what is the duty of congress, not a matter of individual preference. It is a question purely of constitutional law. That we have the power to govern without the obligation of uniform taxation may be an unfamiliar proposition, but it is so because we have never before had occasion to use the power to the same extent. The constitution makers may not have thought of it, yet, as we have seen, it is

an incident of full sovereignty commonly exercised at the time the Union was formed,—one which is now prohibited to the states, and so must have passed to the federal government with the power to make war and treaties, to which it is incident; for the framers of the constitution intended that instrument, not as a limitation upon the freedom of the new sovereign in acting for the states in foreign affairs, not as a check to growth, but as the organic law of a nation that can live and grow. To deny this power to govern territory at arm's length would be to thwart that intention to make the United States an unfettered sovereign in foreign affairs; for, if we wage war successfully, we must some time become, as many think we are now, charged with territory which it would be the greatest folly to incorporate at once into our Union, making our laws its laws, its citizens our citizens, our taxes its taxes, and which, on the other hand, international considerations and the sense of our responsibility to its inhabitants may forbid us to abandon. The construction of the constitution which would limit our sovereign power would force us into a dilemma between violating our duty to other nations and to the people under our care, on the one hand, and violating our duty to ourselves, on the other. That construction would in such case imperil the honorable existence of our republic. It could not have been intended by those who framed our constitution that we should be born a cripple among the nations.

There has been found, then, no reason, either on principle or authority, why the United States should not accept sovereignty over territory without admitting it as an integral part of the Union, or making it bear the burden of the taxation uniform throughout our nation. To deny this power is to deny to this nation an important attribute of sovereignty. The intent of the constitution is to make the federal government a full sovereign, with powers equal to those of other nations in its dealings for the states in foreign affairs. If the United States has this power,—and we have found no reason to deny it,—the treaty of Paris is constitutional. It is unnecessary to determine what limitations may control us in governing such territory. It is sufficient that we have the power to govern it without subjecting it to the burden of our national taxation. There is, then, no ground for declaring unconstitutional the treaty of cession, which accepts sovereignty on the condition that the status of the ceded territory as foreign country shall be preserved as it was until congress shall determine it. The treaty of Paris, then, is valid. It left the political status of the inhabitants of Porto Rico unchanged. Their status at the time of cession was, as declared by the supreme court, that of inhabitants of a foreign country, as regards the constitution of the United States, and within the meaning of the tariff acts. The treaty of cession did not change that status. And, as congress had not acted at the time of this importation, Porto Rico was still a foreign country, in the sense of the tariff law, and duties were lawfully assessed on the articles imported therefrom. The decision of the board of general appraisers is affirmed.

LIEBIG'S EXTRACT OF MEAT CO., Limited, v. LIBBY, McNEILL & LIBBY et al.

(Circuit Court, N. D. Illinois. July 5, 1900.)

1. TRADE-MARKS—COMMON-LAW RIGHTS.

The royal pharmacy in Munich having used the name "Liebig" for many years to designate the meat extract manufactured by it, with the permission of Baron Liebig, the originator of the process of manufacture, his consent during the same time to the use of the name by the Liebig's Extract of Meat Company, Limited, cannot lay the foundation for a common-law right in the latter company to the exclusive use of such name as a trade-mark.

2. SAME—INFRINGEMENT—PROCUREMENT BY OWNER.

The placing by a defendant upon wrappers inclosing its goods of a fac simile signature in imitation of complainant's registered trade-mark, in compliance with a special order given by agents or detectives acting for the complainant, does not constitute an actionable infringement of the trade-mark.

3. SAME—UNFAIR COMPETITION.

Complainant, Liebig's Extract of Meat Company, Limited, had sold its product in the markets of the United States for many years, and it had attained a wide reputation, when defendant entered the market with a similar extract, distinctively dressed, but subsequently sent out goods in a package so similar to complainants in color and general appearance as to show that deception was intended, and liable to result, in the sale of the goods to ultimate purchasers; and it further used on such packages, as the name of the producer, the fictitious title of "Liebig Fluid Beef Co." Held, that it was guilty of unfair competition, which entitled complainant to an injunction.¹

In Equity. Suit for infringement of trade-mark and for unfair competition. On final hearing.

Arthur Steuart and James L. Steuart, for complainant.

Bond, Adams, Pickard & Jackson, for defendants.

SEAMAN, District Judge. The issues involved in this case are interesting and important, and, after hearing the oral arguments, which were quite full, and reading the briefs, I have examined such of the testimony as seemed essential to complete understanding of the controverted facts. Regarding the allegations of the bill sufficient for raising either issue presented by the testimony,—infringement of trade-mark rights and unfair competition,—I deem it unnecessary to review the various propositions argued in the briefs, or the testimony at large, and state my conclusions only on the facts and law so far as material for a decree.

1. As to any common-law trade-mark right in the name "Liebig" in connection with "extract of meat or beef": This collocation came into use under the following circumstances: Baron Liebig was an eminent German chemist, and president of the Royal Academy of Sciences at Munich, and became interested philanthropically in the subject of producing a meat extract from material otherwise wasted, which would greatly benefit mankind. He published in 1847 a formula by which an extract was obtained free from gelatin and fat, and this is substantially the present process of the complainant.

¹ Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper & Bros.*, 30 C. C. A. 376.

His writings upon the subject were extensive and well known. Whether he was the originator of the formula, in that view, is not material for the purposes of this case, as the evidence is clear of its popular acceptance in association with his name, and of numerous publications of like purport prior to the use of the name by the complainant or its alleged predecessors in title, and the publications on the part of the complainant have so asserted constantly. Moreover, this extract was manufactured at the royal pharmacy in Munich (owned by the king, with Dr. Pettenkofer as director) from 1848 up to 1865, when the Fray Bentos Company commenced operations; and independent manufacture was continued at the royal pharmacy, under the name of "Liebig's Extract of Meat," long after 1865,—the use of such name being, by permission of Baron Liebig, given to Dr. Pettenkofer in 1852, and thereafter so employed at the royal pharmacy. In 1863 the Fray Bentos Company was organized to manufacture this extract in South America on a large scale, entered into operation in 1865, and was succeeded by the complainant company, an English corporation, in 1866; the operations of the latter company commencing in 1867, and since continuing with greatly enlarged production, and reaching the markets of the world, including sales in the United States, which have become very extensive. These corporations successively named their product "Liebig's Extract of Meat," with the assent, unquestionably, of Baron Liebig and Dr. Pettenkofer, who gave their names, for a consideration, to the *inspection* of the product as sent to the German headquarters for such purpose and for distribution; and the royal pharmacy served as a distributing agent with the goods so named, although continuing on its part the same use for its separate production, which it is claimed was carried on only through the early years, and up to a time when a sufficient supply for their market could be furnished by the complainant. I find no testimony which shows devolution of title from the royal pharmacy in the use of this name for the extract, nor that such use was treated or referred to as material in any agreements prior to a grant of such right made by Baron Liebig individually to the complainant by an instrument dated April 12, 1866; and this is clearly insufficient foundation for an exclusive common-law right, in view of the prior use for many years in the royal pharmacy under a grant which remained in force and in use thereafter. Both English and continental decisions relating to the trade-name right asserted here on the part of the complainant are brought into this record, and the former are peculiarly instructive upon this point, namely, *Meat Co. v. Hanbury*, 17 Law T. (N. S.) 298, and *Same v. Anderson*, 55 Law T. (N. S.) 206, culminating in the House of Lords decision in 1885, and are all against such right. The continental decisions sustain the right; but, founded upon registries of trade-mark, are not strictly applicable, and clearly not controlling for the point under consideration here. The complainant entered the markets of the United States in the light of the facts recited, and of the English decisions as well, and cannot maintain exclusive trade-mark right to the designation of extracts of meat under the generic name of "Liebig"; and this, aside from any question of possible limitation of

its rights through the registration of certain trade-marks in this country. In this connection the objection of the complainant to the pleadings and matters contained in the records of the English cases offered on the part of the defendant is sustained, to the extent of excluding them from consideration as evidence in this case. Excepting possibly the sworn answer of Rotter in the Anderson Case (which may be admissible by way of an admission on behalf of the complainant), they can be considered only to ascertain the scope of the decisions as precedents, and not as tending to prove any facts in controversy here; and in reaching the conclusion above indicated the Rotter answer is likewise left out of consideration. *City of Carlsbad v. Kutnow*, 35 U. S. App. 753, 18 C. C. A. 224, 71 Fed. 167.

2. As to the trade-marks registered in the United States: The contention relates mainly to the fac simile signature, "J. V. Liebig" (referred to as the "signature in blue"), stamped diagonally across the face of the wrapper. Infringement is alleged in two forms of "Walker" exhibits and one "Lansing" exhibit, but no cause of actionable infringement is clearly established against the defendant. The "Lansing" form was made by employes of the defendant upon a special order given by agents or detectives acting for the complainant, and, however competent as evidence tending to show intention or state of mind on the part of the defendant, the making, under the circumstances shown, does not constitute infringement of the trade-mark. The Walker form of signature, shown in the admitted label, "Walker Wrapper No. 2," is not such an imitation in signature as to constitute infringement per se of the registered trade-mark. If the Walker signature, presented in the bill as "Complainants' Exhibit Defendant's Wrapper," is so manifestly an imitation as to infringe this trade-mark, the evidence, mostly circumstantial, offered to charge the defendants with such making, is deemed insufficient to overcome the testimony on the part of the defendants by which their participation is positively denied, and Walker and other witnesses testify to their independent production by Walker in New York. I refrain from further comment on the testimony of Walker, as another action is pending which involves his conduct.

3. Of unfair competition: The manufacture of the beef extracts in question is open to all the world, and the manufacture in accordance with the Liebig formula is equally open to the defendants under that name, "subject, however, to the condition that the name must be so used as not to deprive others of their rights, or to deceive the public, and therefore that the name must be accompanied with such indication that the thing manufactured is the work of the one making it, as will unmistakably inform the public of that fact." *Singer Mfg Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. The complainant has possessed in the United States a trade in its products for more than 30 years, and for many years its trade has been of great extent, aided by large expenditures for advertising. The defendant entered the market with an extract which was well distinguished in the marking and the color of the package, but subsequently, in the Walker transaction, at least, adopted a dress for the goods which clearly simulated that of the

complainant, and was calculated to deceive. It assumed as the name of the producer the fictitious title of "Liebig Fluid Beef Co.," with the label, stamped in blue, "J. Walker," and the color and general appearance of the package closely resembled that of complainant. It is true that "Union Stock Yards, Chicago, U. S. A.," appears on this label; but, taking all the circumstances, it is evident that deception was both intended and liable to arise, in palming off the goods upon ultimate purchasers as those of complainant. The other exhibits, which bear the same color and fictitious title, taken with the shape and general appearance, although without blue signature, are deemed obnoxious and inexcusable under all the circumstances. *Charles E. Hires Co. v. Consumers' Co. (C. C. A.) 100 Fed. 809.* I am of opinion that the complainants are entitled to a decree for the protection of their good will, enjoining the defendants from such simulation of the label and name of the complainant. The injunction will apply to each of the forms of outer wrapper above indicated, but will not extend to jars or pots in use, nor to the neck labels, inner labels, or certificate, as neither of these is deemed objectionable, within the rule and to the extent demanded for such protection.

The question whether an accounting shall be ordered, in the view indicated, and under the circumstances shown (with exclusive agency in Corneille, David & Co.), is left to be determined in connection with the framing of a decree, when the question of costs will also be settled. Let the decree be prepared by counsel for complainant, to be submitted to the other side, and a hearing will be granted at such time for the final form of decree.

HENNESSY et al. v. WILMERDING-LOEWE CO,

(Circuit Court, N. D. California. June 19, 1900.)

No. 12,588.

1. TRADE-MARKS—SUITS FOR INFRINGEMENT—DAMAGES RECOVERABLE.

The amount recoverable by the owner of a trade-mark from a willful infringer is not limited to the profits made by the defendant, but includes also the damages resulting to the complainant from the injury to his business or the reputation of his goods.

2. SAME—EXEMPLARY DAMAGES.

Exemplary damages cannot be awarded by a master on an accounting directed in a suit in equity for infringement of a trade-mark.

3. SAME—COSTS.

A decree for the complainant in a contested suit for infringement of a trade-mark carries all costs, in accordance with the usual rule in equity, unless under exceptional circumstances.

In Equity. Suit for infringement of trade-mark. On exceptions to master's report on accounting.

Adolph L. Pincoffs and James L. Hopkins, for complainants.
Naphtaly, Friedenrich & Ackerman, for respondent.

MORROW, Circuit Judge. The complainants in this case are citizens of France, and the respondent a corporation organized under the

laws of this state, having its principal place of business at San Francisco, Cal. Complainants are the manufacturers of a liquor known as the "Hennessy Brandy," and in the bill of complaint allege that respondent has offered for sale and sold a concoction or compound in imitation of complainants' brandy, under the name of "Hennessy Brandy," and has used fac similes of complainants' trade-names, devices, and labels, and, with intent to defraud and deceive the public, has caused its compound to be put up in cases like complainants', and in bottles precisely like those of complainants. The bill further alleges that such imitation is calculated to deceive and has deceived many persons, and misled consumers of complainants' brandy, to the damage of complainants; that the article put up and sold by respondent is inferior in quality to that of complainants, and that the reputation of complainants' brandy is injured by the acts of respondent, and complainants suffer damage thereby. The bill prays that it may be decreed that respondent account for and pay over the income or profits derived from the violation of complainants' rights, together with the damages sustained by complainants, and that a writ of injunction issue, perpetually restraining respondent from a repetition of the acts complained of. The answer of the respondent specifically denies the material allegations of the bill, and, by way of special reply to the bill, alleges that in 1894 one J. C. Wilmerding was engaged in business as a liquor merchant in the city and county of San Francisco, under the firm name of Wilmerding & Co., and upon his decease his executors sold the entire stock of merchandise on the premises formerly occupied by him to the firm of Loewe Bros., and among this stock was a quantity of Hennessy brandy; that the corporation respondent and none of its officers was aware that this was not the genuine brandy manufactured by complainants until about two weeks prior to the filing of the complaint herein, and that this brandy included not more than 24 bottles of spurious brandy, falsely called "Hennessy Brandy"; that James L. Hopkins, one of complainants' solicitors, shortly before the filing of the bill of complaint called at respondent's place of business and desired to purchase a few bottles of Hennessy brandy; that Joseph M. Loewe, a member of the corporation respondent, was about to sell him one of the spurious bottles, but, on being informed by an employé that it was not genuine Hennessy brandy, refused to sell it; that thereafter some person, on behalf of the said Hopkins, called at the respondent's store, and, having asked for Hennessy brandy, was served with the imitation Hennessy brandy by one of respondent's employés, who was ignorant of its spurious character, and therefore sold it to the said person; that such sales did not exceed two dozen bottles, and that no other Hennessy brandy has ever been kept or offered for sale by the respondent; that, when respondent was notified by said Hopkins that the brandy purchased was not genuine, it offered to exhibit its books and accounts for the purpose of showing said Hopkins that it never at any time had more than two dozen bottles of said brandy, and, having explained the means by which this spurious brandy came into its possession, offered to compensate complainants to the extent of the damage suffered by

the said sale; that complainants thereupon demanded so exorbitant a sum that respondent refused to pay it. An interlocutory decree has been entered perpetually enjoining respondent from handling, offering for sale, or selling any liquor falsely purporting to be brandy or cognac bottled by complainants, or any liquor not bottled by complainants and bearing complainants' label, or a colorable imitation of it. Reference has also been ordered to the master in chancery to take, state, and report an account of the profits and damages herein. The master, in his report upon the accounting, finds from the testimony that "the sales made by defendant of imitation Hennessy brandy were made with full knowledge of the fact that the brandy so sold was counterfeit, and with the intention to derive an unjust profit therefrom, and in wanton disregard of complainants' rights." He awards complainants \$50 as damages for the infringement of their trade-mark, and the injury to the reputation of their brandy resulting from respondent's wrongful acts, and finds the profits on the sales of imitation Hennessy brandy to be \$28.60. The master recommends, therefore, that a judgment be entered for complainants and against respondent in the sum of \$78.60. In the briefs filed by complainants' counsel upon accounting before the master, it was contended that the complainants were entitled to punitive damages in addition to an award of damages for the injury to the reputation of their brandy by respondent's acts, for the purpose of deterring others from the same fraudulent acts. The master has decided against this contention, declaring that he is limited on accounting to an assessment of the actual damages suffered by complainants, and that he is not empowered to award punitive damages against the respondent. The report of the master upon the accounting having been filed, the complainants have excepted thereto. The grounds of complainants' exception are stated to be that the master has erred in his findings, that he is limited upon accounting to the assessment of the actual damages claimed by complainants, and that he may not award punitive damages. Complainants ask that the report of the master be vacated, and that he be directed to assess such punitive or exemplary damages as the facts warrant. Respondent has also filed an exception to the report of the master, and particularly to that part of it which decides that the sales of counterfeit Hennessy brandy were made in wanton disregard of complainants' rights. Respondent maintains that this decision is not sustained by the evidence, which it contends shows that respondents never acquired or owned any brandy in imitation of complainants' brandy, except the two cases purchased from the estate of J. C. Wilmerding, deceased, as admitted in the answer; that respondent sold only 18 bottles of this imitation brandy, and those because respondent and its employé who made the sale were in ignorance of the fact that they were counterfeit; and that no sale had been made in wanton disregard of complainants' rights. Respondent further excepts in regard to the part which awards to complainant \$50 damages for injury to the reputation of complainants' brandy, and says that the master has committed error in awarding any damages in addition to the profits realized on the 18 bottles of imitation brandy. Re-

spondent asks that complainants have judgment for no greater sum than \$28.60, and that the costs of the accounting be taxed against complainants.

The testimony on file does not support the first of respondent's objections. The report of the master is most comprehensive upon this point, and contains a very full analysis of the testimony upon which his conclusions are based. Respondent insists that the sales of imitation brandy were made by an employé in ignorance of the fact that the brandy was spurious. This employé, Rosenberg, testified that he has been a secretary of the respondent corporation since its incorporation in 1895, that he has had the supervision of buying the case goods of the establishment, and that he had for 13½ years prior to the incorporation of the respondent been bookkeeper of the firm of Loewe Bros., of which Joseph M. Loewe, manager of the respondent corporation, had been a member from 1889 up to the time of the incorporation of the respondent. The spurious liquor was distinguished by the word "Lyons" marked in the inventory against the two cases of the imitation brandy. Under these circumstances, it is impossible to arrive at any other conclusion than that of the master,—that this employé had full knowledge of the two cases of imitation Hennessy brandy at the time he made the sale to the agent of Hopkins. He sold the spurious liquor to this agent upon three several occasions, and on each of these occasions as genuine Hennessy brandy. It appears also from the testimony that the entries in the inventories of the goods purchased from the Wilmerding Company relating to the counterfeit brandy are in the handwriting of Joseph M. Loewe, the manager of the respondent corporation, which inventory was taken some four years before this suit was brought, and in spite of which the answer of the respondent corporation, sworn to by Loewe, states:

"That among the merchandise so purchased was a quantity of Hennessy brandy; that this defendant did not, nor did any of its officers, learn or know that any portion of said brandy was not the genuine brandy of complainants until about two weeks before the filing of the bill of complaint herein."

This testimony does not tend to establish the bona fides of respondent, nor to support its contention that it is the victim of a mistake arising from the ignorance of its salesman. On the contrary, the facts of the case, as they appear in the testimony, entirely sustain the findings of the master.

With regard to that part of the master's report which awards complainants \$50 damages for injury to the reputation of their brandy, respondent objects, and contends that the master is not authorized by law to impose damages exceeding the profits realized on the 18 bottles of spurious brandy. The interlocutory decree herein orders a reference to the master "to take, state, and report an account of profits and damages herein." According to respondent's contention, the duty of the master extends to an accounting of the profits only. In the case of *Vulcanite Co. v. Van Antwerp*, 9 O. G. 497, Fed. Cas. No. 5,600, it was decided that the terms "profits" and "damages," as used in the patent act, are not convertible. The United States circuit court for the district of New Jersey, in deciding that case, said:

"'Profits' doubtless refer to what the defendant has gained by the unlawful use of the patented invention, and 'damages' to what the complainant has lost."

The master cites various authorities in support of his report, which tend to show the same distinction in trade-mark cases between "profits" and "damages" as is expressed in the patent case just cited. In *Manufacturing Co. v. Gato*, 25 Fla. 886, 7 South. 23, the court said:

"A party whose trade-mark has been violated is entitled to recover all profits realized by the wrongdoer from sales of the spurious article, and also damages resulting from such violation."

In *Sawyer v. Kellogg* (C. C.) 9 Fed. 601, it is said:

"We have no doubt about the propriety of a reference, or of the liability of the defendant. If it can be shown on the accounting that profits were made by his work and labor, or that damages resulted to the complainant therefrom, * * * and if the defendant has damaged the complainant by the unlawful use of the trade-mark, the nature and extent of the damage is a proper subject of inquiry."

In *Benkert v. Feder* (C. C.) 34 Fed. 534, Judge Sawyer said:

"The trade-mark sells the whole article, however inferior or injurious in that particular, and prevents the sale of the owner's goods of equal amount. At least, that is the plausible purpose and the natural tendency, whether always accomplished or not; and the injured party should have at least the whole profit resulting from the wrongful act, and such I understand and hold the rule to be. The damages may be much more, arising from destroying the reputation of the owner's goods."

See, also, *Graham v. Plate*, 40 Cal. 593.

In *Brown, Trade-Marks* (2d Ed.) p. 503, it is said:

"Compensatory damages should be given. The proper measure of damages in case of violation of a trade-mark is generally the profits realized upon the sales of the goods to which the spurious marks are attached. * * * The actual damages would seem, as a general rule, to be all that could be reasonably claimed. There may be exceptions. Cases may arise where the circumstances are aggravated, and such as to repel altogether the bona fides of the infringement. Each case must necessarily depend upon its own circumstances."

The case at bar appears to come within the scope of the law as stated in the extract just cited. Where the circumstances are aggravated, complainants are entitled to damages for injury to the reputation of their goods. This is such a case. Full compensation requires that not only should an account be taken of the profits, but that the damage inflicted upon the reputation of complainants' goods by the sale of respondent's compound under an imitation of complainants' trade-mark should be assessed by the master. This assessment the master has made, and fixed the damages at the sum of \$50, which this court considers to be a reasonable amount, in view of the circumstances, and for which the master has given sufficient reasons.

Complainants, in addition to compensatory damages, demand punitive or exemplary damages, and the master has decided that he is not empowered to grant these. The American and English Encyclopædia of Law, under the title "Trade-Mark," in volume 26, p. 518, says, "Exemplary or vindictive damages cannot be recovered." In connection with this is cited *Taylor v. Carpenter*, 2 Woodb. & M. 21, Fed.

Cas. No. 13,785 (see *Id.*, 11 Paige, 292; *Id.*, 2 Sandf. Ch. 603), where it is said by Woodbury, Circuit Justice:

"On the question of damages, however, in respect to giving 'exemplary' ones, there is some doubt whether the charge is in the exact form deemed proper under modern analyses and decisions on this point. * * * That the jury should have given more than nominal damages, I have no doubt; and I have as little doubt that there were materials enough in the case from which to estimate actual damages, such as the probable extent of sales by the defendant under these marks, and the loss of sales and profits therein by the plaintiffs. The jury would, in a case like this, if a known and deliberate imitation, often renewed and very prejudicial to the plaintiff, not be very nice in their data and inferences, but be sure to give enough to cover all losses and prove an ample indemnity. * * * Not 'smart money' or 'vindictive damages,' but full atonement for the wrong done. * * * In a case like this, if in any, no reason exists for giving greater damages than have actually been sustained, or what have been called 'compensatory.'"

Complainants' counsel, on the other hand, cite the opinion of Lacombe, Circuit Judge, in *Publishing Co. v. Monroe*, 19 C. C. A. 429, 73 Fed. 196, 201, to the following effect:

"Plaintiff in error contends that the court erred in instructing the jury that it might award exemplary damages. That in certain classes of cases juries are authorized to give punitive or exemplary damages, to punish a wrongdoer and to deter others from the commission of a like wrong, is a well-settled law in the federal courts and in the courts of this state. *Day v. Woodworth*, 13 How. 370, 14 L. Ed. 181; *Railroad Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374; *Voltz v. Blackmar*, 64 N. Y. 440. In such cases exemplary damages may be given, in addition to what may be proved to be the actual money lost of the plaintiff. It is contended, however, that, when no actual damages are proved, exemplary damages should be allowed. In support of this proposition, three cases are cited from the Texas Reports, but the law of that state is peculiar on the subject of exemplary damages (*Sedg. Dam.* § 359, and cases there cited), and its decisions inapplicable where a different law prevails. Of the other cases cited on the brief, *Graham v. Fulford*, 73 Ill. 596, was an action on a special statute. *Kuhn v. Railroad Co.*, 74 Iowa, 141, 37 N. W. 116, *Stacey v. Publishing Co.*, 68 Me. 287, and *Maxwell v. Kennedy*, 50 Wis. 649, 7 N. W. 657, sustained the contention of the plaintiff in error. They are, however, at variance with the theory upon which exemplary damages are awarded in the federal courts, namely, as something additional to and in no wise dependent upon the actual pecuniary loss to the plaintiff, being frequently given in actions where the wrong done to the plaintiff is incapable of being measured by another standard. *Day v. Woodworth*, *supra*; *Wilson v. Vaughn*, 23 Fed. 229."

In the above case the plaintiff had sued for damages in an action at common law, and the jury were instructed that they might, under the circumstances, award exemplary damages. It was held that it was not error to instruct the jury that they might award exemplary damages if they found that the circumstances showed wanton disregard of plaintiff's rights. But the case under consideration is an action in equity, and the decision of the court in *Publishing Co. v. Monroe* cannot be considered as applicable. The case of *Day v. Woodworth*, 13 How. 369, 14 L. Ed. 181, cited in *Publishing Co. v. Monroe*, was also an action at law, in which it was decided that the jury might give exemplary damages in an action of trespass.

There does not appear to be any example of a case in equity in which a master, upon an accounting, has acted as a jury in a case at law,

and awarded punitive damages. The complainants in the case at bar might have chosen to prosecute their rights by an action at law. But they have decided to apply for relief to a court of equity. The functions of a master on an accounting do not include the imposing of exemplary damages by way of punishment. They are confined to the estimation of the profits realized by the infringer, on the one hand, and of such damage as has been suffered by complainants, on the other, for the purpose of giving him compensation therefor. Complainants are not entitled to an award of punitive damages. Respondent contends that it ought not to be compelled to pay the costs of the accounting, upon the ground that its infringement was inadvertent, and that it discontinued such infringement directly it was notified by complainants. The alleged inadvertence of the infringement has been completely disposed of by the report of the master adversely to respondent's contention. In *Sawyer v. Kellogg* (C. C.) 9 Fed. 601, Nixon, District Judge, said:

"As to the matter of costs, we find nothing in this case to take it out of the ordinary rule that a decree for an infringement and an injunction carries costs. The only reason suggested by the counsel for the defendant was that no demand was made before suit that the defendant should cease to use the label. We have never understood that in such cases a demand was necessary, nor that an infringer who stoutly contests the suit to the end should be relieved from the payment of the costs which have been incurred in consequence of his wrongdoing and litigation."

There has been no formal submission on the part of the respondent, accompanied by an offer to pay the accrued costs, and the facts do not warrant any departure from the ordinary rule that the losing party pays all costs. The report of the master will therefore be confirmed, and the costs on accounting will be taxed in favor of complainants.

REESE et al. v. ZINN et al.

(Circuit Court, D. West Virginia. July 7, 1900.)

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP OF PARTIES—FORMAL PARTIES—PLEA IN ABATEMENT.

The fact that merely formal parties, against whom no relief is sought, and who are residents of the same state with the real defendants, are made defendants, when they might properly be joined as plaintiffs, will not defeat the jurisdiction of the federal court, on the ground that the parties on one side are not all citizens of different states from those on the other.

2. SAME—AMOUNT IN CONTROVERSY.

Allegations in a complaint for the cancellation of a lease, and to enjoin the lessees from using the premises, that the value of the leased premises is \$10,000, and that the rental value of the property is \$2,400 a year, is sufficient to give jurisdiction to the federal court, where the action is between citizens of different states.

3. LEASE—FORFEITURE—ABANDONMENT—CANCELLATION.

Where the lessee has not only forfeited his rights under the lease, but has abandoned the same, the lessor is entitled to have a cancellation of the lease in equity.

4. LEASE—MUTUALITY—VALIDITY.

A lease which puts it in the power of lessee to terminate the lease at will is void for want of mutuality.

In Equity.

D. H. Leonard, Charles T. Caldwell, and F. A. Baldwin, for plaintiffs.

Roberts & Carter, for defendants.

JACKSON, District Judge. This case is submitted, first, upon the defendants' plea to the jurisdiction of this court, and assigns two reasons why the court should not entertain the jurisdiction: First, that A. L. Hill and A. J. Hill, who are made defendants to this bill, are improperly joined, and should be made plaintiffs, as no relief is asked against them in said bill, they being citizens and residents of the same state as the defendants; second, that the amount in controversy does not exceed the sum of \$2,000, exclusive of interest and costs.

As to the first ground, it is apparent, from both the bill and answer in this case, that A. L. Hill and A. J. Hill are really not necessary parties to this action, and are merely formal parties. There is no relief sought against them. It is well settled that formal parties can be omitted or transposed in the pleadings, or they may be joined plaintiffs or defendants, without ousting the jurisdiction of the court. *Wormley v. Wormley*, 8 Wheat. 421, 451, 5 L. Ed. 651; *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593; *Railroad Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932; *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963; *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411. There are numerous decisions, subsequent to the cases cited, which sustain the same principle. For this reason, the court overrules the plea in abatement in this case.

As to the second ground, that the amount in controversy is insufficient to give this court jurisdiction, the bill upon its face alleges the valuation of the property to be \$10,000, and the lease entered into be-

tween the Hills and the South Penn Oil Company, on the 11th day of May, 1895, shows the rental value of the property, without any oil developments, to be \$2,400 a year; in addition to which the evidence tends to show that by reason of its proximity to other oil properties, and it being in the oil field, the value of the property is largely in excess of the amount required to give this court jurisdiction.

The court, without intending to file an elaborate opinion in this case, will content itself upon this occasion merely to state its conclusions upon the merits of the controversy. The court is therefore of opinion that the plaintiffs are entitled to relief under the bill filed in this case—First, because the parties who claim under the lease executed to the South Penn Oil Company, dated on the 11th day of May, 1895, have, by the terms and provisions of that lease, forfeited their rights, and not only forfeited their rights, but have abandoned the lease; second, because the contract is void for want of mutuality, for the reason that it puts it in the power of the lessee to terminate the lease at will, and thereby confers the same power upon the lessor. This principle is well settled by numerous decisions, both in our own courts, as well as courts of other states. 12 Am. & Eng. Enc. Law, 757; *Kelly v. Waite*, 12 Metc. (Mass.) 300; 2 Bl. Comm. 146; *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759; *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 95; *Eclipse Oil Co. v. South Pennsylvania Oil Co.* (W. Va.) 34 S. E. 923.

For the reasons assigned, the court is of opinion that the prayer of the bill should be granted; that the lease to the South Penn Oil Company, of May 11, 1895, should be canceled and held for naught; and that the lease to M. G. Zinn, of May 16, 1899, is also void for want of mutuality, and was forfeited for nonpayment of rental, and should be canceled and held for naught; and the injunction should be perpetuated, restraining and inhibiting all those claiming under said leases from further operating or asserting any rights under them.

COMMERCIAL BANK OF AUGUSTA v. SANDFORD et al.

(Circuit Court, D. South Carolina. June 12, 1900.)

1. TAXATION—CONSTRUCTION OF STATUTES.

Statutes imposing taxes are to be strictly construed, contrary to the rule applicable to remedial statutes, and the powers granted to officers thereby must be strictly executed.

2. SCHOOL DISTRICTS—MODE OF LEVYING TAXES—SOUTH CAROLINA STATUTES.

Act S. C. Dec. 24, 1888 (20 St. at Large, p. 49), amended and re-enacted in 1893 (21 St. at Large, p. 402), which relates to school districts, and, among other things, requires the presentation of a petition to authorize the levy of a special tax in a district, and which further provides that it "shall not interfere with any school district which has heretofore been created by special act," being a general statute, does not affect the powers of a district subsequently created by a special act, which itself prescribes the procedure for the levy of a special tax in such district; and a tax levied in the manner so prescribed is valid, although no petition therefor was presented.

3. TAXATION—VALIDITY OF TAX SALE—ACTS OF OFFICER DE FACTO.

A sale of lands in South Carolina under a tax execution directed to a sheriff is not unlawful because made by a person who acts as a deputy,

with the approval of the sheriff, although his appointment as deputy has not been confirmed by the judge of the circuit court, as required by statute, but his acts are valid as those of an officer de facto.

4. SAME—STATUTORY LIMITATIONS—SALE OF EXCESSIVE QUANTITY OF LAND.

Under the statute of South Carolina (Rev. St. § 347) providing that a sheriff having a tax warrant for collection shall seize and sell so much of the property of the delinquent taxpayer "as may be necessary to raise the sum of money therein named and charges thereon," the limitation is mandatory, and a sale of a tract of land worth \$2,500, and readily capable of division, to satisfy a tax warrant calling for only about \$30, is unauthorized, and voidable by the landowner.

5. MORTGAGES—RIGHT OF MORTGAGEE TO ACCOUNTING FOR RENTS.

A mortgagee of land cannot require a purchaser of such land at tax sale to account for rents received while in possession under his tax deed.

6. EQUITY—DECREE BETWEEN CO-DEFENDANTS—NECESSITY OF CROSS BILL.

A defendant cannot have a decree against a co-defendant without a cross bill with proper prayer and process or answer, as in an original suit.

In Equity. Suit to foreclose a mortgage, and incidentally to cancel a tax deed to the mortgaged property.

J. R. Lamar, for complainants.

Messrs. Henderson, for defendant Mary E. Sandford.

B. T. Rice, for other defendants.

SIMONTON, Circuit Judge. In this case, the defendants, other than Mrs. Sandford had interposed demurrers. The demurrers were heard and overruled, with leave to defendants to plead or answer as they were advised. 99 Fed. 154. All of the defendants have answered. Mrs. Julia B. Easterling, one of the defendants who had demurred, now disclaims. She produces in evidence her deed, executed 26th September, 1898, and duly recorded 12th December, 1898, whereby she conveyed in fee all her interest and estate in this land to E. R. Easterling, for \$500. The cause, being at issue, was referred to a special master to report the testimony. His report has been filed, and a full hearing has been had. The bill is filed for the foreclosure of a mortgage executed by Mrs. Mary E. Sandford to the Commercial Bank of Augusta on 7th May, 1896, to secure the sum of \$2,500. This mortgage was duly recorded in the proper office on 11th May, 1896. The debt bears interest at the rate of 8 per cent. per annum. The principal sum, with interest from the 4th November, 1897, is due and unpaid. The contract provides for the payment of the debt and interest, and commissions of 10 per cent. if the claim be put in the hands of an attorney for collection. As against Mrs. Sandford, the complainant is entitled to a decree for \$2,500, with interest at the rate of 8 per cent. per annum on the principal sum, and for 10 per cent. additional on the amount due as commissions, and, in default of payment, to a decree for foreclosure and sale. The only litigated questions are between complainant and the other defendants. After the execution and record of the mortgage, a tax was levied in Elko graded school district, in which this land lies, for the purposes of a graded school. Mrs. Sandford having failed to pay any tax on this land for the fiscal year beginning January 1, 1897, a tax execution was issued against her for all state and county taxes and for this school tax for Elko graded school

district, and was levied on said land. The entire tax was \$19.70. The entire execution, being penalty, costs, and commissions, aggregated, with the tax, \$31.10. The whole tract was levied upon, and in due course offered for sale on first Monday of August, 1898, and was purchased by H. S. Mellichamp, J. B. Easterling, and E. R. Easterling for \$85, and a conveyance made of said land to them as tenants in common. On 26th September, 1898, Mrs. Julia B. Easterling, by deed, conveyed her interest in fee to E. R. Easterling for the sum of \$500. At the date of the levy and at the time of the sale, the lands were under rent to Layton McDonald, and, when the rent became due, he paid the sum stipulated to the clerk of the court of common pleas for Barnwell county, to abide the result of this case. The amount so deposited is \$240.63. The land, after said purchase by Mellichamp and the Easterlings, was rented for the year 1899 for 10 bales of cotton.

The vital questions in this case are the validity of the school tax, the validity of the levy under the tax execution, and the validity of the sale, and of the conveyance made thereunder. It must be borne in mind that the legislation now under discussion is not remedial legislation. In all such cases, courts labor to arrive at the beneficial intent of the legislature, and seek to secure it full effect. *Com. v. Kimball*, 24 Pick. 370, and cases collected in 23 Am. & Eng. Enc. Law, 309, 362, and 24 Am. & Eng. Enc. Law, 358. We are construing statutes imposing taxes and burdens on the taxpayer. In all such cases the rule is changed. "The highest power that a sovereign—the lawmaking power—can confer is the power to tax. Every act conferring that power must express it plainly, and the act so expressing it must be strictly construed." *Suth. St. Const.* 459.

In every case of doubt, such a statute is construed against the government. *U. S. v. Wigglesworth*, 2 Story, 369, Fed. Cas. No. 16,690. Lord Cairns, in *Partington v. Atty. Gen.*, L. R. 4 H. L. 100, 122, says:

"As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, when you can simply adhere to the words of the statute."

See, also, *Twine Co. v. Worthington*, 141 U. S. 474, 12 Sup. Ct. 55, 35 L. Ed. 821; *Rice v. U. S.*, 4 C. C. A. 104, 53 Fed. 910. It is tersely put in the Reports of the supreme court of the United States:

"One who claims title under summary proceedings, when a special power has been executed, as a tax sale, must show every fact necessary to give jurisdiction and authority to the officer, and a strict and exact compliance with every requirement of the statute." *Parker v. Overman*, 18 How. 137, 15 L. Ed. 318; *Williams v. Peyton*, 4 Wheat. 77, 4 L. Ed. 513; *McClung v. Ross*, 5 Wheat. 116, 5 L. Ed. 46.

The validity of the tax: By an act approved 23d December, 1891, the general assembly created a new school district within the county of Barnwell, to be known as the "Elko Graded School District," and authorized the levy and collection of a local tax therein. 20 St.

at Large, p. 1234. The seventh section of the act dealt with the tax: "The said board of trustees, if they deem it expedient, shall on or before 15th of January, 1892, and on or before the same day in each succeeding year, call a meeting in said school district, of all the legal voters living in above named school district, and returning real or personal property therein." Public notice must be given of such meeting at least 10 days before it, by posting the same in three conspicuous places in said school district, and by publishing the same at least twice in the newspaper of the county having the largest circulation. This meeting decides what tax shall be levied. The chairman of the meeting shall, within one week thereafter, notify the chairman of the board of trustees and the county auditor of Barnwell county of the amount of the tax, and the auditor shall at once assess the same on all the real and personal property returned in the school district. In the present case, the meeting, after due advertisement, was held, and the tax was levied, and the auditor notified. There was no petition presented, praying such levy. Such a petition is required in the second section of "An act to provide for the establishment of separate school districts in the several cities, incorporated towns, and villages in this state, to authorize the levy and collection of special taxes therein, and to authorize the levy and collection of special taxes in the several school districts, now formed or to be hereafter formed outside of cities, incorporated towns, and villages," approved 24th December, 1888. 20 St. at Large, p. 49. This act was amended in certain small particulars in 1893, and, according to a custom prevailing in the South Carolina legislature, the whole act, as amended, was re-enacted. 21 St. at Large, p. 402. The first act was passed before, and the second was passed after, the date of the Elko graded school district act. Were it important, an interesting question would arise: Does the amending act speak as of its own date, or does it relate back to the date of the act amended? Both acts have this proviso in the third section: "Provided that this act shall not interfere with any school district which has heretofore been created by special act." If the amending act speaks from its own date, this proviso would in terms apply to the Elko district. If it relates back to the date of the amended act, it would not so apply. This, however, is not important. "A general act is not to be construed to repeal a previous particular act unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts, standing together." *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030; *South Carolina v. Stoll*, 17 Wall. 429, 21 L. Ed. 650. The provisions of a special charter or a special authority derived from the legislature are not affected by general legislation on the subject. *Cass Co. v. Gillett*, 100 U. S. 585, 25 L. Ed. 585; *Black, St. Const.* 116 et seq.

The levy of this tax was valid. Was the levy of the tax execution valid? The execution was put into the hands of the sheriff, and by him given to one Smith, who levied on the land and conducted the sale. Smith was employed in the sheriff's office as a deputy, but his general appointment as deputy had never been confirmed by the judge,

nor was he specially deputized in writing to do these acts. The tax execution is directed to the sheriff or to his lawful deputy. By section 713, Rev. St. S. C., the sheriff is authorized to appoint one or more deputies, to be approved by the judge of the circuit court or any circuit judge presiding therein. Such appointment shall be evidenced by a certificate thereof, signed by the sheriff. But section 715 provides that the sheriff, without seeking the approval of the circuit judge, may appoint special deputies, as the exigency of his business may require, for the service of process in civil or criminal proceedings only, and for their conduct he shall be responsible. This section does not say that the appointment be in writing. Taking this in connection with the fact that this man Smith was de facto a deputy, and that his acts have been recognized by the sheriff, it would seem that the levy, although irregular it may be, was not unlawful. "The acts of an officer de facto, although his title may be bad, are valid so far as they concern the public or the rights of third persons." *Ralls Co. v. Douglass*, 105 U. S. 728, 26 L. Ed. 957.

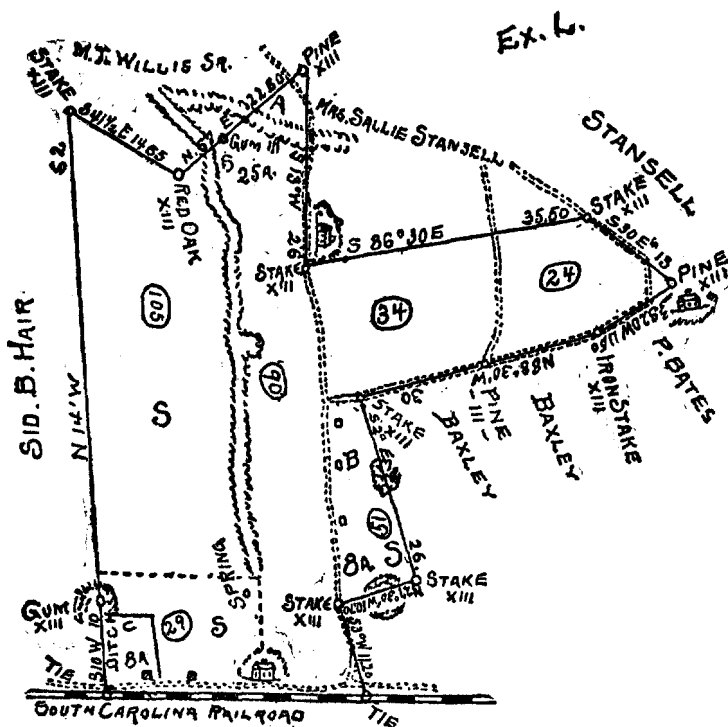
Was the levy and sale invalid? The land was worth at least \$2,500. The taxes, penalties, and costs were some \$31 in all. The whole plantation was levied upon and sold, and brought \$85. Section 347, Rev. St. S. C., provides when and how the tax execution should issue. It gives minutely the form of the execution. Its requirement is to levy the same by distress or sale of so much of the defaulting taxpayer's estate, real or personal, or both, as may be sufficient to satisfy the taxes, state, county, and special, of the defaulter. This language has no ambiguity. Only so much of the defaulter's estate as may be sufficient to pay the tax must be levied upon and sold. The language is mandatory. It is designed to protect the property holder. The purpose of the law is to secure the tax, not to confiscate the property of the citizen. Speaking upon this subject, Mr. Justice Field, in *French v. Edwards*, 13 Wall. 511, 20 L. Ed. 703, says:

"There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power, or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the right of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words, importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory, but mandatory. They must be followed, or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

Clearly, the provisions of this South Carolina statute were made with this object, and they are mandatory. Judge Cooley adds the weight of his authority to this. In his work on *Taxation*, he says:

"Such a provision [that only so much of the land must be sold as would pay the tax] must be strictly obeyed. A sale of the whole, when less would pay the tax, would be such a fraud on the law as to render the sale voidable at the option of the landowner; and the deed would be void on its face if it showed the fact of such excessive sale." Page 496.

What, then, are the facts of this case? Was this body of land of such a character that it could not be divided into parts without destroying the value of the whole? The land on this tract is good, arable land. It lies about a mile from Elko, a town on the Southern Railway. The tract itself is on the railroad. Several witnesses who were examined gave it as their opinion that there were parcels of the tract which could easily have been cut off and sold, and that they would have brought a sum of money largely in excess of the tax. The plat shows the small tracts indicated.



One tract marked "A," on the upper part of the plat, has 25 acres in it. All the witnesses say that it can be cut off from the land, and easily bring \$100. Another, marked "B," on the lower side of the plat, separated from the main body of the land by a public road, contains 8 acres, has on it one or more tenant houses, and rents for a bale of cotton for the year. Its estimated value is over \$100. In the opposite corner of the plat, on the railroad, is another piece of land, containing 8 or 10 acres, easily cut off from the tract, and worth \$100 and upward. It is manifest that any one or all of these little parcels could have been sold, and could have paid the tax. Under these circumstances, the conclusion cannot be avoided that a levy on the land as a whole, valued by witnesses at \$2,500 to \$3,000, assessed for taxation at \$1,433, having on it a comfortable dwelling house and several tenant houses, in order to pay a tax of \$31, was an excessive levy. It

was a violation of the act, and, in the language of Judge Cooley, a fraud on the law. The sale made under these circumstances was invalid, and the conveyance executed by the sheriff to Mellichamp and the Easterlings is set aside as void.

The purchasers at the tax sale rented the land in 1899, and have it now under rent for 1900. They have received the rent for 1899. It is claimed that they must account for it. The complainant mortgagee has no right to such an account. "A mortgagee is not entitled to rents and profits of mortgaged premises until he takes actual possession, even though he has the right to take possession on condition broken." *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415. Nor can the mortgagor in these proceedings claim such an account. She does not set up any such claim in her answer. Nor has she filed any cross bill praying relief against her co-defendant. "One defendant cannot have a decree against a co-defendant without a cross bill, with proper prayer and process or answer, as in an original suit." *Daniell*, Ch. Prac. (Perkins' 3d Am. from 3d Eng. Ed.) 1648. This renders any discussion unnecessary with regard to Mrs. Julia R. Easterling. She conveyed all her interest to E. R. Easterling a short time after the tax sale. A decree will be entered in conformity with this opinion.

MURPHY et al. v. KIRWAN, Surveyor General, et al.

(Circuit Court, D. Minnesota, Fifth Division. July 5, 1900.)

1. PUBLIC LANDS—MISTAKE IN SURVEY—JURISDICTION OF LAND DEPARTMENT.

The land department of the United States has no power to correct errors in a survey of public lands after such lands have been sold, by reference to such survey, to purchasers in good faith; the remedy of the government, if a mistake has been made to its injury, being by a suit in the courts.

2. SAME.

Where the United States has caused a township of public land, containing a navigable lake, to be surveyed, and a plat of the same made, showing the meander line of the lake, and the fractional subdivisions of land bordering and having riparian rights thereon, and has sold all the lands in the township in accordance with such plat, the land department has no jurisdiction or authority, on a claim that the meander line as shown on the plat is inaccurate, and is in fact at some distance from the lake, to survey and sell the lands lying between such line and the lake, as against bona fide owners of fractional lots, who purchased the same on account of their riparian rights, and especially where no boundaries were marked on the ground by the surveyor, so that the location of the land could only be determined by purchasers by reference to the lake shore, as the only natural boundary given.

In Equity. Suit for injunction.

M. H. Stanford, for plaintiffs.

E. C. Stringer and R. G. Evans, for defendant Kirwan.

Albee Smith, for defendant Crosswell.

LOCHREN, District Judge. This is a bill in equity, wherein the complainants ask for a decree restraining and perpetually enjoining the defendants from making a survey of certain lands claimed by the

complainants and described in the bill, surrounding Cedar Island Lake, in township 57 N., of range 17 W. of the fourth P. M., in the county of St. Louis, Minn.; such survey having been ordered by the land department of the United States. The defendant Kirwan is the United States surveyor general for Minnesota; and the defendant Crosswell is a deputy surveyor, with whom a contract has been made, by order of the commissioner of the general land office, to make the survey. Upon the filing of the bill, and after due notice and hearing, a temporary injunction was issued, as prayed for in the bill, and the order allowing the same was afterwards affirmed by the circuit court of appeals of this circuit. *Kirwan v. Murphy*, 28 C. C. A. 348, 83 Fed. 275.

Upon final hearing the following facts appear: (1) On or about April 26, 1876, a contract for the survey of all lands in township 57 N., of range 17 W., in St. Louis county, Minn., was made by the government of the United States with one Henry S. Howe, as a deputy surveyor of the United States; and thereafter said Howe made and filed what purported to be field notes of a survey of said township, from which a purported official plat of said township was thereafter made, and approved by the surveyor general of the United States for the district of Minnesota, and by the commissioner of the general land office, of which plat Exhibit A, attached to the bill of complainants, is a substantially correct copy. (2) There is no evidence, nor any marks upon the ground, to indicate that any actual survey of said township 57 was ever made by said Howe, as required by his said contract and by the rules and regulations of the general land office, or at all, beyond the running and due marking of the exterior boundary lines of said township, where the section, quarter, and other posts and markings established by him are, and always have been, clear, distinct, and readily found and traced. There is no evidence on the ground that section lines were ever run by him in or across said township, or section corner posts or quarter posts ever located or set by him, except a corner post at the northwest corner of section 36, and a quarter post in the western line of said section 36; and there is no evidence that witness trees were ever blazed or marked by him. (3) Cedar Island Lake is a navigable, deep, and permanent body of water, fed principally by springs, having an area of about 900 acres, instead of about 1,800 acres, as described in the field notes of Howe, and shown on said official plat of said township. Instead of the shores of said lake being low and swampy, as stated in said field notes, the banks are generally high and sloping lands, suitable for agriculture, extending around the lake, and support a good growth of pine and other forest trees, large enough for lumbering, such as will not grow in water. The condition was the same in 1876, and no material part of the land surrounding the lake is accretion. Southerly and westerly of said Cedar Island Lake are five other deep, navigable, and permanent lakes, in the same township, none of which are shown by the field notes of Howe's survey, or upon said government official plat of said township, and all of which have, since the making of said official plat, been sold and patented by the government, as land, according to said plat. (4) There is no evidence

upon the ground that any meander line of said Cedar Island Lake was ever surveyed by said Howe, or any meander posts placed by him about said lake, except one where the north line of said township encounters said lake. And the outlet of said lake is at a different place from that described in said field notes and shown upon said official plat. After the making of the said survey and plat, and before its approval, complaints touching the accuracy thereof were made to the commissioner of the general land office, but on the withdrawal of such complaints the said survey and plat were approved. (5) The land lying between the actual water line of said Cedar Island Lake and the meander line of that lake as delineated on said official plat of said township comprises the land in controversy in this suit, and is the same land directed to be surveyed by the commissioner of the general land office, and referred to in the surveyor's contract, which is attached, as Exhibit A, to the answer in this suit, being therein described as "the public lands situate in Secs. 2, 3, 4, 9, 10, and 11 in township No. 57 N., R. 17 W. of the 4th principal meridian, lying between the old meander boundary of Cedar Island Lake, as given by the original field notes of Henry S. Howe, U. S. deputy surveyor, approved by the surveyor general of Minnesota Aug. 19, 1876, and the shore line of said Cedar Island Lake." (6) Prior to the commencement of this suit the United States has sold, and by its patents has conveyed to the purchasers, according to said official plat made from said Howe survey, all the land in said township 57, as the same appeared upon said plat, to which plat all of said patents expressly refer; it being then and still the only government plat of said township. (7) The complainants are the grantees and owners by mesne conveyances from the patentees of the record title to the following described fractional lots in said township, to wit: Lots 1, 2, and 3 in section 2; lots 1 and 2 in section 3; lots 1 and 8, and portions of lots 3, 5, and 6 in section 4; lots 1, 2, 3, and 4 in section 9; lots 1, 2, 3, and 4 in section 10; and lot 3 in section 11,—being the same lands which are more particularly described in complainants' bill, and each of which fractional lots appear and are represented on said official plat as bounded by and upon said Cedar Island Lake. (8) So far as appears, none of the patentees of said lands had any notice or knowledge of any fraud or misconduct on the part of said Howe in or about the making of said survey and field notes, and all were purchasers in good faith of said lands. (9) Complainants purchased said fractional lots of land of the patentees or their grantees for the pine timber thereon, and the convenience of landing the same in the said Cedar Island Lake, to be driven to the place of manufacture, and before such purchase, in the year 1883, caused said lands to be explored and examined by an experienced timber estimator, who, in making such examination, used, as is customary in such cases, a copy of said official plat of said township which did not have upon it any statement of the acreage or amount of land in any of the subdivisions, and who reported to the complainants his estimate of the amount of pine timber on said lands, and the general character of said land, and the riparian character thereof, as bounded upon said Cedar Island Lake, but did not

discover or report any fraud or error in the survey of said township, or any error or mistake in the said official plat. And the said complainants purchased, paid for, and took conveyances of said lands in good faith, and without any notice or knowledge of any such fraud, error, or mistake. (10) The other permanent lakes in said township, not shown upon such official plat, but appearing thereon as land, and since sold and patented by the government as land according to such official plat, include areas equal to the area of said Cedar Island Lake; and portions of such lakes were purchased by complainants as land, with their other purchases in said township. (11) The survey sought to be restrained in this suit was ordered by the commissioner of the general land office, upon the direction of the secretary of the interior, in a proceeding instituted by certain settlers upon the land in controversy, of which proceedings the complainants had due notice, and in which they appeared.

The case as presented at the final hearing does not differ in any material respect from the showing upon the motion for the preliminary injunction. If that injunction was properly allowed, a decree for permanent injunction should follow. The order granting that injunction was affirmed by the circuit court of appeals, and Judge Riner's very full and clear presentation of the facts and of the law leaves little that can be added. *Kirwan v. Murphy*, 28 C. C. A. 348, 83 Fed. 275.

In the surveying, platting, offering for sale, and sale, of lands, the government deals as proprietor. The transactions are matters of business; and as between the government and its patentees, or the purchasers from such patentees, all the rules applicable to private ownership and private sales attach, as in the case of an individual vendor. The government, through its agents and employés, makes the surveys and prepares the plats according to which it offers for sale and sells its lands. If its agents and employés are negligent or unfaithful, and loss to the government results, it cannot shift that loss upon an innocent purchaser, who has bought and received title upon the representations of the plats prepared by the government, and according to which the land is offered for sale, and the sales made, and the title to the lands conveyed by patent. The question whether the government, because of the negligence or fraud of its surveyor, has any claim to any part of the land which it has sold and conveyed by patent to the purchaser, is a question which the land department of the government cannot assume to determine. The patent passes the title from the government, and takes the land from the jurisdiction of that department. "With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals, and, if the government is the party injured, this is the proper course."

Moore v. Robbins, 96 U. S. 530, 533, 24 L. Ed. 848. It is admitted that all the land in said township has been sold according to said plat, and conveyed to the purchasers by patents referring to said plat. According to the said patents and said plat, to which they all refer, the government has conveyed away the title to every acre of land in respect to which the land department has assumed to order this survey, the effect of which will be to disturb and cast a cloud upon the titles of the purchasers under these patents. It is admitted that as much in area in deep lakes in said town has, in accordance with said plat, been so sold and patented as land, as there is of dry land represented on said plat as covered by Cedar Island Lake, and that part of this deep-lake area was purchased as land by complainants. The government, as against purchasers in good faith, like the complainants, is bound by its own plat, in accordance with which it has sold and conveyed all the land in that township. The purchasers must settle their titles and boundaries between themselves, and the land department has no longer the right to meddle with the land or cast doubt upon the titles so conveyed. The case is unlike the cases of *Granger v. Swart*, 1 Woolw. 88, Fed. Cas. No. 5,685, and *Niles v. Cedar Point Club*, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. —. In those cases the plats and field notes showed that the boundary meander lines were not on the banks or margin of navigable water, but of other low lands, so there was no basis for the claim that the meander line merely indicated a natural boundary, or that any riparian rights existed, as parcel of the land patented. In the case at bar the meander line is shown on the official plat, referred to in the patents, as marking the actual margin or bank of Cedar Island Lake, a navigable body of water, and therefore as including, in the lots so bounded, riparian rights upon that lake. Neither is this case like that of *Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68, where the surveyor obviously surveyed the lot in question to a bayou which he mistook for and marked as the Indian river. There the bayou was plain and open to be seen, and fitted, as the meandered boundary, with all the other calls of the survey. The natural water course which was meandered was there, and corresponded with the survey and plat. The surveyor was merely mistaken in the name by which he designated the water course. Here there was no such mistake. There is no body of water which the meander line will fit, except Cedar Island Lake, which is the lake named on the plat.

While these fractional lots bordering on Cedar Island Lake, which complainants purchased of the patentees, are much larger in acreage than is represented on the plat, this alone furnishes no ground to warrant the land department in disregarding the patent, and assuming to take possession of the excess through a resurvey, and selling the same again. In *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442, a small fractional lot, of $4\frac{1}{2}$ acres, meandered on a lake, was held to include an unsurveyed point running beyond the meander line and into the lake, containing 25 acres. And a subsequent survey by the land department, and patent to another purchaser of the 25 acres, was held invalid. The court said (page 412, 140 U. S., page 821, 11 Sup. Ct., page 444, 35 L. Ed.):

"We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants to the beds of such lakes, after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable, part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation, which ought not to be created or sanctioned. * * *

The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents, when issued, refer to this plat for identification of the lots conveyed, and are equivalent to, and have the effect of, a declaration that they extend to, and are bounded by, the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow."

See, also, *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428.

In the present case the official plat shows the bank of Cedar Island Lake, a large permanent body of still water, as one of the boundaries of each of the fractional lots here in dispute. This is a natural, unchangeable monument and boundary, to which courses, distances, and quantities must all give way. The purchasers of these fractional lots from the government, and, later, their vendees, the complainants, going upon the ground with a copy of the official map before purchasing, would not find section corners, nor any interior lines in the township; for the evidence shows that nothing of the kind was marked or designated on the ground. The only monument or boundary visible was the bank of Cedar Island Lake; and, with that boundary fixed and plain, they would form their judgments as to the location, character, and value of the land, and as to the value of the timber thereon, which they were purchasing, as well as of the riparian rights belonging to and parcel of the land. The proposal of the land department now is to take summary possession of this very portion of these lands which the patentees and their vendees, the complainants, were able to locate with certainty, from the only fixed and visible boundary, and with reference to the value and desirability of which, including the riparian rights, the purchases were made, and allow the same to be now entered by prowling squatters. If the United States has still any valid claim to any portion of these lands, the title to which they have conveyed away by patent, they should first establish such claim in a court of justice; and, if they can recover any part of any of those lots, it is quite certain that it will not be the part which the land department now proposes to take,—the very part, including riparian rights, which the patentees and complainants were shown by the plat to be the lands which they were purchasing, and which they examined with the view of purchasing, and in fact did purchase and pay for. The evidence shows, as is above stated, that the riparian rights upon this lake were considered by complainants as an important element of value in making

their purchases. As stated by Mr. Justice Mitchell in *Lamprey v. State*, 52 Minn. 181, 197, 53 N. W. 1142, 18 L. R. A. 677:

"The incalculable mischiefs that would follow if the riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line had been changed by accretions and relictions, are self-evident, and have frequently been animadverted on by the courts. These considerations apply to riparian ownership on lakes as well as streams. * * * The owners of lands bordering on them have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the state to any relictions produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water. The endless litigation over the location of the original water lines, and the grievous practical injustice to the owners of the original riparian estate that would follow, would of themselves be a sufficient reason for refusing to adopt any such doctrine."

The government having sold these fractional lots, and conveyed the title thereto to the purchasers by patents which, by reference to the plat, covered the lands to the banks of Cedar Island Lake, the land department has no jurisdiction or authority to meddle with these lands by making the survey which that department has ordered, and which the defendants were about to make when this suit was begun. If the government has any right or equity to have such patents corrected because of error or mistake, it must apply to a court having jurisdiction for that relief. And in such case, from the showing made in this suit, the title of the complainants to such portions of such lots as border on said lake, as a permanent, visible boundary, will be the least assailable. Decree will be entered as prayed for in the bill, and the form thereof, unless agreed to by counsel, may be settled upon two days' notice.

FARMERS' LOAN & TRUST CO. et al. v. LOUISVILLE, N. A. & C. RY. CO. et al.

In re LOUISVILLE TRUST CO.

(Circuit Court, D. Indiana. July 7, 1900.)

1. RAILROADS—FORECLOSURE OF MORTGAGE—REORGANIZATION AGREEMENT IN FRAUD OF CREDITORS.

A decree foreclosing mortgages on a railroad cannot be impeached because of a prior agreement between a committee of bondholders and officers and directors of the company to form a reorganized company, and purchase the property at the sale, and thereby relieve it from the unsecured debts of the company, even though it is a part of such agreement that stockholders of the old company may obtain stock in the new on payment of a small difference, where the mortgages are due because of default in the payment of interest, and the company is in fact insolvent, and it does not appear that the trustees who brought the suit are parties to or had knowledge of the agreement, or that the default which matured the mortgages was due to such agreement.

2. SAME—PROTECTING INTERESTS OF STOCKHOLDERS—LEGALITY.

A plan of reorganization made by railroad bondholders for the purpose of purchasing the property at foreclosure sale, and by which stock-

holders in the old company are permitted to convert their stock into stock in the new company on payment of a stipulated difference, is not for that reason fraudulent and void as to general creditors of the old company, where it does not appear that any of the stockholders, as such, were parties to the plan; that it caused or in any manner affected the foreclosure proceedings, or deprived the general creditors of any rights, so that whatever rights, if any, are secured to the stockholders are at the expense of the bondholders, and not of the unsecured creditors.

8. SAME.

A creditors' suit was commenced against a railroad company, in which a receiver was appointed, on a showing of the insolvency of the company, the commencement of attachment suits against it, and the threatened institution of others, which would result in destroying the unity of the property. Subsequently default was made in payment of interest on the company's bonds, and suits were instituted by the trustees in the mortgages for their foreclosure, which were consolidated with the prior suit. After default on the bonds, but before the filing of the bills for foreclosure, a committee of bondholders was appointed, who devised a scheme of reorganization, in pursuance of which they made a contract with a syndicate, which included some of the officers of the company, by which such syndicate agreed to purchase for cash certain bonds and stock of the new company, and to deliver certain of such stock to stockholders of the old company, who should elect to exchange their stock therefor and to pay a stipulated sum per share in cash. It did not appear that any stockholders were parties to such agreement, except such as were also bondholders. The plan was carried into execution, and the bondholders' committee purchased the property at the sale under foreclosure decree for a sum much less than the mortgage indebtedness thereon. The company was unquestionably insolvent, and it was not shown that such arrangement in any way affected the foreclosure proceedings; nor did it appear that the stock in the new company received by the stockholders in the old was of any greater value than the cash payment required to be made by them therefor. *Held*, that such arrangement did not constitute a fraud upon the unsecured creditors of the old company, nor operate to their injury, so as to entitle them to place the property again in the hands of a receiver, to be operated for their benefit until their claims were discharged.

On Exceptions to the Report of the Master.

St. John Boyle, Swager Sherley, and Shackelford Miller, for petitioner.

Francis Lynde Stetson, G. W. Kretzinger, and E. C. Field, for defendants.

WOODS, Circuit Judge. The mandate of the supreme court in this case was:

"To set aside the confirmation of sale. To inquire whether it is true, as alleged, that the foreclosure proceedings were made in pursuance of an agreement between the bondholder and stockholder to preserve the rights of both and destroy the interests of unsecured creditors, and that, if it shall appear that such was the agreement between these parties, to refuse to permit the confirmation of sale until the interests of unsecured creditors have been preserved, and to take such other and further proceedings as shall be in conformity to law." 174 U. S. 674, 689, 19 Sup. Ct. 827, 43 L. Ed. 1130.

Upon the filing of this mandate, on July 7, 1899, the petitioner, the Louisville Trust Company, was granted leave to file and filed an amended and supplemental petition; and thereupon it was ordered, on motion of that company, that the order of March 10, 1897, "confirming the sale made under the decree in this court," be set aside, and that the petition and amended and supplemental petition, and

any answers thereto, required to be filed within ten days, be referred to James M. Winters, Esq., as special master, "to take proof and inquire whether it is true, as alleged, that the foreclosure proceedings were made in pursuance of an agreement between the bondholder and stockholder to preserve the rights of both and destroy the interests of unsecured creditors, and that he shall further take such lawful evidence as may be produced before him by any of the parties to this cause in relation to the matters set up and alleged in the amended and supplemental petition, and shall make report to the court of his findings thereon, together with the evidence so taken." On April 4, 1900, the report was filed, embracing a finding of facts and a statement of legal conclusions. The report shows an agreement of counsel "that, in the order authorizing and directing the special master to report the facts with his findings, the word 'findings' is intended to cover both findings of fact and conclusions of law." The fifteenth finding of fact is as follows:

"(1) There was no fraud or fraudulent intent or fraudulent conspiracy on the part of the trustees, the bondholders, the bondholders' committee, the stockholders, or the New Albany Company; (2) there was no conspiracy; (3) there was no damage to the unsecured creditors; (4) there was no unlawful advantage to the stockholders."

Five conclusions of law are stated, as follows:

"First, the petition has not been sustained by the proofs; second, the supplemental petition has not been sustained by the proofs; third, the answers have been fully sustained by the proofs; fourth, the petition and the supplemental petition should be, and are, denied and dismissed, with costs; fifth, the sale as reported by the special master should be confirmed by a reinstatement of the former decree of confirmation, and by the precedent vacation of the decree of July 7, 1899, setting aside the decrees of confirmation."

The evidence is contained in two printed volumes,—one of "Depositions," and the other of "Exhibits." On May 3d the Louisville Trust Company filed exceptions to the report, alleging the following errors:

"(1) In finding or assuming that the complainant Mills was an active and real litigant, and controlled or directed the proceedings in this suit, and that he instituted the said action and prosecuted the same in good faith for the benefit of all the creditors of the defendant railway company, because the same is not true, and is disproven by the testimony. (2) In finding that the president, Samuel Thomas, and the vice president, John Greenough, and other directors of the company, did not procure and direct the institution of the suit, and did not actively, individually, and as officers of the company and representatives of the stockholders, aid and assist in its prosecution, and procure and assent to the decree of foreclosure and the confirmation of sale, for the purpose of reorganizing the company on a basis which would pay to themselves and friends their unsecured debts, and preserve and continue the interests of the stockholders in the property, and leave the debt due to the petitioner and other holders of like bonds unpaid, because such finding is not true, and is contrary to the evidence. (3) In finding that the said officers and directors did not participate in forming or constituting or procuring the reorganization committee, and in finding that such committee represented and acted only in the interests of the bondholders, and not in the interest of certain creditors and the stockholders, because the same is not true, and is contrary to the evidence. (4) In finding that the right of the stockholders, continued and preserved to them under the plan of reorganization, was of no value, because the same is not true, and is contrary to the evidence. (5) In finding that

the foreclosure proceedings in this case were not made in pursuance of an agreement between bondholder and stockholder to preserve the rights of both, and destroy the interests of unsecured creditors. (6) In reciting evidence incorrectly, in reporting immaterial and irrelevant matters, and in ignoring and not considering material and uncontroverted testimony. (7) The special master also erred in not finding and reporting that this suit and the foreclosure proceedings were instituted by the railroad company, its officers and directors; that it was carried on, and the decree obtained and executed, at the request and with the aid and assistance of such company and its officers and directors; that this was done and the reorganization effected for the purpose of paying certain unsecured debts and continuing the interests of the stockholders in the property, and to leave the debt due to the petitioner and other like debts unpaid, and without power or opportunity to enforce payment; and that all of this was done under an arrangement between bondholders and stockholders by which their rights and the rights of the officers and their friends, who were unsecured creditors, could be preserved and maintained, and the rights of the petitioner be destroyed. (8) In not finding that the allegations of the petition and amended petition of the Louisville Trust Company had been proven, and that the sale of the property heretofore made should not be confirmed until the rights of the petitioner and other creditors were preserved. (9) In not finding and reporting that a receiver should be appointed to take charge of the property, under proper orders of court, and to maintain and operate the same for the benefit of the petitioner and other unpaid creditors, subject to such liabilities as might be adjudged to be prior in law, and that an accounting should be made by the Chicago, Indianapolis & Louisville Railway Company of the earnings and income of the property since the same has been in its possession."

The statement of the case in the opinion of the supreme court, it is to be observed, is in some respects different from the statement made by the circuit court of appeals, from which the cause was removed on certiorari to the supreme court. See *Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co.*, 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130; *Id.*, 56 U. S. App. 208, 28 C. C. A. 202, 84 Fed. 539. A restatement, in outline, of the principal facts, is deemed proper here, with an indication of such corrections and additions as are thought worthy of notation.

The decree of the circuit court of appeals for the Sixth circuit, affirming the validity of the guaranty by the New Albany Company of the Beattyville bonds, was rendered on June 22, 1896 (43 U. S. App. 550, 22 C. C. A. 378, 75 Fed. 433); and, instead of "within a few days" thereafter, it was not until August 24th ensuing, and after a number of attachment suits had been brought in Louisville by holders of the guaranteed bonds, causing and threatening serious embarrassments to the New Albany Company, that Mills proceeded to obtain the appointment of a receiver. It was not until November 16, 1896, that the decree in the Sixth circuit was removed on certiorari to the supreme court, and only after that date were the proceedings in this court in this case had while that case "was still undecided." Besides the portions of the Mills bill referred to in the opinion of the supreme court, it was alleged in that bill that the total amount of claims asserted against the company by reason of the bond guaranty, according to advice received of the officers of the company, would probably exceed \$1,200,000; that the holders were numerous and scattered; that already suits in attachment had been brought against the company in the courts of Kentucky by some of the holders of the guaranteed bonds, and the earnings and traffic balances

of the road seized in garnishment; that other like suits in Kentucky and Illinois, and seizures, not only of current earnings, but also of engines, cars, and trains of the road, when found in those states, were threatened, and, it was believed, would presently occur; that the company had no property other than its railroad, equipment, and appurtenances, and certain described corporate stock, all covered by mortgages, and was without resources to pay its unsecured debt, except from such surplus income from its road operations as might remain after paying interest upon mortgage bonds; that the current earnings, in consequence of a short wheat crop and lessened traffic, were about \$60,000 a month less than for the corresponding period of the previous year; that the decline was likely to continue for some months, and it would be impracticable to realize therefrom, after paying operating expenses, taxes, and rentals, enough to pay the next shortly maturing coupons on \$3,800,000 general and equipment mortgage bonds; that the decision holding the company liable for more than a million dollars upon its guaranty had absolutely destroyed the credit of the corporation so that it could not either pay or renew its bank obligations or fund the same, "and the said corporation is in fact insolvent"; and last before the prayer it was averred:

"That to permit its [the road's] severance, or the continuous disturbance of its operations, will result in ruinous sacrifice to every creditor of said corporation, and disable it from performing its duties as a public carrier. That the complainant verily believes that unless this court, in view of the present condition of the affairs of said insolvent corporation, and the divers threatened litigations, attachments, and seizures, and the impending and inevitable default soon to occur on the two mortgage liens aforesaid, will deal with the property as a single trust fund, and take it into its judicial custody for the protection of every interest therein, that divers individual creditors of the defendant will proceed to assert their remedies in the different courts in the several states where the property is situated; that levies and attachments will be laid upon the engines and cars of the company, and the fuel, material, and supplies which are indispensable to the continuous operation of the railroad will be seized, which will greatly interfere with and ultimately prevent the company from a proper discharge of its duties as a carrier, and seriously diminish the earnings of the road; that considerable and unnecessary multiplicity of suits will result; that judgments and priorities will be attempted, and the trust property, valuable mainly in consequence of its unity, will be dismembered by the conflicting decrees and judgments of the many courts exercising such separate jurisdictions at the suit of individual creditors."

On November 12, 1896, the Farmers' Loan & Trust Company and John H. Barker, trustees, filed their bill against the railway company to foreclose the consolidated mortgage, given to secure six per cent. bonds for \$4,700,000, alleging a default in the payment of interest due on October 1, 1896. On the same day the Central Trust Company of New York and John H. Stotsenburg, trustees, filed their bill against the railway company to foreclose the general mortgage given to secure five per cent. bonds for \$2,800,000, alleging a default in the payment of interest on November 1, 1896, and on that day the two suits for foreclosure and the suit of Mills were consolidated. On December 14, 1896, the Central Trust Company of New York and James Murdock, trustees, filed their bill against the railway company to foreclose the equipment mortgage, a first lien on equipment and a subordinate lien upon the railroad, given to secure

bonds for \$709,000, alleging a default in the payment of interest due on December 1, 1896; and on December 21st a second order of consolidation was made, which included this suit and all the suits combined by the previous order, and not alone, as stated in the supreme court case, "these several foreclosure suits." The fact is important, since the right of the Louisville Trust Company to become a party and to prosecute the appeal was then, it appears, supposed to rest upon the fact of the Mills bill having been "filed in the avowed interest of himself and all other creditors." It was so contended in the circuit court of appeals in response to a motion to dismiss the appeal on the ground that the appellant was not a party to the decree appealed from. In their first brief, counsel for the appellant, citing *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, said:

"The present suit is a general creditors', brought by Mills on his own behalf, and all other creditors who may seek to come into it. That in such a case appellant had a right to intervene, there can be no doubt."

And in the supplemental brief, filed on November 30, 1897, besides other passages and citations of authorities to the same end, occurs this expression:

"The admitted insolvency of the Monon estops appellees from claiming any need of an execution and return of nulla bona, as, indeed, does the fact of Mills having obtained such a return."

Estoppels are mutual, it is to be remembered; and yet, after asserting a standing in court under Mills, the petitioner now denies that Mills had any standing.

On January 23, 1897, the Louisville Trust Company, upon a petition showing that it was a holder of guarantied bonds to the amount of \$125,000, was allowed to appear in its own behalf. It made no averment or pretense of want of prior notice of the proceedings, offered no excuse for not coming in sooner, asked no time or leave to answer or to present a full petition, and alleged no reason why a decree should not then go; and, the parties to the foreclosure suits having all appeared and filed, so far as necessary, answers admitting the allegations of the bills, a decree was entered foreclosing the three mortgages in suit, and directing a sale of the property. The decree contains the usual reservation of unconsidered questions for future determination, and the special reservation, added to meet an objection or suggestion of counsel for the Louisville Trust Company, of "full power to adjudge with respect to the income of the receivership and the rights of creditors in and to the same." The mortgages, it should be noted, all covered income. The Louisville Trust Company took no further step until February 27th, when the advertised day of sale was but ten days off. It then filed, and on March 9th brought to the attention of the court, the so-called "full intervening petition, verified by affidavit,"—that is to say, by the affidavit of the president of the Louisville Trust Company, who, claiming no knowledge on the subject, and giving no source of information or reason for his belief, simply "saith that the statements contained in the foregoing petition are true, as he verily believes." That petition is a long one, and contains much more than is set out or indicated

in the statement of the case in the supreme court. It filled more than ten pages of the printed record in the circuit court of appeals. After formal averments and a recital of the facts concerning the execution and guaranty of the Beattyville bonds and the litigation which resulted in the decree of the circuit court of appeals for the Sixth circuit, on the fourth page is a statement of the proceedings by Mills, which, it is alleged, "were procured by the said New Albany Company for the purpose of hindering and delaying the unsecured creditors of said company in the enforcement of their debts." This is followed by a statement of the proceedings and decree in the foreclosure suits, and on the next page comes the averment, not observed or not apprehended by this court, and not referred to in the opinion of the circuit court of appeals, which the supreme court has treated as sufficient alone to entitle the petitioner to relief. "The allegations of this intervening petition as to the wrong intended and being consummated," said that court, "were specific and verified," and on the strength thereof, unaided by evidence, declared:

"It is not true that in revising and reversing the final action of the circuit court we are acting on mere suspicion, or disturbing either settled rules or admitted rights."

The allegations referred to are these:

"And the petitioner further says that prior to the entry of the said decree the holders of the bonds secured by the mortgages to the Farmers' Loan & Trust Company and the Central Trust Company as aforesaid, and the holders of the preferred and common stock of the said Louisville, New Albany & Chicago Railway Company, or a part thereof, had entered into an arrangement or agreement for the purpose of procuring the sale of the said property, its purchase by and in behalf of the parties entering into such combination, and reorganization thereof, and the issue of securities to the said parties, including said stockholders, without the payment of the debts and liabilities of the said company, and for the purpose of hindering and delaying the said creditors, and with a view to prevent the collection or enforcement of such debts and liabilities, and that the said decree of sale was obtained by the said company and said complainants in order to carry out such unlawful purpose, and to prevent the general or unsecured creditors of the said company from having an opportunity to be heard in matters arising in the said cause."

The petition then proceeds with averments which were the subject of discussion in the circuit court, and which alone, as the opinion delivered shows, were considered by the circuit court of appeals. Those questions were of the validity of certain consolidations, by reason of the invalidity of which it was claimed that property and franchises in Illinois were not covered by any of the mortgages; that no title was acquired by the Chicago & Indianapolis Air-Line road, and, therefore, in respect to that part of the road, the mortgage for \$2,800,000 to the Farmers' Loan & Trust Company and John H. Barker, trustees, was illegal, and likewise the other mortgages thereafter executed. It was further alleged that, by reason of provisions in the several mortgages quoted in the petition, the suits for foreclosure were prematurely brought. It was also alleged that the New Albany Company had large assets not included in any of the alleged mortgages, which were subject to the demands of unsecured creditors, but were unknown to the petitioner; that the moneys earned by the receiver over and above the amount neces-

sary for operating expenses should be, and does constitute, a fund for distribution among the creditors; that the net earnings amounted to a large sum, but the amount thereof was unknown to the petitioner. It was further alleged, on information and belief, that a large portion of the capital stock of the New Albany Company had not been paid by the subscribers or holders thereof; that a very large sum was due and payable by the holders of stock to the company, which should be directed herein to be collected and distributed to the creditors. The prayer of the petition is as follows:

"Wherefore your petitioner prays that the decree of foreclosure and sale heretofore entered in this cause be set aside; that the pretended consolidations herein mentioned be adjudged void, and that the said mortgages before mentioned be declared to be invalid; that this cause be referred to a commissioner to ascertain and report what assets of the said New Albany Company are embraced by any liens, and what are not so included, and the amounts and descriptions thereof, and that, among other things, the master be directed to ascertain what portion of the capital stock has not been paid for, and the amounts due thereon, and that the receiver herein be directed to take steps to enforce the collection of any amounts due to the said company; that due and proper advertisement be given for the proof of debts, and that said master be directed to ascertain and report the names of the creditors herein, and the amounts of debts due to them; that it be adjudged that the master ascertain what net earnings have accrued and shall hereafter accrue from the operation of the said railway in the hands of the receiver, and that the amount thereof be adjudged and declared to be a fund to be distributed among the general and unsecured creditors of the said company; and that all such other and further proceedings be had for the sale of the assets of the said company, and the distribution thereof, as shall be according to law and the rights of the parties."

All this, it will be observed, is on the theory of a valid and honest receivership, under which, conducted regularly, the rights of the petitioner and others interested should be enforced. If the allegations that the proceedings of Mills were intended to hinder and delay creditors, and that the decree was obtained in order to carry out the alleged agreement between bondholders and stockholders, had been deemed substantive, the proper prayer would have been that the suits be dismissed. That those averments were not considered by counsel for the petitioner to constitute ground for relief in the circuit court of appeals is shown by their briefs. Rule 24 of that court required that the brief for appellant should contain (1) "a concise abstract or statement of the case"; (2) "a specification of the errors relied upon"; and (3) "a brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed." The statement of the case in the brief for the appellant concluded with this statement:

"On the 27th day of February, 1897, the Louisville Trust Company filed a second intervening petition, in which it set out in detail its claim as creditor, and alleged that the orders entered in the case and the decree had been obtained by collusion between Mills and the other complainants and the railroad company for the purpose of obtaining the property of the Monon without the payment of the general creditors, and prayed that the decree be opened and the sale postponed, the case referred to a commissioner to ascertain debts, liens, etc., the net earnings of the road in the hands of the receiver, and that further proceedings be had for the sale of the assets of the company and a distribution thereof. On the 9th of March the court refused to open the decree or postpone the sale, and on the 10th day of March the road was sold, and the

same day the report of sale was filed, and on the same day the report was confirmed. On May 1, 1897, an appeal was prayed by the Louisville Trust Company to this court, and was granted. The above statement is an outline of perhaps the holdest attempt to obtain possession of railroad property at the expense of its creditors ever shown by the records of a court of equity."

The argument made was directed wholly to two specifications of error, namely, that the cause was not ready for hearing and the decree premature, and that the court erred in deciding that the trustees in the mortgages were entitled to a foreclosure at the time the suits were brought and at the time the decree was entered. Under the first of these specifications it was insisted that "the case of Mills was clearly not ready," for the reason stated at the conclusion of the argument in this wise:

"Without having had a chance to ascertain the assets of the Monon, its earning capacity, or its indebtedness, we cannot say with any degree of accuracy, and this court cannot know, whether or not a sale was or is needed at all. [We do know, however, that this suit was only instituted to free the Monon from the debt that the circuit court of appeals for the Sixth circuit has said it incurred by its guaranty of the Beattyville bonds.] We do know that during times much worse than those existing at the time of and since the filing of this suit the Monon was always able, out of its earnings, to pay the interest on its bonded indebtedness."

Other than the sentence in brackets, there is no reference in the original brief to the allegations in question, and in the supplemental brief filed after the oral argument there is nothing on the subject. As the case was presented to it, the circuit court of appeals was therefore justified in saying, as it did, that "the sole ground of objection to the complainants' case in the court below, as set forth in the petition of the appellant asking to have the decree set aside, and which was addressed to the discretion of the court, was the total invalidity of the various bonds and mortgages because the defendant corporation, which is a consolidated company, was never regularly consolidated," etc.; and it was with reference to the case as then presented, and not as it was afterwards treated by the supreme court, that the circuit court of appeals used the expression, "a travesty upon equity proceedings." The supreme court had said as much in *Bronson v. Railroad Co.*, 2 Black, 524, 528, 17 L. Ed. 347. It is not to be supposed that a scheme of foreclosure and reorganization shown to be designed to preserve the interests of stockholders at the expense of creditors could receive the sanction of an honest and intelligent court or judge, and, if such a question is to be regarded as novel, it must be because of the manner of presentation and treatment. Whatever may have been said in the course of the argument before him, the judge of the circuit court did not apprehend, and, until the ruling of the supreme court was announced, did not know, that the case involved the question decided. Indeed, if counsel had made the point, and had designated the averments intended to present it, it is not probable that, without the aid of the opinion of the supreme court, the averments would have been deemed sufficiently comprehensive and specific, or duly verified. The allegation that the proceedings in behalf of Mills "were procured by the said New Albany Company for the purpose of hindering and delaying the general or unsecured creditors of said company in the enforcement of

their debts" probably would have been construed to mean, not a fraudulent purpose, but a purpose to cause only the hindrance and delay necessarily incident to the proceedings; and, even if the averment should have been deemed to be of a fraudulent purpose on the part of the railroad company, it would have been thought to affect in no way the proceedings of Mills or the foreclosure suits, it not being alleged that Mills and the trustees in the mortgages knew of or participated in the fraudulent intent. It is certainly a novel idea that a debtor, who, with intent to hinder and delay his general creditors, procures one of them, who is ignorant of his purpose, to bring proceedings for the appointment of a receiver, thereby lays the foundation not only for the defeat of the creditor who brings suit, but for the defeat of suits thereafter brought for the foreclosure of mortgages by trustees likewise innocent of any fraudulent design or knowledge. So, too, the allegation in respect to the obtaining of the decree probably would have been deemed indefinite, inadequate, and not sufficiently verified to be acted upon without proof. The Farmers' Loan & Trust Company and the Central Trust Company are alleged to have been parties to the agreement with the holders of the stock, or part of it; but their respective co-trustees, Barker, Stotsenburg, and Murdock, are not implicated. What the agreement or arrangement was is not stated; nor that it continued in force, or had anything to do with bringing about the decree. The allegation is that "prior to the entry of the said decree" the parties named "had entered into an arrangement or agreement for the purpose of procuring the sale of said property, its purchase by and in behalf of the parties entering into such combination, and reorganization thereof, and the issue of securities to the said parties, including said stockholders, without the payment of the debts and liabilities of said company, and for the purpose of hindering and delaying the said creditors, and with a view to prevent the collection or enforcement of such debts and liabilities." Besides not including the individual trustees, who, for all that is alleged, may have had control of the suits, and besides the evident improbability of an agreement which contemplated "the issue of securities to the said parties," that is to say, to the trust companies (but not as trustees), the agreement, if in force and operative to bring about the decree, was not unlawful because it contemplated a sale and reorganization without the payment of unsecured debts or liabilities, unless there was a purpose to take from those creditors something which belonged to them, outside of or over and above the mortgages, and nothing of that kind is alleged; nor, because of the alleged purpose of hindering and delaying, it not being alleged that a hindering or delaying beyond what was necessarily incident to the proceedings of foreclosure prosecuted by lawful and regular methods was contemplated. The concluding part of the allegation, that the decree of sale "was obtained by the said company (not stockholders, as first stated) and said complainants in order to carry out such unlawful purpose, and to prevent the general or unsecured creditors of the said company from having an opportunity to be heard in matters arising in said cause," does not help, but, rather, detracts from, what preceded. "Such unlawful purpose" is meaningless, because nothing un-

lawful as against the petitioner had been alleged, and, instead of a purpose to hinder and delay, even to an extent unavoidable, the intended wrong dwindles to a purpose "to prevent the general or unsecured creditors of the said company from being heard in matters arising in the said cause." This certainly does not mean, and from the entire allegation, whether taken together or analyzed clause by clause, I should have been unable, without authoritative instruction, to deduce, "an agreement between mortgagee and mortgagor [bondholder and stockholder] to preserve the relative rights of both, and simply extinguish unsecured indebtedness." The supreme court gave much weight to "facts apparent on the face of the record," which, taken as a whole, were declared to be "very suggestive, independent of positive allegation,—so suggestive, at least, that when a distinct and verified charge of wrong was made the court should have investigated it." As already explained, the charge of wrong under consideration, if mentioned or hinted at by counsel, escaped the attention of this court. The facts referred to, however, were well known to the court; and for some of them the court was directly, and for others indirectly, responsible. The court appointed the general manager of the road the receiver. The court entered the judgment at law in favor of Mills, and on the same day entertained and granted the application for the appointment of the receiver. The court knew of the proceedings and decrees in the Sixth circuit, and that it was because of the large liability thereby established, and of the attachment suits begun and threatened, that the application for a receiver was precipitated. It was the belief of the court, too, that the Mills suit was a friendly one, brought because at that time there had been no default in the payment of interest upon mortgage bonds which could be made ground for a suit to foreclose. I suppose it to be "common knowledge" that, when an emergency for a receivership arises, it is not infrequently applied for and granted upon the bill of a friendly creditor in anticipation of an early default in the payment of interest, which will afford ground for a mortgage foreclosure. The creditors' bill in this case was ample in its showing of the insolvency of the company, and the attachment suits which had been brought and those threatened constituted an unusual and imperative emergency for immediate action. Any delay for the sake of seemliness of procedure would have been itself at once an unseemly pretense and a denial of just relief in a pressing emergency, brought about by those who now complain. The court did not know that Mills held his demand against the company as trustee for a syndicate of which the president of the company was a member, nor that the demand was secured by a pledge of collaterals; but the security being, as the proof shows, largely inadequate, it is not perceived that the proceedings were censurable or any the less valid on account of those facts. On all these phases of the case it is enough to quote from the recent opinion of the supreme court itself, in the case of *Dickerman v. Trust Co.*, 176 U. S. 181, 189, 20 Sup. Ct. 312, 314, Adv. S. U. S. 312, 314, 44 L. Ed. —:

"We have no doubt that this judgment was collusive, in the sense that it was obtained by the plaintiff and consented to by the defendant company

for the purpose of giving the trustee a legal excuse for declaring the principal and interest of the mortgage to be due, and to give authority for a foreclosure. But this did not constitute collusion in the sense of the law, nor does it meet the exigencies of the petitioner's case. 'Collusion' is defined by Bouvier as 'an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law,' and in similar terms by other legal dictionaries. It implies the exercise of fraud of some kind,—the employment of fraudulent means or lawful means for the accomplishment of an unlawful purpose; but if the action be founded upon a just judgment, and be conducted according to the forms of law and with a due regard to the rights of parties, it is no defense that the plaintiff may have had some ulterior object in view, beyond the recovery of a judgment, so long as such object was not an unlawful one. In *Morris v. Tuthill*, 72 N. Y. 575, which was also a suit to foreclose a mortgage, the court observed: 'The facts that the assignor of a mortgage and his assignee acted in concert with a view unnecessarily to harass and oppress the mortgagor, and with intent to prevent payment, to the end that the equity of redemption might be foreclosed, and they become purchasers for less than the value, do not constitute a defense to an action to foreclose a mortgage. So, also, the facts that the assignee took title from motives of malice, and solely with the view to bring an action, and that the assignor assigned from a like motive, and without due consideration, furnish no defense, and do not impeach the plaintiff's title. It is sufficient to sustain the action that the mortgage debt is due, has been transferred to and is owned by plaintiff; and the mortgagor can only arrest the action by paying or tendering the amount due.' If the law concerned itself with the motives of parties, new complications would be introduced into suits, which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motive. *Davis v. Flagg*, 35 N. J. Eq. 491; *Dering v. Earl of Winchelsea*, 1 Cox, Ch. 318; *McMullen v. Ritchie* (C. C.) 64 Fed. 253, 261; *Toler v. Railway Co.* (C. C.) 67 Fed. 168. Now, in this case there is no doubt that Flanagan's claim was an honest one; that the coupons upon which he brought the suit were due and unpaid; and there is nothing to show that he would not have been entitled to a judgment upon them if the defendant had made a contest. The company was notoriously insolvent. Its coupons for 1894 and 1895 were unpaid. All its property was subject to the mortgage given to secure its bonds. It could no longer continue its business. Flanagan had a perfect right to bring suit, and under these circumstances the president of the company was guilty of no wrong in consenting to a judgment, and to the immediate issue of an execution. The company was not bound to defend if there were no defense. The forms of law were complied with. It would doubtless have been more seemly if judgment had not been entered until the return day of the summons, if the execution had not issued until the expiration of the twenty days allowed by law, and if the trustees had not been so alert in seizing upon the nonpayment of the judgment as an excuse for declaring the principal and interest of the bonds to be due. But this haste did not render the judgment or execution void. If the company had become insolvent and could no longer carry on its business, it was not only its legal obligation, but its moral duty, to surrender the mortgaged property to the mortgagees, in order that the latter might protect their interests. If the corporation saw fit to consent to a foreclosure, a minority of stockholders cannot question their right to do so. The fact that the Flanagan action was undertaken for the purpose of enabling the trustee to declare the principal and interest due does not invalidate the proceedings, so long as there was a debt due, an action properly conducted to recover it, and the object to be gained was not an illegal one."

The exceptions to the master's report embrace many matters which are irrelevant, or, if found one way or another, constitute, at most, only evidence upon the ultimate issue to be determined. The fourth, fifth, and eighth exceptions are directed to the inquiry ordered by the supreme court, and will be considered together as presenting

the question whether "it is true, as alleged, that the foreclosure proceedings were made in pursuance of an agreement between the bondholder and stockholder to preserve the rights of both and destroy the interests of unsecured creditors." The scope of this inquiry, and the principles upon which it should be determined, must be found in the opinion of the supreme court, unless in any particular the matter was put at large by the amended and supplemental petition, to the filing of which, without prejudice to the rights of the respondents to object on account of the delay and laches of the petitioner, there was no objection. In so far as they relate directly to the subject of inquiry, the allegations of the amended petition are as follows:

"And the petitioner charges that the proceedings in behalf of the said John T. Mills, Jr., were solicited and procured by the said New Albany Company, or the board of directors thereof, including Samuel B. Thomas, president, and W. H. McDoel, vice president, for the purpose of hindering and delaying the general or unsecured creditors of the said company, and to prevent the enforcement of their debts, and were not instituted or prosecuted by the said John T. Mills, Jr., in good faith, or for the purpose of protecting himself or the creditors of the said company. * * * And the petitioner further says that prior to the filing of such bills, and prior to the entry of the said decree, there had been constituted a committee, and which had been formed by and in behalf and with the apparent approval and at the instance of the officers and directors of the said company, and which consisted of Frederick P. Olcott, Henry W. Poor, and Henry C. Rouse, and styled, 'The Committee of Bondholders,' for the purpose of bringing about a sale and reorganization of the railway properties of the New Albany Company; and an arrangement or agreement had been made and entered into by such committee, and by holders of bonds and the officers and directors of said company, for the purpose of procuring a sale of the properties of the said New Albany Company, and its purchase by and in behalf of the bondholders and of the stockholders of the said corporation, and for the purpose of continuing and preserving the interest of the stockholders in the said corporation without the payment of the debts and liabilities of the said company, and for the purpose of hindering and delaying and defrauding the unsecured creditors of such corporation, and with a view to prevent the collection or enforcement of any such claims against the said company, and that, for the purpose of carrying out and effecting such unlawful scheme, a device was adopted by which the said committee attempted or pretended to make sale of certain securities of the reorganized company to a syndicate, which was, as the petitioner is informed and believes, largely composed of officers, directors, and stockholders of the said company, including the said president and vice president, but with an agreement that upon payment of a small assessment the stockholders in the old company should be able to convert their stock into the stock of the new company, and thus preserve and continue their interests, and that no provision was made by which any general creditor was entitled to be paid, or to obtain or to receive any of the securities or other rights in the reorganized company, and that because of the said agreement the complainant John T. Mills, Jr., at the instance and request of the officers of the company, and the company itself, by its said officers, acquiesced in the entry of a decree of sale herein; and the foreclosure suits were brought and said decree was entered after said arrangement had been made, and for the purpose of carrying out the same, and of securing the interest of the stockholders, and depriving the general creditors of any power to enforce their claims against the corporation, and that afterwards, in pursuance of the said agreement, the said John T. Mills, Jr., and the said corporation agreed to the confirmation of the sale herein on the same day upon which it was made,—all of which was because of the said fraudulent agreement by which they were to preserve and continue their rights and interest in the property without the payment of the debts and liabilities of the company. * * * And the petitioner further says that the said Chicago,

Indianapolis & Louisville Railway Company was so organized for the purpose of carrying out the scheme before mentioned, and in pursuance thereof did issue their securities accordingly, and that the said preferred and common stockholders of the Louisville, New Albany & Chicago Railway Company were allowed to and did convert their old stock into the stock of the new company, according to the said plan or arrangement, and such old stockholders, or their assignees, are now the owners and holders of such stock. * * * Wherefore the petitioner prays that the court do appoint a receiver, with directions to take charge and custody of the railways and other properties and assets of the Louisville, New Albany & Chicago Railway Company, and which are now in possession of the Chicago, Indianapolis & Louisville Railway Company, and that he be directed to manage and operate such railways, and to collect and hold any and all other assets for the benefit of those who may be entitled by law, and that he be authorized to collect from the Chicago, Indianapolis & Louisville Railway Company all and every asset, property, and the amount of any claim in the hands or in possession of such company and belonging to the Louisville, New Albany & Chicago Railway Company, and that he require and enforce an accounting by the said company of all the earnings derived by such company from the operation of the said railways since it took possession thereof, and for all and such other and further relief as to the court shall seem meet. And the petitioner further prays that an order be entered herein directing the defendants, the Louisville, New Albany & Chicago Railway Company, the Farmers' Loan & Trust Company and John H. Barker (trustees), the Central Trust Company and John H. Stotsenburg (trustees), the Central Trust Company and James Murdock (trustees), John T. Mills, Jr., Frederick P. Olcott, Henry W. Poor, Henry C. Rouse, and the Chicago, Indianapolis & Louisville Railway Company, to appear, within a time to be fixed in such order, and to plead and make answer to the allegations herein,—an answer under oath, however, being expressly waived,—and for all such other and further orders and judgments as to the court shall seem meet and proper."

In so far as these averments differ from the original petition, as it was construed by the supreme court, they seem to me to impair, rather than to strengthen, the petitioner's position in the case. If it be assumed, as, perhaps, in view of the construction put upon the original petition, it must be, that there is an adequate charge of an arrangement or agreement entered into for a fraudulent purpose, it was not "between the bondholder and stockholder," as expressed in the mandate, but was "made and entered into by such committee and by holders of bonds and the officers and directors of said company." It is alleged, on belief, that the syndicate was largely composed of officers, directors, and stockholders; but that can hardly be deemed to help out the previous averments, since the same individuals may have been (the evidence shows they were) both bondholders and stockholders, and an allegation of an agreement entered into by them does not show an agreement between the bondholder, on the one side, and stockholder, on the other, in the sense of the mandate. Furthermore, while it is averred that the preferred and common stockholders of the old company "were allowed to and did convert their old stock into stock of the new company," it is not alleged that the privilege of so doing was of value, or that the stock so acquired in the new company was worth more than the cash sums which by the plan were required to be and were paid therefor. But a more radical and, as it seems to me, a fatal, defect in the petition is the failure to allege that the trustees in the several mortgages participated in or knew of the wrongful purpose attributed to the bondholders' committee and the officers and

directors of the New Albany Company; and, if the averment had been made, it would have been without support in the evidence. There being no question but that the mortgages foreclosed were valid and an installment of interest upon the bonds secured thereby overdue and unpaid when the suits were brought, no agreement, conduct, or purpose, however fraudulent or wrongful, of Mills and the officers of the railway company, in respect to the proceedings of Mills, or of the bondholders' committee and the officers of the company, or of any syndicate, could be ground for an attack upon the decree of foreclosure, unless the trustees knew of the intended wrong, and prosecuted the suits to a decree and sale for the purpose of aiding in its consummation. And even in such case, unless it were shown that the holders of the bonds secured by the mortgages were also implicated in the scheme, on what ground or theory could equity interfere? The allegation "that because of the said agreement the complainant John T. Mills, Jr., at the instance and request of the officers of the company, and the company itself, by its said officers, acquiesced in the entry of the decree, * * * and [Mills] agreed to the confirmation of the sale herein on the same day upon which it was made," is obnoxious to criticism. In the first place, it is not true. In the entry of the decree there is no recital of the presence or consent of Mills. His rights under his bill were not adjudged by the decree. In the order of confirmation his presence and consent by counsel are stated, but there is no evidence that this consent was in any manner due to, or given "in pursuance of, the said agreement"; and the assertion "that because of the said agreement * * * the company itself, by its said officers, acquiesced in the entry of the decree," in view of the alleged responsibility of those officers for all that was done from the beginning, is little less than preposterous. If the company seemed "a most willing debtor to have all its property destroyed," the evidence shows that it was also a most helpless one, which after a struggle for existence maintained for a decade or more, not by its earnings, but by the proceeds of sales, at ruinous sacrifice, of bonds and stock to the amount of millions, had finally been reduced to dependence upon the personal credit of its president and others, against whom these accusations have been lodged because they were unwilling to go on in a hopeless attempt to carry the company under the new and unexpected burden imposed upon it by the decree in the Sixth circuit. The only theory suggested in the opinion of the supreme court by which the petitioner's standing in the case can be vindicated is that there was an agreement to preserve the rights of stockholders at the expense of creditors, and that in consideration thereof the stockholders were induced to submit without objection to a speedy foreclosure. "It is one thing," says the opinion, "for a bondholder who has acquired absolute title by foreclosure to mortgaged property to thereafter give of his interest to others, and an entirely different thing whether such bondholder, to destroy the interest of all unsecured creditors, to secure a waiver of all objections on the part of the stockholder and consummate speedily the foreclosure, may proffer to him an interest in the property after the foreclosure.

The former may be beyond the power of the courts to inquire into or condemn. The latter is something which on the face of it deserves the condemnation of every court, and should never be aided by any decree or order thereof. It involves an offer, a temptation, to the mortgagor, the purchase price thereof to be paid, not by the mortgagee, but in fact by the unsecured creditor." That theory the amended petition abandons or ignores, and, instead, vainly alleges the obtaining of the consent of Mills and of the company itself, through its officers, to the decree of foreclosure and to the confirmation of sale. For reasons already adverted to, the consent of neither, as alleged, is of the slightest consequence.

Of the evidence taken by the master, all of which I have carefully read, except some of the tabulated statements, little more need be said. To establish the supposed agreement between the bondholder and stockholder reliance is placed upon certain documentary evidence, supplemented, it is claimed, by published statements attributed to Samuel Thomas, as president of the New Albany Company. An article in the Commercial and Financial Chronicle of August 15, 1896, after reference to attachment suits by Beattyville bondholders, professed to give an "official statement" made the day before by President Samuel Thomas, but not signed, in which were the following expressions:

"The lawyers of the New Albany Company deem the defense of the company to be impregnable, but the litigants are trying to make the procedure as vexatious as possible. Even should they attain finally to a judgment in their favor, the claim would rank only as an unsecured debt, subsequent to all the existing mortgages, and it would be extinguished by an assertion of the rights of the mortgagees. Should it ever become necessary for the mortgagees to take action to extinguish the claim, there seems to be no doubt that the road would be ultimately restored to the stockholders, and that there is no danger of their stock being wiped out. The legal situation is totally unexpected, and must be admitted to be menacing to the present credit and convenience of the company, but the situation does not justify such a sacrifice of their property as the proprietors have been frightened into making. The equity in the road is valuable, and the best efforts of the management will be directed to maintain it in the present stockholders."

In the same journal, of August 29, 1896, was published an interview, attributed to President Thomas, containing the following:

"The receivership, however, was precipitated by the attempt of the Beattyville bondholders to enforce the payment of interest on their bonds, under Judge Taft's recent decision upholding the guaranty. An official statement regarding this attempt was in the Chronicle of August 15, 1896 (page 269). A majority of the New Albany bonds is held by the friends of the company, and the intention is to reorganize after foreclosure sale. This will result in debarring all claims on account of the Beattyville guaranty. * * * This action is taken in the interest of the present security holders, and will maintain the property intact until such time as a reorganization can be arranged. The company has always been abundantly able to pay all of its debts, and its solvency has never been questioned until the judicial decision of Judge Taft opened the way to saddle the company with the debts of another road. It is to-day in better physical condition than ever before, and its capacity for earning money is better. The sole embarrassment arises from the fact that it has been called upon to pay the debts of another corporation. The receivership will put an end to this, and all similar causes of annoyance inherited from past management. A majority of our mortgage bonds is in the hands of friends of the company, and it will be easy to arrange for a foreclosure

which will extinguish the alleged claims in connection with the Beattyville suit, and will enable the property to be restored to those at present interested in it without the sacrifice of any part of their existing values."

These interviews, counsel for the petitioner concede, were prepared by John Greenough, the vice president of the company, but, they insist, were submitted to and approved by Gen. Thomas. I have no doubt they expressed his thoughts and purposes at that time.

A bondholders' agreement, purporting to be made on October 10, 1896, after reciting the necessity of action to protect their interests, and that foreclosure suits had been or were about to be instituted, proceeds to constitute Frederick P. Olcott, Henry W. Poor, and Henry C. Rouse a committee, and to define their powers and duties. In the eighth article is this clause:

"And, generally, for the purpose of carrying out the plan and making the same effective, the committee is authorized and empowered to enter into a contract or agreement with a syndicate, containing such conditions and provisions as the committee may approve, to sell and deliver to said syndicate, for the sum of \$2,100,000 in cash, the following securities of the new company, viz.:

Refunding mortgage five per cent. fifty-year gold bonds, of	
the par value of.....	\$ 1,500,000
New preferred stock, of the par value of.....	680,750
New common stock, of the par value of.....	10,500,000"

The committee so appointed put out a statement, dated October 10, 1896, and addressed, "To the Holders of the Bonds of the Louisville, New Albany and Chicago Railway Company," in which the proposed plan of reorganization was set out, the important features of which were these: The new company, to be called the Chicago, Indianapolis & Louisville Railway Company, was to issue refunding mortgage five per cent. fifty-year gold bonds to the amount of \$15,000,000, of which \$11,409,000 should be used to take up existing bonds of the old company to the amount of \$13,509,000 (only \$700,000 of the new bonds going to the holders of \$2,800,000 general mortgage bonds), \$1,500,000 should be sold for cash to a syndicate, and \$2,091,000 should be deposited with a trustee, and issued from time to time, not exceeding \$400,000 in any year, for betterments and equipments, and should also issue, of new preferred stock, four per cent., noncumulative, \$5,000,000, and of new common stock, \$10,500,000. "To provide the capital needed by the new company, it is proposed to sell for the sum of \$2,100,000, in cash, new bonds to the amount of \$1,500,000, together with \$680,750 preferred stock and \$10,500,000 of the new common stock. A responsible syndicate has made a proposition to purchase the same, and has entered into an agreement with the committee to allow the holders of the old preferred and common stock, extinguished by the foreclosure, the first opportunity of subscribing for the new common stock, on the following basis: The existing (old) preferred stock shall have the privilege of subscribing for an equal amount of common stock in the new company at \$7.50 per share, receiving, in addition thereto, new preferred stock equal to the amount of cash paid. The existing (old) common stock shall have the right to subscribe, at \$7.50 per share, for an amount of common stock in the new company equal

to one-third of the existing (old) common stock, receiving with each subscription, in addition, new preferred stock equal to the amount of cash paid. The effect of these provisions will be as follows: Each \$100 of existing (old) preferred stock will receive \$100 of new common stock, and \$7.50 of the new preferred, paying therefor \$7.50 in cash. Each holder of \$300 of existing (old) common stock will receive \$100 of new common, and \$7.50 of new preferred, upon payment of \$7.50 in cash. The syndicate is not to be required to extend the privilege of subscription to the capital stock of the Chicago, Indianapolis and Louisville Railway Company (the new company to be organized to purchase the property) beyond the first day of January, 1897." The syndicate agreement also purports to have been made on October 10, 1896, between Olcott, Poor, and Rouse, "as a committee of bondholders" of the railway company, and Samuel Thomas, for himself and his associates, called the "Syndicate." By the fourth article "the syndicate promises, covenants, and agrees to and with the committee that it (the syndicate) will give and cause to be given to the owners and holders of the preferred stock and common stock of the existing Louisville, New Albany and Chicago Railway Company the right to subscribe for the new common stock aforesaid before any of the said new stock shall be distributed among the members of the syndicate, upon the following terms, that is to say"; the terms stated being the same as those announced in the published plan of the committee.

Another contract, bearing the same date (October 10, 1896), between Samuel Thomas, representing the syndicate, and the Central Trust Company of New York, simply made the latter company the agent of the syndicate to effect the proposed surrender of old stock and issue of new upon the terms prescribed; it being provided, among other things, that the trust company should cause notice by advertisement to all holders of preferred and common stock of the existing company that on or before November 30, 1896, such holders might surrender to and deposit with the trust company their certificates of stock, duly indorsed in blank, and receive therefor receipts of the trust company entitling the holder to new common stock, etc. Whether such notice was given does not appear.

These writings show no agreement between the bondholder and stockholder, as such. They do show an agreement between the bondholders' committee and the syndicate by which the latter covenanted with the committee that the holders of old stock should have the privilege of subscribing for the stock sold to the syndicate on the terms stated. That committee represented bondholders, but not all of them. Some members of the committee and also of the syndicate were holders both of bonds and of stock, but no member of either was a holder of stock alone. The holders of eighty-five per cent. of the stock of the New Albany Company availed themselves of the privilege of taking the new stock, and paid therefor \$584,545 to the syndicate. To what extent they were also holders of bonds, does not appear. To a large extent they were also holders of bonds, and it does not appear that any one who was not a bondholder availed himself of the privilege. After August, 1896, the stock of the New

Albany Company was practically worthless, the quotation of the common on October 12, 1896, being $1\frac{1}{2}$ and of the preferred $3\frac{1}{4}$ to $4\frac{1}{4}$, and by December and January following the value had run down to a fraction of a cent for the common, and 1 to 2 cents for the preferred. The special master has reported that there was no damage to the unsecured creditors, and that the privilege given to the holders of stock in the old company to obtain stock in the new was of no value, and the weight of the evidence seems to justify the finding. At most, the value of the privilege was no more than nominal, and the finding that there was no fraud or fraudulent conspiracy on the part of the trustees, the bondholders, the stockholders, or the New Albany Company is, beyond question, right. There is no evidence tending to show that the privilege so given was offered in order "to secure a waiver of all objections on the part of the stockholder, and speedily consummate the foreclosure," or for any like purpose. It does not appear that any stockholder ever complained of the receivership, or hinted at opposition to the proceedings at any step. No objection was ever made to the plan of reorganization, except by the holders of consolidated six per cent. bonds, and to meet that objection the plan was modified so as to give them a new six per cent. bond. Finally, whatever was the value of the privilege in question, and whatever the purposes and motives of those concerned in giving it, it is not shown that the stockholders obtained anything at the expense of the creditors. On the contrary, it is clear that the entire property which was covered by the mortgages foreclosed, and passed by the sale to the purchaser, was worth much less than the mortgage debts; and if anything of value was given to the stockholder by the plan of reorganization, beyond what he paid for with new money, it was at the expense of the bondholder. The foreclosed mortgages secured bonds and interest due to an amount exceeding \$8,600,000, and the sale was for only \$3,001,000. Do these facts make out a case within the condemnation of the supreme court?

To be literally within the mandate, there must have been an agreement between "the bondholder and stockholder," but manifestly that is not to be read literally. It does not mean a single bondholder on one side, nor a single stockholder on the other. Does it mean all bondholders, or all stockholders? It may not fairly be said to mean all stockholders, because the creditor would have a right to complain of the destruction of his interests, whether in favor of one or all of the stockholders. But if, on the other hand, it does not mean all of the bondholders, then how can the relief proposed be given, without injuring the bondholder who had no share in the wrong? The "public interest," which, in a well-known line of cases, commencing with *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, has been deemed to "justify a limited displacement of contract and recorded liens in behalf of temporary and unsecured creditors," has reference to the public convenience as involved in the continued and safe operation of railroads; and, outside of that, there would seem to be no "public considerations" which require, in the foreclosure of a railroad mortgage, any departure from "the ordinary rules or rights of mortgagor and mortgagee in a foreclosure." It was on

public considerations (that is, to make the road a safe and efficient carrier) that receiver's certificates to the amount of \$200,000 were issued and made a charge upon the income of this road. It was not a matter of public concern that a default in the payment of interest should have been forestalled, and certificates to raise money for that purpose nobody stood ready to buy. It is for the public interest that in all litigation the rights of parties shall be determined upon settled and consistent principles. In *Railroad Co. v. Howard*, 7 Wall. 392, 19 L. Ed. 117, in pursuance of a plan for the sale, purchase, and reorganization of a railroad under a decree of foreclosure, one-sixth of the purchase price was to go (and the new company was ready to pay the amount) to the stockholders of the old company; but, on a bill brought by creditors, it was held that they were entitled to have their whole debt paid before any portion of the fund derived from the sale should go to the stockholders of the old company, which was insolvent. That was a direct and fair mode of enforcing "the familiar rule that the stockholder's interest in the property is subordinate to the rights of the creditors,—first of secured, and then of unsecured, creditors"; and what reason was there why the petitioner in this case, with equal simplicity and directness of procedure, should not have brought a bill to enjoin the delivery of the new stock to the holders of the old stock until the value thereof, over and above the cash assessment, should be paid into court for the benefit of the petitioner and other unsecured creditors, or, if that value could not be determined satisfactorily, to obtain a decree that the petitioner be allowed, upon repayment to the subscribers of the cash which they had paid, to take the new stock subscribed for by holders of the old stock? A decree to either effect would have afforded a complete remedy for the alleged wrong, against the beneficiaries of the wrong, and could have involved no injury to bondholders who had no part in the transactions complained of, or to the new company and the innocent purchasers of its securities. It is not alleged that the facts were not known in time to seek such relief. On the contrary, it is fairly inferable that the plan of reorganization was known to the petitioner's counsel before the sale, and probably before the decree, and might just as well have been brought forward even in its first petition. Another remedy, perhaps yet available, if the alleged wrong was real and substantial, and enforceable without the possibility of injury to innocent third parties, might be sought against the individual holders of the old stock who obtained the new.

A number of cases have been cited which go far towards establishing the validity of the plan of reorganization here in question, but, with a single quotation, I content myself with a reference to them: *Kurtz v. Railroad Co.*, 187 Pa. St. 59, 40 Atl. 988; *Pennsylvania Transp. Co.'s Appeal*, 101 Pa. St. 576; *Dow v. Railway Co.*, 144 N. Y. 426, 430, 39 N. E. 398; *Ferguson v. Railway Co.*, 17 App. Div. 336, 45 N. Y. Supp. 172; *Hutchins v. Hutchins*, 7 Hill, 104, 107; *Bame v. Drew*, 4 Denio, 287, approved in *Wicker v. Hoppuck*, 6 Wall. 94, 98, 18 L. Ed. 752; *Shoemaker v. Katz*, 74 Wis. 374, 43 N. W. 151; *Central Trust Co. v. United States Rolling-Stock Co.*

(C. C.) 56 Fed. 5. In *Paton v. Railroad Co.* (C. C.) 85 Fed. 838, of an agreement much like this one, Judge Jenkins said:

"The question is presented whether any plan of reorganization can be sustained which does not comprehend the protection of the rights of general creditors of the corporation, or, in other words, whether bondholders have a right to agree with stockholders upon terms which may be agreed upon to give the latter an interest in the new corporation, without including creditors in such plan of reorganization, or at least tendering them an opportunity of joining therein. I fail to perceive any just reason why, in the absence of fraud or oppression, such arrangements should not be upheld in a court of equity. It was competent for these bondholders to exclude stockholders from any agreement. It was also competent for them to exclude creditors. The bondholders, under different mortgages, could agree among themselves, without reference to creditors or stockholders; and, in case of agreement with stockholders, unless the scheme is clearly one to secure to the stockholder that which should justly go to the creditor,—unless it can be said that it was a scheme to defraud creditors,—I perceive no reason which would justify denunciation of the plan. To the contrary, such plans of reorganization have met with general approval, because they tend to avoid sacrifice and loss, and are beneficial to the public. *Robinson v. Railroad Co.* (C. C.) 28 Fed. 340; *Mackintosh v. Railroad Co.* (C. C.) 34 Fed. 582; *Central Trust Co. of New York v. United States Rolling-Stock Co.* (C. C.) 56 Fed. 5, 7; *Pennsylvania Transp. Co.'s Appeal*, 101 Pa. St. 576."

If the evidence required a finding that the foreclosure proceedings had been in pursuance of the alleged wrongful agreement between the bondholder and stockholder, it would be the duty of the court, under the mandate, "to refuse to confirm the sale until the interests of unsecured creditors have been preserved," and the question would be how that could and should be accomplished. In behalf of the petitioner it is contended, on the authority of *Barnes v. Railway Co.*, Fed. Cas. No. 1,016, *Railroad Co. v. Howard*, supra, *Montgomery Co. v. Dienelt*, 133 Pa. St. 585, 19 Atl. 428, and other cases, that the holders of the foreclosed bonds, having accepted new securities in payment of the old, cannot be restored to their original rights; that, "even as to the bonds taken by the old bondholders, their claim is inferior to that of the creditors of the old company, and in this event the proper method of accounting would be to use the net earnings derived from the property, after the payment of the interest on the undisturbed (unforeclosed) bonds of \$5,300,000, for the payment of these unsecured creditors"; but that if it should be held that, to the extent of their new bonds, the holders of the original bonds are "entitled to a priority over unsecured creditors, it is denied that under any circumstances could they claim any such lien in behalf of the preferred stock which they accepted in discharge of their bonds." The proposition is extremely inequitable, and the decisions cited do not compel its adoption. This is a suit by the creditor, seeking to have the confirmation of the sale set aside until the rights of creditors cut off by the sale shall have been provided for. What are their rights? Manifestly, to have any surplus of value in the property or its proceeds, over and above the mortgage debts, applied to the payment of their demands. On the sale made there was no surplus, and, on the theory of the sale having been wrongfully obtained, their remedy is another sale under circumstances which will afford them the best practicable opportunity to protect their rights.

If the old bonds have been extinguished, it is because of the sale; and it is not for the petitioner and other creditors to say that as to them the sale was wrongful and shall be set aside, and yet as to them it shall remain so far in force as to remove out of their way a large part of the mortgage debt, which was confessedly valid, and would now be in full force and effect but for the sale, made under the order of the court, and which it is proposed the court shall set aside. Those who would have equity must accept it upon equitable terms. The decision of the supreme court commands the protection of the rights of creditors, but it does not require the sacrifice of the rights of bondholders; and if, on the proofs, the right of the petitioner to relief were established, relief, it seems to me, could be given only by means of a new sale, at which all interested should have an opportunity to bid, and, if more should be realized than necessary to pay the mortgage debts, the remainder should go to the petitioner and other creditors. Net income and sums expended since the sale in betterments should, of course, enter into the accounting. But on that basis the petitioner has indicated neither readiness nor willingness to accept relief, and how in this proceeding it could be awarded on any other theory I do not perceive. If a receiver were again put in charge, the net income would be applicable to the payment of the mortgages, and no benefit could accrue to creditors until the foreclosed mortgages had been fully paid. A receivership for such a purpose, of course, is not to be thought of. If it be true, as alleged in the amended and supplemental petition, that the new railway company has come into possession of earnings or assets to which it was not entitled, and which ought to be paid upon or applied to the satisfaction of the demands of the creditors of the old company, the remedy is plain, and there is no necessity or reason for an attack upon the foreclosure decree and sale.

The proof shows that the judgment recovered by Mills and other demands against the New Albany Company were paid or purchased by the syndicate, and the amount thereof credited against the sum which the syndicate had agreed to pay for the securities turned over to it; but, if unlawful, that was, at most, a wrongful disposition of the proceeds of the sale, and did not affect the validity of the sale itself. The petitioner's remedy, if any, should be sought against those who obtained, or possibly against those who were instrumental in giving, the wrongful advantage.

The answer of the Chicago, Indianapolis & Louisville Railway Company to the amended petition asserts the rights of an innocent purchaser under the foreclosure decree, the appeal from which was taken and prosecuted without obtaining a supersedeas, but it is not necessary to enter upon that question. The exceptions to the report of the special master will be overruled, and a decree may be prepared accordingly.

FARMERS' LOAN & TRUST CO. v. PENN PLATE-GLASS CO. et al.

(Circuit Court of Appeals, Third Circuit. June 14, 1900.)

No. 33.

1. MORTGAGES—INSTRUCTION — OBLIGATION TO PROCURE INSURANCE.

A mortgage given by a corporation to a trustee to secure an issue of bonds may properly contain provisions defining and limiting the duties and obligations of the trustee to the holders of the bonds, and which have no relation to the contract of the mortgagor, and do not affect its liability. A clause of such character, relating entirely to the duties and obligations of the trustee, and providing that it shall be no part of its duty "to file or record this indenture, * * * or to renew such mortgage, or to procure any further, other, or additional instruments of further assurance, * * * or to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made; but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or require the same to be done,"—cannot be construed, in the absence of any other provision on the subject, as imposing on the mortgagor an obligation to keep the property insured for the benefit of the bondholders on demand of the trustee.

2. SAME—PURCHASER OF EQUITY OF REDEMPTION.

Where a mortgage contained no provision requiring the mortgagor to keep the property insured for the benefit of the mortgagee, the fact that the mortgagor did so until it became insolvent does not constitute a construction of the contract by the parties which can bind a subsequent purchaser of the property subject to the mortgage to procure such insurance.

3. SAME—PROCEEDS OF INSURANCE—SUBJECTION TO LIEN OF MORTGAGE.

Where a mortgage did not require the mortgagor to keep the property insured for the benefit of the mortgagee, there is no ground upon which a court of equity can declare a lien in favor of the mortgagee on the proceeds of insurance procured by a purchaser of the property subject to the mortgage.

4. SAME—EQUITABLE LIEN.

The rule that, where a mortgagor has covenanted to insure the mortgaged property for the benefit of the mortgagee, a court of equity may impress an equitable lien in favor of the mortgagee upon a fund arising from insurance taken by the mortgagor in his own name, is based upon the existence of an express contract by which the owner agreed to give a lien upon that particular fund, and upon the maxim that equity regards as done that which ought to be done; but, as equity cannot create the lien independently of contract, such rule cannot be applied to the proceeds of insurance taken for his own benefit by a grantee of the equity of redemption in the property subject to the mortgage, between whom and the mortgagee there is no contract with respect to such fund.

5. SAME—PURCHASER OF PROPERTY SUBJECT TO MORTGAGE—OBLIGATIONS ASSUMED.

The acceptance of a conveyance of mortgaged property "subject to the mortgage" can have no greater or other effect, at the most, than an express contract on the part of the grantee, with the grantor, to pay the mortgage debt. It does not bind the grantee to perform any of the covenants of the mortgage, except those which run with the land, and a provision that the mortgagor shall insure for the benefit of the mortgagee is not such a covenant.

6. SAME.

Under the rule in Pennsylvania, by which the contract of a grantee arising from the acceptance of a conveyance of mortgaged property subject to the mortgage is held to be one of indemnity to the grantor with respect to the mortgage debt, the grantee is not bound to indemnify against

a personal covenant of the mortgagor to insure; nor does such conveyance impose any obligation on the grantee which can be enforced by the mortgagee, where the mortgage expressly exempts the mortgagor from personal liability for the mortgage debt.

7. SAME—RIGHTS OF MORTGAGEE—PROCEEDS OF INSURANCE.

The facts that a purchaser of property subject to a mortgage when brought into court as a defendant in a suit to foreclose the mortgage successfully resisted the appointment of a receiver, and in good faith interposed a defense which delayed the rendition of a decree and a sale of the property, and that prior to such decree the buildings on the property were destroyed by fire, cannot give the mortgagee any equitable claim to the proceeds of policies of insurance taken by such defendant for the protection of its own interest in the property.

8. EQUITY—SPECIAL JURISDICTION TO ADMINISTER FUND IN COURT—EFFECT OF STIPULATION.

A stipulation was made in such case by certain large stockholders of the purchasing defendant, which was a corporation, that, in case of the loss of the property by fire pending the litigation, so much of the proceeds of the then existing insurance, taken for the benefit of the defendant, as was necessary to satisfy the mortgage debt, should be set aside for that purpose, provided it should be finally adjudged that the defendant was bound to insure for the benefit of the mortgagee, which it denied. After the destruction of the property, the court, on application of the mortgagee, appointed a receiver to collect the insurance, which he did. *Held*, that such facts did not give the court any special jurisdiction over the proceeds of such insurance, as a fund in court to be administered, nor give the mortgagee any right to a lien thereon which it would not otherwise have had.

Acheson, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

In Equity. The following is the opinion of the court below (BUFFINGTON, District Judge):

As we view it, the decision of the original case depends on the answer to two questions: First, has the trustee shown a right under the mortgage to foreclose? And, secondly, if so, can W. L. Kann or the Penn Plate-Glass Company, later successive purchasers of the mortgaged premises, question the validity of the mortgage? From the very nature of a pledge or mortgage of property, a right to foreclose or sell the pledge arises, ex necessitate, and without express grant of such power, upon default. "Such right of mortgage foreclosure," says Mr. Justice Matthews in *Railroad Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. Ed. 47, "follows from the nature of the security, and arises upon its face, unless restrained by its terms." When, then, the right of a mortgagee or pledgee to dispose of the pledge is denied, a limitation or exception abridging such right should be shown; and such limitation, being in derogation of an inherent, essential right, must be strictly construed. *Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 142, 11 Sup. Ct. 512, 35 L. Ed. 116; *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (C. C.) 61 Fed. 546; *Toler v. Railway Co.* (C. C.) 67 Fed. 179. Moreover as the provision enabling a mortgagee to take possession of mortgaged premises is held to be cumulative (*Morgan's L. & T. Railroad & Steamship Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625; *Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.* [C. C.] 36 Fed. 221; *Farmers' Loan & Trust Co. v. Winona & S. W. R. Co.* [C. C.] 59 Fed. 957; *Dow v. Railroad Co.* [C. C.] 20 Fed. 260; *Credit Co. v. Arkansas Cent. R. Co.* [C. C.] 15 Fed. 46; *Alexander v. Railroad Co.*, 3 Dill. 487, Fed. Cas. No. 166), it follows that limitation on the exercise of such specific cumulative power cannot restrict the general generic right of foreclosure incident to the mortgage.

The provision in the present mortgage relating to foreclosure by bill in equity is found in the last clause of article third. The clause therein found,

"That, in case default shall be made as aforesaid," refers to the default specified in article second, relating to entry sub conditione by the trustee, and to the default specified in the first part of section third, relating to a public sale sub conditione by the trustee. The first provision relates, inter alia, to a default in payment of interest, and is as follows: "In case default shall be made in the payment of any installment of interest on any of the aforesaid bonds according to the tenor of the said bonds, and of any of the coupons accompanying the same, or in the performance of any covenant, agreement, or stipulation herein contained, and hereby required to be kept and performed by the said party of the first part, and if such default should continue for the period of six months after demand made in writing by said trustee upon said party of the first part for the payment of the said moneys or the performance of the said covenants, it shall be lawful for the said trustee * * * to enter into or upon * * * the premises hereby conveyed." The second provision, found in the opening of section third, embraces the default of interest specified above, and adds the default of principal. It is as follows: "In case default shall be made as aforesaid, or in case default shall be made in payment of the principal of any of the said bonds or any part thereof, and in case such default shall continue for the period of six months after demand made in writing by the said trustee for the payment of the said moneys or the performance of the covenant or covenants, it shall be also lawful for the said trustee, and upon receiving a written requisition, signed by majority in value of the bonds secured hereby, then outstanding, with proper indemnification against costs, compensation, and expenses, it shall be the duty of the said trustee, or its successor or successors, after entry as aforesaid, or other entry, or without entry, personally or by its attorney or agent, to sell and dispose of all and singular the premises, franchises, and contracts hereby conveyed and assigned, or intended so to be, as an entirety, or such part or parts of the same as shall be necessary, from time to time, at public auction." The last clause of section third provides for judicial foreclosure, and is as follows: "And in case default shall be made as aforesaid, and shall continue as aforesaid, it shall also be lawful, and it shall be the duty of the said trustee and its successor or successors in the said trust, upon receiving a written requisition, signed by the holders of one-third in value of the bonds hereby secured and then outstanding, after entry as aforesaid, or other entry, to commence and prosecute such actions, suits, or proceedings at law or in equity as shall be necessary to obtain the sale of the said premises by and under judicial authority, and to bar and foreclose the equity of redemption of the said party of the first part, its successors and assigns, and of all persons claiming under them or any of them and the said premises hereby conveyed or intended so to be, with the appurtenances, and every part and parcel thereof." Analysis of these three provisions shows that the first authorized an entry by the trustee in case interest was defaulted for six months, and retention and operation of the property until such interest was paid from the profits. Action under this provision was wholly at the will of the trustee. The bondholders had no voice or compelling power in its exercise. The second provision was for a public nonjudicial sale by the trustee. To the default of interest specified in the preceding section there was added default in payment of bond principal, and there was superadded a clause empowering a majority in value of the bondholders, on giving indemnity for costs, to compel the trustees to make such nonjudicial sale. The third provision, it will be noted, is for the same defaults, authorizing the entry of judicial procedure by the trustee. It is contended by the respondents that, by this last provision, the trustee could not resort to such judicial proceedings to foreclose unless upon the request of one-third of the bondholders. By the complainants it is contended that the language used was not a limitation upon the right of the trustee to resort to judicial proceedings, but conferred on the bondholders the power to compel the trustees to do that which the default made it lawful and discretionary for it to do without such request. After careful consideration, we are of opinion the contention of the complainant is right. It is the natural construction of the language used, and is in accord with the general scheme of the mortgage. The first provision defines what it shall be lawful for the trustee to do in the way of

simple entry and taking temporary possession. This provision, within the scope of its operation, broadly empowers such trustee to act, but imposes no duty upon him to do so, and empowers the bondholders to impose none. In the broad, untrammelled enabling power thus vested in the trustee, we find the construction and scope of the term "it shall be lawful," as employed in this mortgage. In the second provision, relating to nonjudicial sales, we find the same thought in the words "it shall also be lawful," but find an added duty is cast on the trustee; that is, on request of a majority of the bondholders, the trustee is compelled to sell. That this is the proper construction of this clause there can be no question. Any other reading is a distortion of words. Now, the same general idea is found in the provision for judicial proceedings. The same words, "it shall also be lawful," are found, and serve to indicate untrammelled enabling power vested in the trustee, while introduced by the copulative "and," in conformity with the preceding provision, is the act which the bondholders can compel the trustee to perform. To read the terms, "it shall also be lawful," and, "and it shall be the duty of the trustee," as synonymous, and simply imposing a duty on the trustee at the request of the bondholders, is to deny the first phrase the meaning it unquestionably bears in the two preceding sections. Such construction would vest the trustee with the broadest discretion to make a nonjudicial sale, where he could easily abuse the power, and shear him of all personal discretion in seeking a remedy by a judicial sale, where the court could check any abuse of discretionary power. To warrant such construction, the language should be so explicit that no other was possible. After careful consideration, it is clear to us that the provision in reference to the bondholders was an enabling power, to be exercised at their option, and not a limitation or shearing of the right of the trustee to foreclose. We are therefore of opinion the trustee had a right to file the present bill without a prior request by one-third of the bondholders.

This brings us to the second question, namely, whether the Penn Plate-Glass Company or W. L. Kann, the subsequent purchasers of the mortgaged premises, can question the validity of the mortgage in suit. It will be noticed that the mortgagor is not contesting the right to foreclose or the validity of the mortgage. The mortgage is assailed by the successive purchasers, to wit, Kann and the Penn Plate-Glass Company. In examining the authorities cited, we must distinguish between those bearing on the question whether a purchaser has personally assumed payment of an existing incumbrance, and those which involve the question whether he takes subject to it. The question now before us is whether the purchasers took the land incontrovertibly subjected to the lien of the prior incumbrance, to wit, the mortgage in suit. This is a mixed question of fact and law. The Pennsylvania Plate-Glass Company having become insolvent, the court of common pleas of Westmoreland county, by virtue of the equity powers conferred by the Pennsylvania statute, took jurisdiction of its assets, and possession thereof by its receiver, and enjoined W. L. Kann, the execution creditor, from proceeding on his execution. The mortgage in suit was not then due or defaulted, the trustee was not made a party to the bill, and, the mortgage being a first lien and duly recorded, the property unquestionably came to said court subjected to the lien of the mortgage. Later the receiver presented a petition to said court to sell the mortgaged property. If the mortgage was *ultra vires*, was fraudulent, or was given without consideration, it was in the power of the receiver or the corporation, by appropriate remedy, to free the company's land from such unlawful lien. Not only did he omit to do this, but he elected to sell the equity of redemption, and to expressly subject the land, in the hands of the purchaser, to the lien of the mortgage. His purpose to allow the mortgage debt to remain charged on the land, and thus avoid requiring prospective purchasers to pay the entire sum at once, is shown in the petition, which says: "He further suggests to the court that the interest on the \$250,000 of bonds owed by said company will fall due on July 1st next, and that there is no way within his power by which the said interest can be paid, and the bonds prevented from falling due in accordance with the terms of the mortgage. If the real estate and plant of the said company are to be sold, in the opinion of your petitioner such sale should be held some time before July

1st, for the reason that the property can then be sold subject to the lien of the first mortgage, and therefore a very much less sum of money will have to be raised by the purchaser than if the plant were to be sold under foreclosure proceedings by the trustees in the mortgage. This will result in opening the field to a larger number of bidders, and will probably have the effect of realizing more money from the sale for the benefit of the creditors, and possibly of the stockholders, than could otherwise happen." The order of sale provided: "Property to be sold subject to the lien of the first mortgage of \$250,000, to secure the payment of the bonds, which said mortgage is recorded in Westmoreland county, in Mortgage Book 43, page 1, and subject to all taxes for the year 1894." The return cites the sale made in accordance with the order, and that the property "was sold, subject to the payment of the first mortgage and taxes for 1894, discharged of all other liens, to W. L. Kann, for the sum of \$37,000." The sale being confirmed, a receiver's deed was made July 2, 1894, to Kann, which recited: "The above-described property, under the order of court aforesaid, was sold and is now conveyed by the said receiver, and was bought and is now accepted by said grantee, subjected to a mortgage made by the said Pennsylvania Plate-Glass Company to the Farmers' Loan & Trust Company of the City of New York, dated first January, 1891, recorded in Westmoreland county in Mortgage Book No. 43, page 1, and subject, also, to all taxes for the year 1894." It will be noted that the purchaser was the execution creditor, who was enjoined from proceeding on his execution, and who, as a party to the proceedings, must be presumed to have had notice and knowledge thereof.

Acceptance of deed bound the grantee to its conditions. "A grantee, having accepted a conveyance and enjoyed its benefits, is bound by its provisions." *Keller v. Ashford*, 133 U. S. 620, 10 Sup. Ct. 494, 33 L. Ed. 667. And the language used and the acts of the parties were such as to subject the land to the mortgage burden. So far as the corporation could do, this company by its receiver, and under the supervising control of a court of equity, waived all question as to the validity of the mortgage, and elected to sell the mere equity, subjected to its lien. The title acquired, and the condition on which it was acquired, being part of the same act, the acceptance of the former *ipso facto* weighted it with the accompanying burden. As to the legal effect of such action on the part of the selling mortgagor and the accepting vendee, we think the vendee accepted and was bound by the status of the mortgage as the mortgagor elected to leave it. The creator of the lien, who had the right to attack it or confirm it, has, prior to the purchaser acquiring any interest whatever in the land, elected to ratify it and sell the land subject to it. If in so doing he has done what he ought not to have done, or left undone what he ought to have done, that concerns the vendor alone. Such act has done the vendee no harm, has caused him no loss. What right, therefore, what equity, what interest, what standing, has the purchaser to question what his vendor has done? What right has he to release the land from the burden to which the vendor has chosen to expressly subject it? What equity or whose equity would be worked out by such a course? The question in hand is not as to the effect of a judicial sale of incumbered property, without any specification of liens in the order of sale, of which *Water Co. v. De Kay*, 36 N. J. Eq. 552, is an instance, but it is the case of a court exercising its power to sell specifically subject to a lien and a deed made expressly subjecting the property conveyed to a specified recorded lien. In such case the purchaser of mortgaged premises takes but an equity of redemption. He cannot question the validity of the mortgage, else he would acquire an interest in the land never conveyed to him by the vendor. *Freeman v. Auld*, 44 N. Y. 50; *Johnson v. Thompson*, 129 Mass. 398; *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343; *Calkins v. Copley*, 29 Minn. 471, 13 N. W. 904; *Tuite v. Stevens*, 98 Mass. 305; *Dolman v. Cook*, 14 N. J. Eq. 56; *Conover v. Hobart*, 24 N. J. Eq. 120; *Post v. Dart*, 8 Paige, 639; *Shufelt v. Shufelt*, 9 Paige, 137; *Green v. Kemp*, 13 Mass. 515; *Morris v. Floyd*, 5 Barb. 130.

The cases from the various state courts disclose convincing reasons in support of the principle. The federal cases are to the same effect. In *Bronson v. Railroad Co.*, 2 Wall. 311, 17 L. Ed. 732, a third mortgage was given by a railroad company, and, in express terms, was made subject to the bonds

secured by a prior second mortgage. On foreclosure proceedings under the third mortgage the road was sold. Subsequently a bill to foreclose was filed by the trustees of the second mortgage, and a company which owned the equity of redemption was made a party. An attempt was made to question the validity of the second mortgage. But the right to do so was denied. The court there say: "Even if there had been any valid objection to these bonds under the second mortgage, it was competent for the obligor to waive them; and no better proof could be furnished of the waiver than the acknowledgment of the full indebtedness, by making the subsequent security subject to it. This was a question that belonged to the obligor to determine for himself when giving the third mortgage, but, besides this, what right have those coming in under it to complain? They come in with a full notice of the acknowledgment of the indebtedness and previous lien. And especially what right have the Milwaukee & Minnesota Company to complain, who purchased the equity of redemption through Barnes, their agent, subject to the previous incumbrance of \$1,000,000? They have the benefit of that incumbrance, by an abatement of that amount in the price of the purchase." In *Jerome v. McCarter*, 94 U. S. 736, 24 L. Ed. 137, the same doctrine was announced, the court saying: "Nor is there any doubt entertainable respecting the amount due under the prior mortgages. Indeed, the company is estopped by the provisions of its mortgage, of which the complainant is trustee, from asserting that the entire amount of the two \$500,000 mortgages and of the receiver's mortgage was not outstanding when the present mortgage was made. The full indebtedness was acknowledged, by making the junior mortgagee expressly subject to it; and, as there is no evidence that any portion of it has been paid, it is not admissible for the mortgagors or their assignees in bankruptcy to deny it." In *American Waterworks Co. v. Farmers' Loan & Trust Co.*, 20 C. C. A. 133, 73 Fed. 962, the question now before us was considered by the circuit court of appeals of the Eighth circuit. In that case the American Waterworks Company of Illinois, having given two mortgages, sold its plant to the American Waterworks Company of New Jersey, by a deed which described the said mortgages, and recited that the property was conveyed to the grantee company, "subject to said incumbrances." On a bill to foreclose it, the purchaser sought to attack the validity of the mortgages. In holding this could not be done, the court said, "The New Jersey Company, we think, is estopped from asserting the invalidity of the mortgages executed by its predecessor, the Illinois Company, by virtue of the well-established rule that a purchaser of property, who accepts a conveyance thereof which described incumbrances existing thereon, and expressly declares that the conveyance is made subject thereto, will not be allowed to question the validity of such incumbrances. One who thus buys property has no right to challenge the validity of a mortgage lien existing thereon at the date of his purchase, which his grantor by the terms of his conveyance did not see fit to challenge, but recognized in the most formal manner, by declaring that he conveyed the property subject to the existing lien. Whether such mortgage is valid or otherwise is no concern of the purchaser; for, in contemplation of law, he only acquires an equity of redemption in the property conveyed to him,—that is to say, a right to discharge the mortgage debt,—and it would be a breach of good faith, having purchased this right and nothing more, to deny the validity of the incumbrance, and seek to avoid the payment thereof on that ground. As between the grantor and grantee in a conveyance made subject to an existing mortgage, the amount of the incumbrance should be regarded as part of the purchase price left unpaid at the date of the conveyance which the grantee undertakes to pay. At all events, he impliedly agrees not to challenge the validity of the incumbrance. The authorities to this point are amply sufficient, in our opinion, to preclude the New Jersey Company from defending against the foreclosure on the ground that the mortgage is invalid."

In view of these authorities, and of the inherent justice of such a course, we hold that the land having been expressly made subject to the mortgage in suit, and having been purchased and accepted by W. L. Kann, and subsequently by the Penn Plate-Glass Company, subject to the same, neither of said parties can question its validity. No valid reason, therefore, being shown to the con-

trary, a decree of foreclosure will be entered. Of the right of individual bondholders to participate in the proceeds of said foreclosure we express no present opinion.

Supplemental Bill.

During the pendency of the original bill the improvements on the mortgaged land were burned. An insurance of some three hundred thousand dollars, placed during the pending of the original bill, was on these buildings. Thereafter the trustee filed a supplemental bill, making the insurance companies parties, alleging the existence of an equitable lien on said insurance in favor of the bondholders, and praying the appointment of a receiver to collect and hold the proceeds of the policies. Such receiver was thereafter appointed. He has collected the larger part of the insurance, and holds the same subject to the order of this court. It therefore becomes the duty of the court to pass on the question of equitable lien.

There were two parties to this mortgage,—the executing mortgagor and the accepting trustee. Now, the liabilities or obligations created by a contract can rest originally only on a party to it. If they do not rest on some party to the contract, no obligation whatever exists. When, therefore, the Pennsylvania Plate-Glass Company in its mortgage enumerated certain acts which the trustee might, in its discretion, require to be done, it is clear that, unless it imposed the fulfilling of such requisition upon itself, it imposed it upon no one. Indeed, the nature of the acts which the trustee was empowered in its discretion to require shows that they were such as the mortgagor would naturally perform. Thus, the trustee could require further instruments of conveyance or assurance. These would be executed by the mortgagor, the owner of the fee. It might require the payment of taxes. These the mortgagor, against whom they were assessed, and who was legally bound for them, would naturally be the one to pay. So with the insurance. The owner of the property, the holder of the legal title, the person who had the insurable interest, would be the one to insure. Vesting in another a right to make a requisition implies an obligation to honor such requisition when made. We are therefore of opinion that by the terms of the mortgage the mortgagor company covenanted to insure on request of the trustee. The acts of the parties were in accord with such construction. Prior to the receivership the mortgagor company kept the property insured for the benefit of the bondholders, and its obligation so to do was recognized and enforced by the state court during the receivership, by its issue of receiver's certificates for the purpose. These policies were in force when Kann purchased. The proofs show they were turned over to him, and he was informed by the receiver they were outstanding. The covenant of the mortgagor to insure on request being shown, demand being made upon it for such insurance, and its failure to comply continued for six months, vesting a right of entry and possession of the trustee, we next inquire, what was the relation to this duty of a successor in the possession and title of the mortgagor to whom such possession was delivered and the equity of redemption conveyed by an order of court, and deed based thereon, in the terms set forth in the foregoing opinion bearing on the original bill?

It has been strongly urged that the covenant to insure does not run with the land, and that this fact governs the case. But this, as we view it, is not the crucial question of this cause. If the insurance made by the purchaser is impressed with an equitable lien in favor of the trustee, it is not because the mortgagor's covenant runs with the land, but because, from the nature and subject-matter of the duty assumed by the mortgagor, the terms of the deed and its acceptance, the facts and circumstances of this particular case, and the law bearing thereon, the insurance placed by the purchaser becomes so liable. To the consideration of such facts and the law thereunto appertaining, we now turn.

In an opinion herewith filed, disposing of the original bill, we have recited at length the provisions of the mortgage, the insolvency of the mortgagor company, the receivership proceedings in the court of common pleas of Westmoreland county, the sale of the property, together with the proceedings leading thereto, and the deed made in pursuance thereof. The property was purchased by W. L. Kann for the sum of \$37,000, and conveyed to him by deed

dated July 2, 1894. He held the property until July 1, 1895, when he conveyed the same to the Penn Plate-Glass Company, of which company he was president, for \$83,500. His deed recites, "The above-described property is now conveyed by the said parties of the first part, and is now accepted by the said party of the second part, subject to a mortgage made by the said Pennsylvania Plate-Glass Company to the Farmers' Loan & Trust Company of the City of New York for two hundred and fifty thousand (\$250,000) dollars, dated Jan. 1, 1891, recorded in Westmoreland county, in Mortgage Book No. 43, page 1; being the same property which Joseph W. Stoner, receiver of the Pennsylvania Plate-Glass Company, conveyed to Wm. L. Kann by deed dated July 2, 1894, and recorded in Westmoreland county, in Deed Book 235, page 257." The interest on the bonded indebtedness falling due on July 1, 1894, and January 1, 1895, was paid by Kann, but that payable July 1, 1895, was defaulted. On November 29, 1895, written demand was made by the trustee upon the mortgagor, its receiver, upon Kann and the Penn Plate-Glass Company, to insure for the benefit of the bondholders. They failed to do so, and such default continued for more than six months prior to the filing of the bill. On the filing of the bill the trustee moved for the appointment of a receiver to take possession. The plant was then being operated by the Penn Plate-Glass Company, a large number of persons employed, the issues of the cause and the legal rights of the parties not determined. In this aspect of the cause, and the court being satisfied that a receiver could not operate the works, it declined to appoint a receiver. The question of insurance arose during the pendency of the application for a receiver; and thereupon counsel for W. L. Kann and the Penn Plate-Glass Company signified their willingness to place insurance upon the property for the benefit of the trustee if they were bound to do so, but denied the liability of said parties to do so. Subsequently they did place a large amount of insurance upon the property, and during the pendency of the motion filed a guaranty, signed by W. L. Kann (the president of the company) and Emanuel Wertheimer (a stockholder), conditioned as follows: "That, in the event of a loss by fire of the property described in the said Pennsylvania Plate-Glass Company mortgage, that then there shall be paid out to the said Farmers' Loan and Trust Company, trustee, in trust for the holders of valid bonds secured by the said mortgage, a sum equal to the total amount of such valid bonds, out of policies of insurance existing in favor of the Penn Plate-Glass Company: provided, that it shall have been finally adjudicated that the Penn Plate-Glass Company, the present owner of the said property, is bound or liable by anything contained in the said mortgage, or the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage. And it is provided, further, that in the event of a loss by fire, and the insurance money payable in that event is applied to the restoration of the plant of the Penn Plate-Glass Company, bound by the said mortgage, that then this obligation shall be null and void, without prejudice to the right of the Penn Plate-Glass Company, its successors and assigns, to deny its liability to take out, keep, and maintain policies of insurance on said plant at any time for the benefit of holders of valid bonds secured for the said mortgage, or for the trustee of said mortgage. And it is further distinctly understood and agreed that, in the event of partial losses and partial restorations, the amount of the insurance money applied thereto shall be a credit on the account for which we have become bound by this obligation." After the loss it appeared that, in the insurance placed, the Penn Plate-Glass Company and W. L. Kann, its president, had placed a provision therein in terms excluding the bondholders from any interest in the policies. Whatever may be the effect of such provision as between the insurance companies and the insured, we do not regard it as a material consideration here. It was an act *inter alios acta*. The trustee and the court had no knowledge of it. It was not done in pursuance of any agreement, and can in no way affect the legal and equitable status and rights of the parties before the court; for, if the purchaser was bound to insure for the benefit of the trustee, equity will consider the policies as placed in fulfillment of that duty, for it considers that as done which ought to be done. Pom. Eq. Jur. §§ 364-377. It always implies an in-

tention to fulfill an obligation. Id. §§ 420-422. It regards and treats that as done which in good conscience ought to be done. Id. § 364.

The question of the effect of acceptance of a deed reciting that property was conveyed subject to a specified incumbrance is discussed in many Pennsylvania cases. In some it was held a personal liability, or an assumption of the incumbrance direct to the original creditor, was created; in others, that no such direct liability to the original creditor arose, but an agreement by the vendor with his vendee to indemnify the latter against having to pay the incumbrance. To warrant a decree for an equitable lien in this case, it is sufficient to hold that, as regards the covenant to insure, there was an agreement to indemnify, though, from the nature of the subject-matter, and the special facts and circumstances, there are grave reasons for contending that the purchaser of the property in this case became directly liable to the trustee to insure. The covenant of the mortgagor in reference to insurance was *sui generis*. It was not a covenant which necessarily bound the mortgagor to the performance of any present or future thing. It obligated insurance, it is true, but only in case it was required by the trustee. The trustee might never exercise its right. Hence, while the possible liability existed, there was no certainty it would ever attach. From these considerations, it is clear that when the mortgagor came to sell the property there was no exact financial value which could be put upon this covenant to insure. It could not be a subject of barter and sale, because liability under it depended wholly and solely on the will of the trustee. It was created by the mortgage, but was a matter to be performed in futuro, but at once if required. Now, with this unfulfilled, future, and indefinite liability clearly resting by the mortgage on the mortgagor at the time of the sale, what, as between the vendor and vendee, became of it when the property was sold, and the vendee, by the terms of the deed, left the purchase money, to the extent of the mortgage debt, in the land, and agreed to indemnify the vendor against it? The duty to insure was incidental and supplemental to the mortgage debt. Its purpose was to make it more secure and insure the payment. As was said by the supreme court of that state in *Miller v. Aldrich*, 31 Mich. 418, when speaking of the relation of a covenant to insure to the mortgage: "Chapman had bound himself to afford Miller security supplementary to and connected with the mortgage. The mode agreed on had reference to the mortgage buildings, and was to be of a nature to keep the mortgaged property itself so far intact, as a means of security to perpetuate the safety of the mortgagee's interest in case the buildings should burn. This stipulation was in equity a sort of adjunct to the mortgage, and was binding on Chapman, and on all others in his shoes with notice." Now, if by acceptance of the deed the purchaser agreed to indemnify the vendor against the mortgage debt, shall he not much more be deemed to have assumed every incident which was made a supplemental, additional, covenantal means of insuring the payment of such mortgage debt? By the authorities already cited, it is clear that by the terms of the deed this property was subjected incontrovertibly to the burden of this mortgage. It did not lie in the purchaser's mouth to question or release the land from the burden to which he and his vendor had subjected. So much for the rights of the trustee. As between the vendee and the vendor, the authorities are clear that by the terms of the deed the vendee agreed to indemnify the vendor against liability on the mortgage. Conceding for present purposes that, on a sale under the mortgage of the premises, personal liability of the mortgagor for the bonded debt ceased, yet, in the first place, no sale has thus far taken place; and, in the second, the company is still liable for the mortgage debt by virtue of its covenant to insure, and hence the need of indemnity against such covenant to insure. Was this liability indemnified by the vendee's acceptance of the deed? In *Campbell v. Shrum*, 3 Watts, 60, the leading Pennsylvania authority, it was held that acceptance of an agreement to convey land "under and subject to the payment of all the purchase money and interest now due," by a specified article of agreement, constituted an assumption by the vendee. In *Blank v. German*, 5 Watts & S. 42, the principles of an "under and subject" purchase are discussed, and it is there said: "Had the defendants below purchased the property subject to the mortgage debt, the case would have been within the principle of *Campbell v. Shrum*, because the price would have been estimated

at the clear value less the mortgage debt; and it may be said that so much of the price would have been virtually retained to answer it, so that the plaintiff would have answered that much, had he been compelled to pay with other funds than those set apart for the purpose in the defendant's hands. As it would have been a fraud in them to retain his money and let him be pursued for it on his bond they would have been held liable on an implied promise to apply it to the purchase intended; and it may be said in every such case that he who purchases expressly subject to an incumbrance, as between the vendor and himself, makes the debt his own, which is the principle of *Campbell v. Shrum*." In *Woodward's Appeal*, 38 Pa. St. 327, the words of the deed were, "subject to the payment of \$2,000,—the mortgage debt." It was there said: "It cannot be doubted that accepting a deed from Mr. Spackman for the house and lot, expressly subject to the mortgage, was an assumption by the vendee to pay it. The debt secured by the mortgage was that of the vendor, and, if its payment was not assumed by the vendee, the express subjection of the property to it by the deed amounts to nothing. The ultimate liability is still upon the vendor, and not upon the house, and the vendee has acquired the entire ownership, without paying or being liable to pay any more than the sum of \$8,750." In *Moore's Appeal*, 88 Pa. St. 452, prior cases were examined by Judge Sharswood, and summed up as follows: "An examination of the cases which have been decided on the legal effect of such a clause in a conveyance shows, we think, that, unless there exist special circumstances to raise a covenant to pay the incumbrance, it amounts only to an indemnity to the vendor. In the language of the opinions, 'the vendee makes the debt his own, as between him and the vendor, for his protection.'"

The question is not affected by the Pennsylvania act of June 12, 1878 (P. L. 205), which provides that the grantee of real estate bound by mortgage, etc., shall not be personally liable therefor, except on an express assumption, and that the use of the words "under and subject to the payment of such ground rent, mortgage, or other incumbrance," shall not, alone, be construed as to make such grantee personally liable as aforesaid. Prior to the passage of this act, as we have seen, it was held in some cases that the under and subject clause constituted a direct assumption of the debt to the holder of it; in others, that it created a mere agreement, as between vendor and vendee, to indemnify the vendor against the incumbrance. The act was then passed, which, as we read it, provided that the under and subject clause alone should not be construed to create a personal liability for the debt (that is, a direct assumption to the owner), but left unaffected the implied covenant to indemnify, as between vendor and vendee. In other words, while the purchaser subject to such incumbrance did not assume payment of the debt to the holder, he was still bound to indemnify his vendee against the incumbrance. In *Blood v. Crew-Levick Co.*, 171 Pa. St. 333, 33 Atl. 346, the deed of the freehold portion, made after the passage of the act, recited it was "under and subject to the lien" of a mortgage, and contained the further provision, "It is hereby agreed between the parties to this instrument that the said party of the second part accept the title * * * subject to the payment of the mortgages herein mentioned." Of these provisions the court say: "We have, then, an implied covenant to indemnify, arising from the 'under and subject to the lien' clause, and an express covenant in the stipulation, beginning with the words, 'It is hereby agreed' to pay the mortgage debt to the holder of the mortgage."

After careful consideration of the law applied to this case, we are of opinion that Kann and the Penn Plate-Glass Company, the subsequent purchasers of the equity of redemption, undertook to indemnify the mortgagor against liability on its covenant in the mortgage to insure. The proofs show that request to insure was duly made by the trustee upon the mortgagor and upon the subsequent purchasers, which request was not complied with. It would therefore seem that by such failure to insure there was a default, and a direct liability of the mortgagor to the trustee upon the covenant to insure; and there was a default, and a liability of the subsequent purchasers to the mortgagor upon their agreements to indemnify. Such requests were made in writing more than six months prior to the filing of the bill. Default having continued more than six months, it became such a breach as warranted the trustee in either

taking possession, selling at nonjudicial sale, or maintaining foreclosure proceedings. After the bill was filed a demand upon these parties to insure was also made at bar by counsel for the trustee at the time of the application for a receiver to take possession of the mortgaged premises, as we have noted above. Under the facts it would seem that a court of equity, having jurisdiction of the subject-matter and of all parties, had power to, and, to avoid circuity of action, would, direct the purchaser to insure for the benefit of the trustee. This court had jurisdiction of the mortgage, and therefore of the mortgagor and mortgagee. Kann and the Penn Plate-Glass Company, who had bought subject to it, were also parties. The question of insurance, with the determination of the several rights or obligations of all parties in reference thereto, were kindred and germane to the foreclosure, and therefore to the principal subject of jurisdiction. The principle is clear that, where equity jurisdiction has once rightfully attached to a controversy, it will be made effective for the purpose of complete relief, and to dispose of all incidental and germane questions. *Fetter*, Eq. p. 13; *Winton's Appeal*, 97 Pa. St. 395; *Allison's Appeal*, 77 Pa. St. 227; *McGowin v. Remington*, 12 Pa. St. 63; *Souder's Appeal*, 57 Pa. St. 498; *Socher's Appeal*, 104 Pa. St. 615. The trustee having exercised its right of requiring insurance, the mortgagor being insolvent, the purchaser being in possession and enjoyment of the premises, and all parties before the court, it would seem clear to us that a court of equity, by its very nature constituted with plastic power to secure direct results, and in pursuance of its principle of avoiding circuity of action, had the right to order and decree that the purchaser should place insurance upon the property for the benefit of the trustee. A court of equity having original jurisdiction to compel specific performance of a contract to indemnify (*Chamberlain v. Blue*, 6 Blackf. 490; *Champion v. Brown*, 6 Johns. Ch. 398; *Fry*, Spec. Perf. [3d Am. Ed.] p. 704), its jurisdiction and power to do so in this case, where the covenant to insure was incidental to the mortgage, the original subject of jurisdiction, and where, moreover, the breach of such covenant to insure was one of the grounds warranting the foreclosure, would seem clear. That the court did not see fit, in an interlocutory stage of the case, to make such order; that in such preliminary stage it did not enter into an immediate, definite ascertainment of its right or duty to do so,—cannot affect the relative right of the parties. Mere lapse of time will not prevent a court of equity from affording relief, where there was a right to relief when the bill was filed. *Wilkinson v. Torkington*, 2 Younge & C. Exch. 729.

Pending the appointment of a receiver, the purchasers agreed to and did place insurance, and the improved property has been wholly destroyed. If the insurance goes to the bondholders, it represents an avoidance of loss for that which it held as security for money paid to the mortgagor. If the purchaser holds it, it speculatively gains by the destruction of that for which it had never paid, to wit, the \$250,000, representing deferred purchase money. Now, on final hearing of this case, it being clear that the purchaser was liable at any time during its pendency to the entry of an order directing that insurance be entered for the benefit of the trustee, and the purchaser having in effect placed insurance subject to the determination of the court as to its liability to do so, why should not the court on final hearing enter the decree which it could have made in an earlier stage of the case? This insurance was placed by a party to this litigation under stress of an application for the appointment of a receiver, and a consequent exclusion from possession. It is now clear that such litigant should have placed the insurance for the benefit of the trustee, and was bound to do so if thereto required by the court. When now, on final hearing, the proceeds of that insurance are before the court,—when the position of the parties has not been changed,—why should not this court on final decree stamp with an equitable lien the proceeds of a fund which it might have created by an earlier order? The position of the parties has not changed. To say that the trustee had an insurable interest, and could itself have insured, does not affect the case. While it could do so, it could also require the mortgagor to perform this duty. The purchasers, with full knowledge of that duty on the part of the mortgagee, took the property, and undertook to indemnify the vendor against this covenant. This they have not done. They paid some \$83,000 for the property. They insured it for more than

\$300,000, and now, on the destruction of the property, which was the substantial security for \$250,000 owing the trustee, they seek to avoid payment of the \$250,000, and to realize on the \$83,000 paid by them the sum of upwards of \$300,000 in insurance upon property for which they have never paid. The allowance of such a result, under the facts and circumstances, would be highly inequitable; for it is a principle of equity that in a contest between one who, seeking to make a gain, and one who is struggling to avoid a loss, equity will lean toward him who has actually lost, rather than to him who merely seeks to gain. *Miller v. Aldrich*, 31 Mich. 416. After careful consideration, therefore, we are of opinion that, to the extent of all valid outstanding bonds represented by the trustee, this fund is in equity and good morals stamped with an equitable lien, and that it is the duty and right of this court to enforce it.

Bernard Carter, for appellants.

Herbert B. Turner and John G. Johnson, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal taken by the defendant the Penn Plate-Glass Company from a decree rendered by the circuit court of the United States for the Western district of Pennsylvania in favor of the complainant, the Farmers' Loan & Trust Company, as trustee, against the defendants. On January 1, 1891, the Pennsylvania Plate-Glass Company, a Pennsylvania corporation, made a mortgage to the Farmers' Loan & Trust Company, a New York corporation, to foreclose which mortgage the original bill herein was filed. The mortgage covered the plant of the mortgagor company,—being a specified tract of land in Irwin, Westmoreland county, Pa., with certain gas and water contracts,—and all the company's other property, real or personal, then owned or thereafter to be acquired, including rents, issues, and profits. This mortgage was given in trust to secure 6 per cent. bonds which were issued to the amount of \$250,000 of principal. On the 19th of March, 1894, a suit was brought in the court of common pleas of Westmoreland county, at the instance of the directors, against the Pennsylvania Plate-Glass Company, to procure its judicial dissolution. In that suit Joseph W. Stoner was on that day appointed receiver of the company. An order was subsequently made for the sale of the property by the receiver, subject to the lien of the existing mortgage of \$250,000. Accordingly, on the 18th of June, 1894, the receiver sold the property so subject to the mortgage at public auction. The defendant W. L. Kann was the purchaser, the price being \$37,500. On July 2, 1894, a deed was, by order of the court, given by the receiver to Kann. It, in accordance with the terms of the order, recited that the conveyance was made "subjected to a mortgage made by the said Pennsylvania Plate-Glass Company to the Farmers' Loan and Trust Company of the City of New York for two hundred and fifty thousand dollars (\$250,000), dated Jan. 1st, 1891, recorded in Westmoreland county in Mortgage Book 43, page 1." Kann held this property for about one year, and until July 1, 1895, when, by deed of that date, he sold and conveyed it to the Penn Plate-Glass Company, one of the defendants herein,—a corporation probably organized by Kann himself for the manufacture of plate glass,—for \$83,000. It is claimed by Mr. Kann and the appellant company that, in addition to the consideration named in the deed, expenditures

for improvements placed upon the property amounted to \$200,000, and brought the purchase price to the Penn Plate-Glass Company up to about \$300,000. These figures are disputed by the complainant, but there is no testimony that directly contradicts that of Mr. Kann in this regard. The deed from Kann recited that the property was conveyed "subject to a certain mortgage made by the Pennsylvania Plate-Glass Company to the Farmers' Loan & Trust Company, of New York, for \$250,000, dated January 1st, 1891, and recorded in Westmoreland county, in Mortgage Book 43, page 1"; this being the mortgage in question. While Mr. Kann held the title to the property he paid the interest coupons on the bonds maturing during his ownership; but those maturing July 1, 1895, the time of the purchase by the Penn Plate-Glass Company, were not paid by that company, and no coupons have been paid since. The Farmers' Loan & Trust Company, in pursuance of the provisions of the mortgage, then declared the principal of the mortgage due, and on July 8, 1896, filed the original bill in this case to foreclose the mortgage, against the Pennsylvania Plate-Glass Company (the mortgagor), W. L. Kann, and the Penn Plate-Glass Company. Kann and the Penn Plate-Glass Company put in answers contesting the right to foreclose on the ground that the mortgage itself was invalid, except as to such of the bonds thereby secured as were held by purchasers for value without notice, and averring that the requisite number of bondholders had not requested such action, and that such request was a condition precedent under the provisions of the mortgage. The Pennsylvania Plate-Glass Company, the mortgagor, put in no answer, and its receiver, Stoner, was not made a party to the bill.

About the time of filing this original bill, namely, on July 16, 1896, the plaintiff made a motion for the appointment of a receiver of the mortgaged premises. This was refused, but, after the court had announced its decision, counsel for complainant mentioned the fact that there was no insurance on the property for the benefit of the bondholders, and that they would be unprotected in case of a loss by fire. Thereupon counsel for defendants expressly denied that either the Penn Company or Kann was bound to insure for the benefit of bondholders, either by virtue of anything contained in the mortgage or the terms of their purchase. Counsel for complainant insisted that they should have insurance, whereupon the court below said, "I can't decide that question," and intimated to defendants that, if they were bound to insure, they ought to protect complainants. They denied still that they were bound to insure, but W. L. Kann and Emanuel Wertheimer, who were stockholders in the Penn Company, agreed to give their individual bond or agreement that out of the then existing policies of insurance, which had been previously taken out by the Penn Company, there should be paid out to the Farmers' Loan & Trust Company, in trust for the holders of valid bonds secured by the said mortgage, a sum equal to the total amount of such lot of bonds. This stipulation was entered into, and approved by the court, and filed, and contained this proviso:

"Provided, that it shall have been finally adjudicated that the Penn Plate-Glass Company, the present owner of the said property, is bound or liable

by anything contained in the said mortgage, or the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage."

The insurance referred to in the above instrument had been placed a long time prior to both the filing of the original bill and the application for a receiver. When Kann became the purchaser of the property at judicial sale, in 1894, he made contracts of insurance to the amount of about \$450,000, covering only his interest in the mortgaged property, and expressly excluding the interest of the bondholders by the following clause in all the policies, namely:

"This property is subject to a mortgage of \$250,000, but it is distinctly understood that this insurance does not cover the interest of the bondholders."

When the Penn Plate-Glass Company, a year later, purchased the property, the insurances were perfected with the same clause excluding the interest of the bondholders.

At or about the time Kann purchased and insured the property as aforesaid, the Farmers' Loan & Trust Company notified Kann to insure for the benefit of the bondholders, in reply to which Kann notified that company in writing that he refused to so insure, and that the existing and future insurance was and would be for his own benefit, and not for the benefit of the bondholders. Similar demands were made upon the Penn Plate-Glass Company at the time of its purchase, and similar replies made by it thereto. These demands and refusals occurred about two years prior to the filing of the original bill, in July, 1896, and have continued and been persisted in ever since, and were reiterated at the time of the application for a receiver under the mortgage foreclosure suit. No further action was taken by the trustee, either to insure itself or to procure its bondholders to do so, or to compel the Penn Company or Kann to do so; and matters in this respect remained in statu quo for nearly three years, when, on April 12, 1898, and before the determination by the court of the issues raised by the original bill, a large part of the plant of the Penn Company was destroyed by fire. Thereupon the Farmers' Loan & Trust Company filed its supplemental bill, claiming an equitable lien on the insurance money held by the Penn Plate-Glass Company to the extent of its loss, and asking that the insurance companies be restrained from paying the insurance moneys to the Penn Company, but that they pay the same to the Farmers' Loan & Trust Company, as trustee for the bondholders, basing its equitable right to relief on the following grounds, namely: (a) That the clause in the mortgage relating to insurance constituted a covenant on the part of the mortgagor company, the Pennsylvania Plate-Glass Company, to insure for the benefit of bondholders. The clause referred to contains the only provision in the mortgage relating to insurance. (b) That in pursuance of this provision the mortgagor company, the Pennsylvania Plate-Glass Company, did place insurance for the benefit of the bondholders, and did maintain the same up to the time of its insolvency, and the appointment of Stoner as receiver. (c) That the receiver, under the directions of the court of Westmoreland county, maintained this insurance until the property was knocked down to Kann at receiver's sale. (d) That Kann, upon his acquisition of the mortgaged property, with full knowl-

edge of the covenant to insure and of the foregoing facts, allowed this insurance to lapse, and, in spite of repeated demands by the trustee, refused to insure for the benefit of the bondholders, and has since persisted in this refusal. (e) That Kann had identified himself with the mortgagor company, advanced money to it, knowing it to be insolvent, and by his acts in connection therewith had brought about the receivership and wrecked the company, and that he had bought the property for \$37,500. (f) That the said Kann, having thus purchased the property subject to the mortgage, was, under the foregoing circumstances, bound to insure for the benefit of the bondholders. (g) The bill further alleged that the Penn Plate-Glass Company was also bound to insure, and stood in the shoes of Kann, because: (1) It had been organized by Kann for the express purpose of purchasing from Kann the mortgaged property and operating the same; and because Kann was the president and principal stockholder therein, and therefore was affected with notice of all the foregoing facts and circumstances concerning the previous insurance, as well as of the covenant to insure. (2) That the trustee, upon the purchase by the Penn Company, notified it in writing upon December 1, 1895, to insure for the benefit of the bondholders, but in response thereto that company had notified the trustee in writing of its refusal so to do, and had persisted in this refusal ever since, although repeated demands had been made upon it to this effect. The above demand was first made nearly a year before the filing of the original bill. (3) That the Penn Plate-Glass Company had interposed a frivolous defense to the original bill, and delayed the proceedings thereunder, thereby preventing the foreclosure and sale, which would otherwise have taken place before the occurrence of the fire. (4) That the Penn Company, with the full knowledge of the foregoing circumstances, had accepted a deed of the property, subject to the mortgage, and was therefore bound to insure for the benefit of the bondholders.

Upon the filing of the supplemental bill, to which about 95 insurance companies were made parties, the court below made an interlocutory decree, appointing Emanuel Wertheimer receiver, to collect the insurance money arising from the existing policies, and to hold \$125,000 thereof for the benefit of 90 bonds secured by the mortgage (the remaining 160 bonds being owned by Wertheimer, who stipulated that the same should not participate in the insurance money), in case it should be decided that the trustee of the bondholders had an equitable lien on such insurance money. The receiver was further directed to pay over all moneys over and above the \$125,000 to the Penn Plate-Glass Company. On February 24, 1898, the court below handed down an opinion overruling the defenses to the foreclosure of the mortgage, and finding that the trustee thereof was entitled to an equitable lien on the insurance money previously placed by the Penn Plate-Glass Company, and on the 25th of July, 1899, entered a final decree, which, *inter alia*, fixed the amount due on the mortgaged property, ordered the foreclosure thereof and a sale of the mortgaged premises, and found that the value thereof was not sufficient to pay the mortgage debt, and ordered the receiver to pay over so much of the \$125,000 of insurance moneys held by him as should be necessary to pay

in full the 90 bonds entitled to participate therein, after crediting them with their pro rata share of the proceeds of the sale of the mortgaged premises. It is from so much of the decree as awards an equitable lien on the insurance money to the complainant that this appeal is taken, and the appellant has filed in this court 29 assignments of error. In the view that will be taken by the court, it is not necessary to consider these assignments separately, as they may all be disposed of in the consideration of three questions which underlie them. These questions are: First. Was there, under the terms of the mortgage, an obligation upon the mortgagor, arising from express covenant or otherwise, to insure and keep insured the mortgaged premises for the benefit of the mortgagee? Second. If the preceding question is answered in the affirmative, then, whether the Penn Plate-Glass Company, by becoming the grantee of the equity of redemption, subject to the mortgage, thereby came under an obligation to insure for the benefit of the trustee, or such an obligation to indemnify the mortgagor against its liability to insure (if such liability existed) as would be available to the mortgagee and complainant in this suit. Third. Even if the preceding question, in both its branches, be answered in the negative, whether there was any equitable obligation resting on the defendants to insure for the benefit of the trustee, growing out of their dealings with this property, or growing out of any alleged exceptional facts or circumstances of the case; in other words, whether, as disclosed in this record, such a special state of facts and circumstances exists as would make it incumbent upon a court of equity to infer a right in the mortgagee to a lien on the insurance, or to impress the fund collected by the receiver from the insurance companies with such a lien in favor of the mortgagee and bondholders.

The first question, of course, stands at the very threshold of this case, and, unless it can be answered affirmatively, there is no foundation upon which can be erected the equitable obligation on the part of the defendants, one or both, or the equitable lien upon the insurance fund paid by the insurance companies to the receiver, as contended for by the complainant below. This is conceded by counsel for complainant below, but they refer us to the tenth article of the mortgage, as containing such express covenant or stipulation on the part of the mortgagor to insure the mortgaged premises for the benefit of the mortgagee and bondholders. No other part of the mortgage is relied on for this purpose, and here, or not at all, must be found the express agreement to insure, from which, and from which alone, the important duties and equitable obligations claimed as against these defendants or these funds must spring. The second and third paragraphs of the tenth article of the mortgage, in which the language referred to occurs, are as follows:

"The trustee shall be under no obligation to recognize any person as holder or owner of any bonds secured hereby, or to do or refrain from doing any act pursuant to the request or demand of any person, until such supposed holder or owner shall produce said bonds and deposit the same with the trustee.

"It shall be no part of the duty of the party of the second part to file or record this indenture as a mortgage or conveyance of real estate, or as a *chattel mortgage*, or to renew such mortgage, or to procure any further, other,

or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien thereof, or for giving notice of the existence of such lien, or for extending or supplementing the same; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made; but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or require the same to be done. It shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable in any case for the act or default of any agent, attorney, or employé selected with reasonable discretion. It shall be entitled to be reimbursed all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any services that it may at any time perform in the discharge of the same."

It requires attentive reading to discover the language in these paragraphs which would give color to the contention of complainant below as to the existence of a covenant therein on the part of the mortgagor to insure for the benefit of the mortgagee and bondholders. It is upon the words "or require the same to be done," in the last paragraph quoted, the complainant below relies. These words, in connection with what preceded them, it is contended, embody a covenant or stipulation on the part of the mortgagor to insure the mortgaged premises for the benefit of the mortgagee and bondholders, whenever demanded by the mortgagee. These paragraphs from the tenth article of the mortgage are obviously concerned with limitations on the responsibilities and obligations of the mortgagee and trustee to the bondholders. Other articles in the mortgage are concerned with prescribing, as between the mortgagor and mortgagee, the terms or conditions upon which default or forfeiture of the mortgage may be declared by the mortgagee, and with exempting the mortgagor from personal liability for the debt the mortgage was given to secure, and confining the remedy of the mortgagee to recover the same to proceedings under the mortgage. Articles containing these stipulations obviously relate to contractual relations between mortgagor and mortgagee. But, in the paragraphs quoted, after the operative and conveying and defaulting clauses in the mortgage, which have to do with the relations of mortgagor and mortgagee, we have here, in the tenth article, what naturally belongs to such an instrument, viz. a declaration and qualification of the trusts assumed in said mortgage by the mortgagee, as trustee, to the bondholders. The language employed is not contractual, as between mortgagor and mortgagee, but declaratory of the trusts assumed, and is addressed by the trustee to his cestuis que trustent. The mortgagor could have no interest in the duties or responsibilities assumed by the trustee to the cestuis que trustent, and the limitations and qualifications put upon those duties and responsibilities so assumed could not affect in any degree the liability of the mortgagor. It seems to us that the court below was in error in deciding that there was such a covenant or contract between the mortgagor and mortgagee. In support of its conclusion the court reasons as follows:

"There were two parties to this mortgage,—the executing mortgagor and the accepting trustee. Now, the liabilities or obligations created by a contract can rest originally only on a party to it. If they do not rest on some

party to the contract, no obligation whatever exists. When, therefore, the Pennsylvania Plate-Glass Company in its mortgage enumerated certain acts which the trustee might, in its discretion, require to be done, it is clear that, unless it imposed the fulfilling of such requisition upon itself, it imposed it upon no one."

We think the court below was mistaken in this reasoning. It is quite possible that language could be used by one of the parties to the mortgage—the mortgagee and trustee in this case—which did not at all refer to the contract between mortgagor and mortgagee, and which did not go to create "liabilities or obligations" as between the parties to the mortgage; and especially is this so when we consider that, while the mortgagee in this case bears a contractual relation to the mortgagor, he also bears a fiduciary relation, as trustee, to his *cestuis que trustent*, in some respects quite independent of his relation as mortgagee to the mortgagor, and that it was quite natural and in accordance with usage in such matters that the trustee should attempt to state in the mortgage, with precision, the extent of the trust which he had assumed for the bondholders. To do this, it was not necessary that he should contract with the mortgagor, or that the language employed by him for the purpose should import obligation to or by the mortgagor. But complainant below contends that the natural import of the word "require" is to impose obligation on some one, who in this case could be no one else than the mortgagor. Let us see if this is so. If the language referred to can have no other interpretation, and if, as the court below says, it "necessarily" refers to an obligation imposed on the mortgagor, then, however unsatisfactory it might be to construe language so vague and indirect into a positive covenant of such value and importance as it is here claimed to be, we would feel compelled to so construe it. But is such a construction a necessary or even a plausible one? It is, in the first place, to be noticed that the alternative phrase, "or require the same to be done," does not specially refer to the subject of insurance, and is not found in direct connection with the language exempting the trustee from responsibility in that regard. It occurs at the close of an enumeration of a number of things which the trustee declares it shall not be under obligation to its *cestuis que trustent* to do. So that it is not the case of the trustee speaking specifically about its exemption from obligation to insure, and saying, as to that, it may, in its discretion, insure or require the same to be done, but it is a case where the trustee, having exempted itself from liability in a number of matters, reserves to itself, in a general phrase, the right, if it sees fit, to do any of the enumerated things. In applying this phrase to the preceding enumeration of things, as to which the trustee claims exemption, we find there are certain acts which refer to an individual performance on its part; as, for example, it is not obliged to "file or record the mortgage," or "renew such mortgage," or "procure further assurance," or "do any act suitable for the continuance of the lien," or "give notice of the existence of the lien," or "effect insurance against fire," or "renew policies of insurance." These are all things to be done or not to be done by *itself*. Then we have the following: It is not obliged to "keep

itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made." Here is a matter as to which there is a distinction made between the direct, personal act of the trustee itself, and what it may require another to do; and the language immediately following would seem to have been framed with direct reference to that distinction, so that when the trustee says it "may, in its discretion, do any or all of the matters or things in this paragraph set forth, or require the same to be done," it was to make it applicable, among other things, to the language just referred to, in regard to the payment of taxes. The alternative phrase, "or require the same to be done," makes the whole reservation of authority to the trustee cover more completely (verbally at least) the preceding enumeration of acts and things as to which it had exempted itself from liability. Again, it is not without significance that although among the enumerated exemptions from duty claimed by the trustee, in this tenth article, there is one from the duty of procuring "further assurance," yet we find that there is an express and formal covenant for further assurance, constituting article 6 of the mortgage. It is from this apparent that the parties to the mortgage, and their counsel, when they desired to bind the mortgagor, knew how to draft a covenant for that purpose, and that they did not consider the mere allusion to an exemption of the trustee, in the tenth article, in connection with the clause saving the right of the trustee to do the thing from which it was exempted, or require the same to be done, a covenant on the part of the mortgagor. It is also clear that this procuring further assurance having been made the subject of a distinct obligation on the part of the mortgagor, by the covenant in the sixth article, was one of the enumerated acts as to which the alternative clause, "or require the same to be done," might apply. It is true that it appears from the record that the mortgagor company did, after the execution of the mortgage, and until the time it went into the hands of a receiver, take out and maintain a partial insurance for the benefit of the mortgagee, and that the receiver, under the direction of the court of Westmoreland county, Pa., maintained this insurance till the property was sold by him to Kann. There is some force in the argument that this was an interpretation of the meaning of the language in the tenth article. But this action of the mortgagor and the receiver cannot amount to the creation of an obligation which was not expressed in the mortgage, and which would bind a subsequent purchaser, whose obligation extended only to the actual meaning of the terms of the mortgage, not to any construction which the original mortgagor might give them. Besides, the mere taking out of insurance by the mortgagor may well have occurred with an understood absence of contractual obligation, and have been prompted by general notions of propriety or feelings of benevolence and good will. If, then, there is no original obligation imposed by the mortgage on the mortgagor to insure for the benefit of the mortgagee, there is no foundation on which the argument for a derivative obligation in that regard can rest; and, as there is no express contract of the grantee of the equity of redemption to so insure, there is no

equitable obligation attaching in this case to the appellant, in respect to the insurance taken for its own benefit, or equitable lien upon the funds arising therefrom, in favor of the complainant. This conclusion would dispose of the case, as complainant's whole contention for the equitable relief sought rests upon the postulate of an express contract of the mortgagor to insure for the benefit of the mortgagee. *Insurance Co. v. Lawrence*, 10 Pet. 507, 9 L. Ed. 512; 1 *Jones, Mortg.* § 748.

But we do not wish to rest our determination of this case upon the mere ground of the construction of the language of the mortgage. We will, as to what we now have to say, assume that the complainant below is right in its contention that the mortgage does contain an express covenant on the part of the mortgagor to insure the mortgaged premises, when thereto demanded by the mortgagee. This brings us to the consideration of the second of the questions above stated, viz. whether the Penn Plate-Glass Company, by merely becoming the grantee of the equity of redemption, subject to the mortgage, thereby came under an obligation to insure for the benefit of the mortgagee and trustee, or such an obligation to indemnify the mortgagor against its obligation to insure, if such liability existed, as would be available to the mortgagee as complainant in this suit.

As to the first branch of this question, it is to be observed that "while," to quote the language of the supreme court in *Wheeler v. Insurance Co.*, 101 U. S. 439, 442, 25 L. Ed. 1057, "it is settled by many decisions in this country that if the mortgagor is bound by covenant, or otherwise, to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor, to the extent of the mortgagee's interest in the property destroyed," the equitable lien in such case arises from the unperformed contract between mortgagor and mortgagee. Equity regards as done that which ought to be done. And, therefore, if the mortgagor, having so covenanted, fails to make the policy of insurance payable to the mortgagee, or to assign the same, before or after loss, the fund arising therefrom is clearly within the operation of the fundamental maxim just quoted, because the mortgagor was bound to so fulfill his promise to the mortgagee as that funds arising from insurance effected by the mortgagor should belong to the mortgagee, at least to the extent of his (the mortgagee's) interest in the property insured. This promise or executory contract equity will enforce by impressing such funds with a lien in favor of the mortgagee, whether in the hands of the mortgagor, his heirs, executors, or administrators, the insurance company, or voluntary assignees of said funds, or purchasers or incumbrancers thereof with notice. *Walker v. Brown*, 165 U. S. 654, 664, 17 Sup. Ct. 453, 41 L. Ed. 865; 3 *Pom. Eq. Jur.* § 1235. But, apart from cases of fraud, it is only when there is such a contract or promise, which can be so enforced, that courts of equity will recognize for that purpose the existence of an equitable lien. In such case the lien is impressed upon funds or property which, belonging to the promisor, were the very funds or property

which constituted the subject-matter of the contract, or to which the contract or promise related. It is essential, therefore, that the funds or other property which are to be charged with the lien should have, either at the time of the contract or afterwards, and while it was still unperformed, belonged to the party against whom the contract is to be so enforced, and be so identified, even though at the time of suit the said funds or property have come into the hands of volunteers, or of others who may be affected with notice. There must, therefore, exist a contract by the party owning, either in present or in expectancy, the property sought to be charged, which directly or by necessary implication expresses the intention to charge such property with the lien, in favor of the other party to the contract. These requisites to the establishment of an equitable lien are clearly recognized by the supreme court in the late case of *Walker v. Brown*, 165 U. S. 654, 664, 17 Sup. Ct. 453, 41 L. Ed. 865. The court in that case quote and adopt the language of the supreme judicial court of Massachusetts in *Pinch v. Anthony*, 8 Allen, 536, as follows:

"It is well settled that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property, of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons, who are either volunteers, or who take the estate on which the lien is agreed to be given with notice of the stipulation."

The supreme court go on to say:

"The subject was very fully reviewed, with reference to the English and American authorities, in *Ketchum v. City of St. Louis*, 101 U. S. 306, 25 L. Ed. 999, where the language just cited was approved; and that ruling was considered and reaffirmed, during this term, in *Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855. *Pomeroy*, in his work on *Equity Jurisprudence* (vol. 3, par. 1235), condenses and states the general result of the authorities on the subject as follows: 'The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbrancers with notice. * * * The ultimate grounds and motives of this doctrine are explained in the preceding section, but the doctrine itself is clearly an application of the maxim, 'Equity regards as done that which ought to be done.''"

We have dwelt upon these requisites to the establishment of an equitable lien, so that the lien of the mortgagee upon the money due upon a policy taken out by the mortgagor, where the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the benefit of the mortgagee, may be distinguished from the lien claimed by the complainant in the present case. No such lien as has been just described exists, or could exist, in favor of the mortgagee, the complainant in this case, as against *Kann* or the appellant, on the insurance funds belonging to them, or either of them. It is not pretended that there was any contract between *Kann* or the appellant company and the complainant to insure for its benefit, or any promise or declaration of intention, upon any or no consid-

eration, that they, or either of them, would so insure, or that policies or fund arising therefrom should be assigned or charged with a lien in its favor. The first essential requisite to an equitable lien, as above described, is, therefore, entirely wanting. There is no contractual relation of any kind between the mortgagee and the appellant, in whose name and for whose sole benefit these policies of insurance were taken out. If such a lien, therefore, exists on these insurance funds, in favor of the complainant, it must be on other grounds than these ordinary and well-understood ones. This is not the case of a mortgagee claiming an insurance taken out by the mortgagor, who had covenanted to insure for the benefit of the mortgagee; nor is it the case of such mortgagee claiming such insurance funds, when they had come into the hands of third persons, "who are either volunteers, or who take the estate [the insurance funds] on which the lien is agreed to be given with notice of the stipulation." The complainant does not claim that the funds due on policies taken out by the mortgagor, and which the mortgagor is held to have promised that he would assign to the mortgagee, have come into the possession of the appellant, with notice, and are therefore charged with a lien in favor of the mortgagee. Its claim is that the grantee of the equity of redemption, having taken the property expressly subject to the mortgage, which contained a covenant on the part of the mortgagor to insure on that ground alone, came either under a direct obligation to insure the premises for the benefit of the mortgagee, or under an obligation to indemnify the mortgagor for his liability under said covenant. But the property or "estate" which came to the hands of the appellant, as grantee of the equity of redemption, was the mortgaged premises, subject to the mortgage. There is no difficulty in determining what that estate is to be charged with. The court here, however, is asked to impress a lien in favor of the mortgagee, not on this estate, but upon funds which were never in any sense the property of the mortgagor, and could never have been the subject-matter of a promise on its part. It is the first branch of the claim above stated (i e. the alleged direct obligation) that we are now considering. The complainant suggests, but it is not seriously argued, that the mere taking of the equity of redemption, subject to the mortgage, put the grantee thereof in the shoes of the mortgagor, and made him "liable upon any covenants upon which the mortgagor is liable." It practically abandons this proposition, however, by everywhere, throughout its elaborate brief, and under each of the three or four heads of the argument, appealing to alleged special circumstances as supplying the equitable grounds for the relief it seeks. The argument of complainant's brief on this point, is, in substance, this: That the mortgage provided that, in case of default for six months or more in any of the covenants or stipulations of the mortgagor, the mortgagee shall have the right to enter and hold possession of the mortgaged premises or to foreclose the mortgage; that the mortgagee in this foreclosure suit has in some way asserted that right, by asking for a receiver, which the court denied (though the bill alleges only the default in payment of interest, as the basis of the suit); and that, to use the language of

complainant's brief, its claim "rests on the right of a trustee to enforce the lien of the mortgage for such a breach of the covenant [by entering and holding possession], and our [its] contention is that, under the circumstances outlined above, the property having been destroyed, the lien of the mortgage is capable of enforcement, and must be impressed on the insurance fund substituted for the lost property." Whatever the force of this argument may be, it at all events distinctly abandons the proposition above referred to, and impliedly admits that no direct liability on the covenant of the mortgagor to insure rested upon these defendants, or either of them, as a consequence of the mere taking of the equity of redemption, subject to the mortgage, but that, "under the circumstances outlined," the lien of the mortgage "must be impressed on the insurance fund substituted for the lost property." But why must the lien be so impressed? We have already adverted to the absence of any contract on the part of the defendant, express or implied, or expression of intention by these defendants, or either of them, to which the doctrine of equitable liens would apply. These funds sought to be charged were not funds of the mortgagor, on whom the obligation of the alleged covenant rested, and which, coming into the hands of defendants, with notice, are therefore within the scope and meaning of this doctrine, but they are the funds which have resulted from contracts of insurance made by these defendants with insurance companies in their own right, and for the protection of their own interests. The contracts were such as the defendant had a right to make, and the "circumstances" under which the contracts were made, so far from implying any intention on the part of these defendants, or either of them, to make the contract for, or appropriate the funds arising therefrom to, the benefit of complainant, expressly negative such intention in the most positive and explicit terms. In the first place, it appears from the language of the policies themselves that they were taken out for the sole benefit of the defendants, and they expressly stated that they did not cover at all the interest of the mortgagee; and, in the second place, it appears by the testimony, and it is not denied,—in fact, it is so stated by the complainant,—that both the defendants, during the periods of their successive ownerships, on being applied to by the mortgagee to take out insurance in behalf of and for the benefit of the trustee and mortgagee, declined, and continued to decline, so often as the request was repeated, coupling their refusal with the statement that no duty or obligation rested upon them so to do. And we find no other circumstances disclosed by the testimony in the record that would serve to create a lien on these insurance funds in favor of the complainant, in the absence of any contract or undertaking on the part of the defendants to so appropriate them. It is hard, under these circumstances, to see why these particular funds were any more subject to a lien in favor of complainant than funds of the defendant on deposit with its banker, or moneys coming to it from any other source. Equity will, under some circumstances, enforce the performance of a contract, or of a duty growing out of a contract, through the indirect methods of the recognition of an equitable lien or assignment;

but it will not, in the absence of fraud, create the duty or obligation independently of a contract, expressed intent, or will, at some time entered into or declared by the party sought to be charged.

So, far, then, we must conclude that the implied contract arising from the words "subject to the mortgage" is simply and solely a contract between the grantor and grantee of the equity of redemption, and can have no greater or other effect, at the most, than an express contract on the part of the grantee with the grantor to pay the mortgage debt, and that this contract must be measured by its own terms; that such an express contract to pay the mortgage debt draws with it no obligation to perform any of the covenants of the mortgage, except those which run with the land, and those would be binding on the purchaser irrespective of any contract to pay the debt. As it is conceded that the alleged contract to insure in this case does not run with the land, an obligation to pay the mortgage debt on the part of the grantee of the equity of redemption, if any such exist, of itself imposes no obligation to insure. This being so, it would seem to deprive of all force the argument of complainant last adverted to, viz. that, inasmuch as the mortgage provides that, in case of default in the performance of any of the covenants of said mortgage, the same shall, at the election of the mortgagee, become due and payable, and that, foreclosure proceedings having been instituted (whether distinctly for this special default or not), there was a right in the complainant trustee to enforce, by entry and holding possession, the lien of the mortgage for such a breach of this covenant, and that such lien is thereby impressed on this insurance fund, payable by the terms of the policies to the appellant company in its own right. But if it be true, as we have stated it to be above, that the implied contract of the appellant, as grantee of the equity of redemption, with the mortgagor and grantor, to pay the mortgage debt, if such implied contract existed, does not draw with it an obligation to perform the covenants of the mortgage, the nexus between such default and the funds resulting from insurance taken out by defendant company in its own right and for its own benefit fails to be established. The apparently hard situation of the complainant in this case might incline a court to desire, but cannot clothe it with, the power to grant the relief sought.

Nor is the claim for a lien upon these funds helped by being rested upon the theory suggested by the second branch of the proposition we have been discussing; that is, that the defendants, or one of them, came under such an obligation to indemnify the mortgagor for his liability under the alleged contract to insure as would be available to complainant in this suit. The view we have taken as to the covenant to insure, where the grantee of the equity of redemption takes subject to the mortgage containing such covenant, would seem to apply, also, to this contention of the complainant; but, as the complainant rests mainly upon this proposition, we must consider it more closely. Two questions present themselves under it: First, was there an obligation resting on the appellant company to indemnify the mortgagor for his liability under the alleged contract to insure, by reason of the conveyance to it of the mortgaged prem-

ises, expressly subject to the mortgage; and, second, if there was such an obligation on appellant company, can it be made available to complainant in this suit? We have already said that this alleged covenant or contract to insure was not one which ran with the land, as it lacks the essential characteristics of such a covenant. It is entirely personal in its character, and does not bind the grantee of the equity of redemption, unless it does so by force of a contract, express or implied, between the parties to the conveyance. *Insurance Co. v. Lawrence*, 10 Pet. 507, 9 L. Ed. 512; *Vernon v. Smith*, 5 Barn. & Ald. 1. As we understand complainant in its brief and argument to practically admit that this is so, further discussion on this point is unnecessary. The reasoning that would exclude the implication of a direct obligation on the part of the defendant company to insure for the benefit of the mortgagee, by reason of its having become the grantee of the equity of redemption, subject to the mortgage, would seem, also, to exclude the implication of an obligation to indemnify the mortgagor on his covenant to insure. The taking expressly "subject to a mortgage for \$250,000" may well be equivalent, as we have before stated, to an express contract to be responsible to the mortgagor for the mortgage debt, as part of the purchase money, but there is no implication in such a taking that the grantee is to be liable on the personal covenant of the mortgagor to insure. It is not within the terms of the contract, and it would be doing violence to the situation to impose such a liability without some evidence of assent on the part of such grantee. The only way in which the grantee of the equity of redemption becomes liable to the mortgagor and vendor, even to pay the mortgage debt, is by virtue of the contract, expressed in the direct assumption of the mortgage as part of the purchase money; and, in the absence of such an assumption, it would be creating a contract for such grantee, to hold him responsible for any covenants or obligations which the mortgagor has seen fit to enter into with the mortgagee. We are here dealing with contract, not with status; and no claim can be enforced against the appellant company, either directly or indirectly, by the impressment of lien on its money or property, unless such claim rests upon an actual contractual relation, or upon such conduct of appellant as amounts to fraud and estops it from denying such claim.

The case of *Miller v. Aldrich*, 31 Mich. 410, referred to by the learned judge below, and the only authority cited for the proposition that the covenant to insure for the benefit of the mortgagee is incidental and supplemental to the mortgage debt, and binding on the purchaser of the equity of redemption, presented facts which clearly involved fraud on the part of the purchaser. As stated by Judge Cooley, who delivered the opinion of the court, the facts were these: The owner and mortgagor (Chapman) had made an express contract with the mortgagee (Miller) to insure for his (Miller's) benefit, and, in pursuance thereof, took out a policy of insurance for the benefit of and payable to the mortgagee. Chapman afterwards sold the property, subject to the mortgage, to one Aldrich, who, with knowledge of the contract to insure, agreed to maintain the existing policy of insurance

for the benefit of the mortgagee. "Instead, however, of having the insurance policy assigned to Aldrich, it was surrendered, and a new one taken out in the name of Aldrich, and without providing in terms for the protection of Miller. This insurance was for eight hundred dollars, which was quite as much as the value of the building would justify. Miller, when he was informed what had been done, called upon Aldrich and expressed apprehension about his security, but Aldrich quieted him by assuring him that in the event of loss he should be protected by the insurance money. The building was actually destroyed by fire in the December following, and the loss has been adjusted and is ready to be paid over, but Aldrich now refuses to apply any portion of the money to the protection of Miller. The purpose of this suit is to compel the application, and the circuit court, has decreed that the insurance moneys, to the amount of the Paine note, shall be paid into court, to be paid over to Miller on his discharging his mortgage." The facts here disclosed would clearly estop Aldrich, the purchaser of the equity of redemption, by reason of his fraud, from denying that the insurance money belonged to the mortgagee.

There is still another ground upon which exemption from this liability to insure for the benefit of the mortgagee could be claimed by the defendants in this case; that is, that under the fourth article of the mortgage the mortgagor is exempted from all personal liability for the mortgage debt, and as, under the Pennsylvania law, as declared by its supreme court, the liability of a purchaser of mortgaged premises, under and subject to the mortgage, was one of indemnity to his grantor in respect to such mortgage debt, it follows that no such liability could exist in the present case. As the liability to indemnify the mortgagor on his covenant to insure is incidental and subordinate to his liability for the mortgage debt, no such liability to indemnify rests upon the appellant company and grantee in this case. This view would, of course, destroy the basis for any derivative claim on the part of this complainant with respect to such liability.

We come now to consider the complainant's last claim, which is that the special circumstances and facts of this case, as disclosed in the record, are such as would make it inequitable for the defendants to deny the relief sought, and that therefore the court should impress a lien in its favor upon the funds which, as it claims, are now in court, and subject to the court's disposition. As we have already intimated, such facts and circumstances must amount to fraud on the part of the appellant company, and serve, in the absence of any express contractual relation, to estop it from denying that these funds, the product of its own insurance, should be applied for the benefit of the complainant. We have carefully read and considered the record in this respect, and fail to find a state of facts showing fraud, or that would constitute an estoppel. It is true that Kann, one of the defendants, and the predecessor of the appellant company in title, became a stockholder and officer in the original company; that he found it in bad financial condition; that he loaned it money; and that finally, for his own protection, and that of others in interest,

he was active in promoting the suit in the Pennsylvania state court which resulted in the receivership and sale of the mortgaged property. We can discover nothing in the conduct of Kann, up to this point, to justify the charge of fraudulent conduct on his part, or that his conduct was otherwise than that of a practical business man, intent upon honestly securing the stake he had made in the company's affairs, or that he otherwise than honestly and prudently managed its affairs, so far as he had the management of them; nor do we find that the imputation that he deliberately wrecked the company, that he might become a purchaser of its property at a nominal price, is justified by the testimony. He became the purchaser at an open sale made by order of the court, and afterwards confirmed by it, and expressly subject to the mortgage of \$250,000. He held it for a year, and then conveyed it to the Penn Plate-Glass Company, one of the defendants in the present suit. Whether he organized the latter company for the purpose of taking the title and carrying on the business, or not, is immaterial. If he did, he did only what he had a right to do; and the company so organized and taking the property by lawful conveyance, subject to the said \$250,000 mortgage, stands before the court as a bona fide purchaser for value. Kann undoubtedly knew, and the appellant company also had notice, not only of the mortgage, subject to which he and it expressly took title, but of all the covenants and conditions contained in the same. Although not very material, the court below seems to have been mistaken in assuming that the policies of insurance taken out by the mortgagor or by the receiver were intentionally allowed to lapse by Kann, after his purchase, without the knowledge of the trustee, and that without such knowledge he afterwards took out policies in his own name on his own interest, and payable to himself, with the express exclusion of the bondholders from any interest in the same. The court was also mistaken in finding as a fact that this "insurance was placed by a party to this litigation under the stress of an application for the appointment of a receiver, and a consequent exclusion from possession," and also in finding that, pending the application for a receiver in the original foreclosure suit, the defendants signified their intention to place insurance upon the property for the benefit of the trustee, if they were bound to do so, but subsequently, and without knowledge of the trustee, took out the policies now in suit, payable to themselves, and expressly excluding the bondholders from any interest in the same, and in also finding that pending the appointment of a receiver "the purchasers agreed to and did place insurance." The facts in this regard, as disclosed by the record, are that, immediately after his purchase of the property at the receiver's sale, Kann, denying the request of the trustee and mortgagee that he should insure for its benefit, took out policies such as are here in question, and the same were renewed and maintained by the appellant company; that this was done openly, and with full notice to the trustee and complainant in this suit; that no duty was recognized by either of the defendants to insure for its benefit. As there was nothing in the conduct of Kann in his dealings with the mortgagor company or the complainant, up to the purchase by him at

the receiver's sale, to affect or qualify his rights as a bona fide purchaser, no more can we find in the record, since that time, anything that would amount to a fraud on this complainant, or serve to estop him or the appellant company from asserting his or its right to the funds arising from the policies taken out in its name and for its sole benefit, and in express repudiation of any duty or right of complainant company in regard to insurance. The complainant also lays much stress upon its allegation that the appellant company obstructed complainant in its efforts to take possession of the mortgaged property, and thereby prevented it from applying the rents and profits to insurance. But it appears that the only acts of obstruction the complainant is able to specify are the appearance of the appellant company in defense of the foreclosure suit; that in defending the same it resisted in open court, during the proceedings in this suit, the application for a receiver, and the delay in reaching a final decree, consequent upon the defense made by the appellant company and Kann, the other defendant identified with it. Upon careful examination, this allegation and the contention founded upon it seem frivolous. The defendants were brought into court by process, and exercised an unquestioned right in interposing, as they did, through respectable counsel learned in the law, the defenses which they were advised to make. Their course in this respect was not rebuked by the court. In fact, the court took their view as to the propriety of appointing a receiver pendente lite, and declined to grant the application of complainant therefor. And this, even though it was suggested that there was no insurance on the premises for the benefit of the mortgagee, and that defendants had declined to so insure, and refused to recognize a duty so to do. The court, in declining to appoint a receiver, said (to again quote its language), "I can't decide that question" (i. e. whether the defendant company was bound to insure for the benefit of the mortgagee and bondholders), "but that, if they were so bound, they ought to protect us" (the mortgagee and bondholders). It was at this juncture that the occurrence much dwelt upon by complainant took place. Kann and Wertheimer (large stockholders in appellant company) agreed to give, and did give, a stipulation in writing that out of the then existing policies, upon the interest of the appellant company, there should be set aside, in case of loss by fire, a sum sufficient to pay the valid bonds outstanding (not including those held by said Kann and Wertheimer), provided that it should be finally adjudicated that the said appellant company was bound, as grantee of the equity of redemption, by anything contained in said mortgage, or in the terms of its said purchase, to keep or maintain insurance for the benefit of the bondholders. The appellant company was not a party to this stipulation. Its only object and effect were to satisfy the court of the sincerity of the contention that the owner of the premises was under no obligation to insure for the benefit of the mortgagee, and that there was no disposition to evade such obligation, if it should be judicially determined that it existed. This is very far from justifying the contention of complainant that giving and filing this written agreement in some way served to put the court in control of the funds that might arise from

this insurance, in such fashion as to clothe it with a special jurisdiction to administer and apply the same. No duty of administering and disposing of a res in court was imposed by this stipulation, and no special equitable jurisdiction was raised thereby.

We are of opinion, therefore, that there is no direct liability between the appellant company and the mortgagee, because of the special circumstances disclosed in the record; and admitting, for the sake of argument, a liability of the defendant, as purchaser, to indemnify the mortgagor for its liability on the mortgage debt, and for its alleged obligation to insure, we find no special circumstances that would serve to transfer that liability into a liability to the complainant, in the shape of a lien impressed for its benefit upon the insurance funds. This view would dispose of the case, without considering the special theory and contention of the complainant that, having all the parties before the court, and the res (being the funds paid by the insurance companies) in court, the court, by recognizing a liability on the part of the defendant company to indemnify the mortgagor on his covenant to insure, instead of first compelling a proceeding against the mortgagor on said covenant, can, in order to avoid circuity of action, impress the funds in its hands with a lien in favor of the complainant. But this theory assumes the liability to indemnify on the covenant to have been established, and that by reason of some special circumstances in the case an equity has arisen in complainant to have that fund appropriated to its use. There is another criticism to be made upon this theory, in regard to the allegation that the res in the hands of the court gives a special remedial jurisdiction in the case. These funds which constitute the res are not in the hands of the court in any such sense as that a special jurisdiction to administer them attaches. They have only come into possession of the court, through its receiver, by reason of the claim that complainant has an equitable lien upon them, and there is a manifest impropriety under such circumstances in contending for a special jurisdiction for such relief on that account. What has been said renders it unnecessary to consider the effect of the act of assembly of the state of Pennsylvania of 1878. That act provides that grantees of real estate, subject to mortgage, shall not be personally liable for payment of such mortgage, unless they shall, by an agreement in writing, have expressly assumed a personal liability therefor, and providing that the use of the words "under and subject to the payment of such mortgage" shall not, alone, be construed to make such grantee personally liable, as aforesaid. We will observe, however, that, whatever may be the effect of this act upon the liability of grantee to grantor of real estate so incumbered, there can be no question that it was intended to destroy all derivative liability of grantee to mortgagee, unless such liability has been created by an express undertaking in writing. As we have before said, much of the difficulty in this case arises from the apparently hard situation in which the mortgagee and bondholders find themselves, and the not unnatural disposition to confound hard conditions with inequitable ones. In this respect, however, it should be remembered that both the owner of the equity of redemption and the mortgagee had

separate insurable interests, and that the mortgagee was fully notified of the absence of insurance for its benefit, and of the refusal on the part of either of the defendants, as owners of the premises, to insure for its benefit, or to recognize a duty to do so. It could have insured the bondholders' interest after the foreclosure suit began, and charged the expenses of so doing to them. *Insurance Co. v. Stinson*, 103 U. S. 25, 26 L. Ed. 473; 1 Jones, *Mortg.* § 397. Instead of doing so, it chose to rely upon its peculiar view of the obligation of the defendants, and took the risk of justifying that view of the law, should it become necessary to do so.

For the reasons given, we are of opinion that so much of the decree of the circuit court as relates to the disposition of the insurance moneys collected by the receiver under order of the court must be reversed, and the court below directed to enter a decree that said moneys shall be paid to the said defendant the Penn Plate-Glass Company, and that the said defendant have its costs under the said supplemental bill. It is so ordered.

ACHESON, Circuit Judge. I am not able to concur in the views expressed by the majority of the court, and I dissent from the decree of reversal. As a justification for this dissent, I might well content myself with a reference to the exhaustive opinion of the court below. The importance of the case, however, both as respects the amount in controversy and the principles involved, seems to call for a specific statement of the reasons which influence me.

I differ from the majority of the court upon the fundamental question whether, under the terms of the trust deed or mortgage, there was an obligation upon the Penn Plate-Glass Company, the mortgagor, upon demand by the trustee, to insure for the benefit of the bondholders. I have no difficulty in finding such an obligation in the stipulation in relation to insurance contained in the tenth article of that instrument:

"It shall be no part of the duty of the party of the second part to file or record this indenture; * * * nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance; * * * but the trustee may, in its discretion, do any or all of the matters or things in this paragraph set forth, or require the same to be done."

It is very clear to me that by this clause a right was conferred upon the trustee, in the interest and for the protection of the bondholders, to require insurance against fire to be placed by the mortgagor upon the mortgaged property. The parties to this indenture were the mortgagor, as party of the first part, and the trustee, as party of the second part. Now, a contractual right in one of two parties to an instrument to require a thing to be done implies a contractual obligation upon the other party to do the required thing. Here the right given to the trustee to require insurance involved a correlative duty on the part of the mortgagor to effect such insurance. As the judge below well said, unless the mortgagor "imposed the fulfilling of such requisition upon itself, it imposed it upon no one." Indeed, unless read as the court below read it, the clause relating

to insurance is absolutely meaningless. Cogent reasons for imposing upon the mortgagor the obligation of effecting insurance for the security of the bondholders lie on the very surface of the case. As the preamble to the mortgage recites, the bonds were issued "to be used towards the payment of liabilities incurred in the erection of a plate-glass works" in course of erection upon the mortgaged premises, and the evidence shows that they were so used. It was the proceeds of these bonds that erected the works. Now, throughout this litigation it has been strenuously asserted by the Penn Plate-Glass Company, the appellant, that by virtue of article fourth of the mortgage the mortgagor was exempted from liability of a personal nature to pay either the principal or interest of the bonds, and that the remedy of the bondholders for payment was confined exclusively to the mortgaged premises. I understand the majority of the court to accede to this view. Manifestly, then, insurance was of the greatest importance to the bondholders. Indeed, it was a vital matter to them. Without insurance, they had no adequate security. For it appears from the testimony of W. L. Kann that the land upon which the works were erected was worth, "probably, \$5,000 or \$6,000," only. The locality was rural, and the land, consisting of 21 acres, according to his estimate was worth only about \$300 an acre. This bonded mortgage debt, it will be remembered, was \$250,000. It is a very significant fact that from the time the works were built down until Kann's purchase, in June, 1894, no one had questioned the right of the bondholders, under the terms of the mortgage, to protection by insurance taken out by the mortgagor for their benefit. Upon demand by the trustee, the mortgagor company effected and always maintained insurance for the benefit of the bondholders, usually to the full amount of the mortgage debt, and at no time less than \$200,000, down to the appointment of the receiver by the state court, in March, 1894; and upon the like demand of the trustee the receiver, acting under the order of the state court, maintained such insurance for the benefit of the bondholders to the full amount of the mortgage debt, receiver's certificates having been issued under the order of the court for the purpose of effecting the insurance. That insurance was in full force when Kann purchased, it having then some months to run. This practical construction by the parties to the instrument of the provision touching insurance may not be conclusive here, but surely it should have great weight in fixing its meaning, if the language employed be deemed of doubtful import. I myself do not regard the language as at all uncertain. It seems to me unmistakably to impose upon the mortgagor company the obligation to insure for the security of the bondholders upon demand by the trustee.

Assuming the existence of a covenant or stipulation in the trust mortgage binding the mortgagor company to insure for the benefit of the bondholders, I pass to the question whether the appellant company came under the operation of this provision of the mortgage. Before adverting to the terms of the deed from the receiver to Kann, and the deed from the latter to the appellant, some collateral matters deserve notice. Kann was a stockholder in and a director of the original plate-glass company, the mortgagor, and treasurer thereof. At the

time of his purchase he had knowledge of the terms of the trust mortgage, and actual notice of the then existing insurance which the receiver, acting under the order of court, had effected for the benefit of the bondholders. Kann organized the new plate-glass company, the appellant, to operate the works on the mortgaged premises, conveyed the property to it, and became its president. The mortgage trustee at once duly notified first Kann, and then his new company, upon its organization, to insure for the security of the bondholders. The trustee likewise duly notified the mortgagor company to insure. That the old company was insolvent and in the hands of a receiver, and that the mortgage trustee was without funds, were facts known to Kann and his company, the appellant. The deed to Kann, in accordance with the terms of the order of court under which it was made, distinctly set forth that the conveyance was made "subject" to the trust mortgage, and the deed from Kann to the appellant likewise set forth that the conveyance was made "subject" to the mortgage. The first article of the trust deed or mortgage provided thus:

"Until default shall be made by the party of the first part in the payment of the principal or interest of the said bonds thereby secured, or some of them, or in the performance of some one or more of the covenants, stipulations, or agreements herein required by it to be kept, performed, or done, the said party of the first part shall be suffered and permitted to possess, manage, operate, and enjoy the said hereinbefore mentioned and described plate-glass works and premises, with the appurtenances, and to take and use the incomes, rents, issues, and profits thereof, and to dispose of the same in any manner not inconsistent with these presents."

And the second article makes provision for entry by the trustee and eviction of the mortgagor company upon default by it, continued for six months after demand by the trustee, "in the performance of any covenant, agreement, or stipulation" contained in the mortgage, and thereby "required to be kept and performed" by the mortgagor.

Certainly the deed from the receiver conveyed to Kann no other or higher rights than those which were vested in the mortgagor company itself. Kann and his grantee, the new company, stood in the shoes of the mortgagor company in respect to title and right of possession. The above-quoted part of the first article of the trust mortgage, equally with the second article, bound the appellant company. Its possession of the property, and perception of the income, rents, issues, and profits, depended upon performance of the stipulation to insure for the benefit of the bondholders. It could not rightfully remain in the possession and enjoyment of the property without thus insuring, after the demand so to do made by the trustee. Therefore, having taken out insurance while thus in possession, and in the exclusive receipt of the income, rents, issues, and profits of the property, equity will conclusively presume that the insurance was taken out and held for the benefit of the bondholders. To effectuate justice, equity here will consider that as done which should have been done. Under the circumstances, the appellant company is not to be heard to say that the insurance was not for the security of the bondholders.

In my judgment, the case of these bondholders—their claim to an equitable lien upon the insurance fund which stands for the destroyed

property—does not at all depend upon the existence of a personal liability on the part of the mortgagor company to pay the mortgage debt. Nor does their case necessarily rest upon the theory of the assumption of that debt by the appellant company. The covenant or stipulation for insurance contained in the trust mortgage lies at the foundation of the equitable lien here asserted. If it be true that there is no personal liability for the debt on the part either of the mortgagor company or its successor in the title, the appellant company, if the mortgaged property itself was the only security the bondholders had, their equitable right to the substituted insurance fund is only the clearer. Now, the conveyance of the property to the appellant company, as we have seen, was made expressly subject to the trust mortgage, and the appellant company accepted the conveyance thus made, and under it took and maintained possession of the property. Then the trustee in due time and form required insurance to be effected for the benefit of the bondholders. The appellant company, with full knowledge of the facts, had voluntarily taken the place of the insolvent mortgagor company. Under the special circumstances, the appellant company should be regarded, I think, as having assumed the obligation to insure as stipulated in the mortgage.

But if a direct contractual liability to insure is not thus to be implied, as against the appellant company, in favor of the trustee, still I am of opinion that the court below rightly held that the appellant company, under the conveyance to it of the property subject to the mortgage, became bound to indemnify the mortgagor company against its liability upon the covenant or stipulation for insurance contained in the trust mortgage. *Moore's Appeal*, 88 Pa. St. 450; *Blood v. Crew-Levick Co.*, 171 Pa. St. 326, 338, 33 Atl. 344. The Pennsylvania act of June 12, 1878 (P. L. 205), as these two cited cases show, has no application here. That act has no relation whatever to a covenant to insure. The purpose of the act was to relieve a vendee from an implied personal liability to pay the mortgage debt, arising from the "under and subject" clause. In *Blood v. Crew-Levick Co.*, however, the supreme court of Pennsylvania distinctly held that the act of 1878 does not touch the covenant of a vendee to indemnify his vendor, implied from the "under and subject" clause. The obligation resting upon the appellant company to indemnify the mortgagor company against its covenant to insure is quite sufficient of itself to sustain the equitable jurisdiction exercised by the court below, and its decree in favor of the trustee. It is well settled that in a court of equity a mortgagee may avail himself of a contractual right of the mortgagor against the purchaser of the mortgaged property. *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667. Here the trust mortgage was the foundation of the suit. Pending the suit the mortgaged property in great part was destroyed by fire. Then the supplemental bill was filed. Thus circuity of action was prevented. The fund arising from the insurance is in the hands of the court. It stands in the place of the consumed property. The trustee's claim grows out of the trust mortgage, and is of an equitable nature. All the parties in interest were before the court. The equitable jurisdiction of the court with respect to the insurance fund, I think, is clear, without taking

into consideration at all the so-called "insurance bond" filed in the cause.

The original bill was filed on July 8, 1896, after six months' default both in respect to interest and the stipulation to insure. The Penn Plate-Glass Company, the appellant, interposed defenses which eventually proved to be entirely groundless. The trustee immediately upon the filing of the bill moved the court for the appointment of a receiver to take charge of the mortgaged property. This motion the Penn Plate-Glass Company resisted. In order to secure the denial of the motion, it procured and had filed in the cause a stipulation under seal, signed by W. L. Kann, the president of the company, and Emanuel Wertheimer, a large stockholder, covenanting that in the event of a loss by fire of the mortgaged property there should be paid to the mortgage trustee, in trust for the holders of valid bonds, a sum equal to the amount of such bonds, "out of policies of insurance existing in favor of the Penn Plate-Glass Company: provided, that it shall have been finally adjudicated that the Penn Plate-Glass Company, the present owner of the said property, is bound or liable by anything contained in the said mortgage, or the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage." This stipulation was filed in court on July 24, 1896. The order denying the motion for the appointment of a receiver was not filed until September 7, 1896. It is true, it appears from the testimony that the judge had previously signified to counsel his intention to deny the motion; but thereupon, in open court (Kann, the president of the Penn Plate-Glass Company, and the counsel of the company being present), the counsel for the trustee called the attention of the court to the matter of insurance. The following is the testimony of the counsel as to what occurred:

"I said to the court that, in considering the motion for a receiver, it occurred to me that the court had not considered the fact that this property was without insurance; that there was danger of fire; that my client was a trustee without funds, and that that was a matter that ought to be considered; and that we were entitled to insurance. The other side denied that they were bound to insure under the terms of the mortgage. I insisted we should have insurance, they denying that we were entitled to insurance under the mortgage; and, under the circumstances, Judge Buffington said, 'I can't decide that question,' and intimated to them that, if they were bound to insure, they ought to protect us, and they denied they were bound to insure; and the paper signed by Mr. Kann and Mr. Wertheimer was given in pursuance of my demand for insurance, and filed in court, and is on file to-day."

This testimony is unimpeached. Certain it is that the court forbore final action upon the motion for a receiver until after the giving of this stipulation as to insurance. Now, it is true that the Penn Plate-Glass Company did not formally join in the execution of this paper, but it procured and had it filed in court. This is averred in the supplemental bill, and is not denied in the answer. Beyond contestation, this stipulation was given at the instance and in behalf of the Penn Plate-Glass Company, and for the purpose of preventing the appointment of a receiver, and it had that effect. In consequence of giving this stipulation that company was enabled to retain possession of the mortgaged premises against the trustee, without right, as the

subsequently taken proofs demonstrated. The fire of April 12, 1898, occurred while the trustee was thus wrongfully kept out of possession by the appellant company.

In the course of his opinion the judge below said:

"This insurance was placed by a party to this litigation under stress of an application for the appointment of a receiver, and a consequent exclusion from possession."

It is said that the judge fell into mistake as to the time the insurance was placed. I am not convinced of this. The policies were before him. We have been furnished with their dates. It is, however, certain that the observation of the judge just quoted is applicable in all its force to the so-called "insurance bond." That stipulation in respect to the insurance was given "under stress of an application for the appointment of a receiver," and to prevent the appellant company's expulsion from possession. But the time when the policies were taken out—whether before or after the application for the appointment of a receiver—is not a controlling matter. If, indeed, they were taken out before that application, this makes it rather the worse for the appellant company. For then it follows that the fact was suppressed that each policy contained this clause, namely:

"This property is subject to a bonded indebtedness of \$250,000, but it is distinctly understood and agreed that this insurance does not cover the interest of the bondholders."

The presence of that clause was not known to the court or to the mortgage trustee until after the loss by the fire. In respect to the insertion of this clause the judge below, in his opinion, speaks thus:

"It was an act *inter alios* acta. The trustee and the court had no knowledge of it. It was not done in pursuance of any agreement, and can in no way affect the legal and equitable status and rights of the parties before the court."

This, I think, is a sound conclusion.

The insurance companies did not see fit to raise any question as to the measure of their liability. They have settled in full. The insurance, as taken, was not, in form or in effect, upon the equity of redemption. It was not upon the interest of the Penn Plate-Glass Company in the property, as intimated in the opinion of the majority of this court. The insurance was upon the glass works, namely, the buildings, machinery, apparatus, and other fixed improvements. The corpus of the property was the subject-matter of the insurance. The insurance companies have paid to the court's receiver the total value of the destroyed property. The appellant company claims, not the value of its equity in the lost property, but the entire insurance fund,—the total value of the destroyed property. The court below decided against the claim, as inequitable. I hold to the same view.

How unconscionable the position of the appellant company is becomes the more manifest when regard is had to the value of the improvements which Kann and his vendee company, the appellant, put on the mortgaged property. The highest figures for all their expenditures, as given by Kann himself, are "about" \$185,000 to \$200,000. Now, if the larger of these amounts is correct, the reversing decree

here will result in a great money speculation for the appellant company at the expense of the innocent bondholders. But in fact Kann's testimony, when scrutinized, discloses that the bulk of the alleged expenditures was in the purchase of additional ground (outside the mortgaged premises), and in the erection thereon of a water and a gas plant. It will be remembered that the price Kann paid to the receiver for the property was \$37,000 only, and the alleged price paid by the appellant company to Kann for the property was only \$83,500.

In concluding, I cannot do better than refer to the case of *Miller v. Aldrich*, 31 Mich. 408, 410, 419, cited by the court below. I premise that there the agreement by Chapman, the mortgagor, to insure for the benefit of the mortgagee was not even contained in the mortgage, but was collateral and oral; and whether Aldrich, the purchaser, had verbally promised, as alleged, to keep up insurance for the benefit of Miller, the mortgagee, was denied. Judge Cooley, in the course of his opinion, said:

"Though Chapman may have had a legal right to surrender the policy he had taken out for Miller's protection, he had no equitable right to do so; and as Aldrich knew all the facts, and took his new policy on a wrongful surrender of one which protected Miller, and for a sum which precluded Miller from insuring on his own behalf, we think Miller must be held to have an equitable interest in the new policy to the extent of his lien, whether Aldrich did or did not expressly agree with Chapman that such should be the case, as the latter says he did. The case is within the principle of *Cromwell v. Insurance Co.*, 44 N. Y. 42, and it is not important whether Chapman had or had not legally bound himself to Miller to keep up insurance for his benefit, when by virtue of the oral understanding he had actually effected such insurance."

Chief Justice Graves, who delivered the principal opinion, said:

"Chapman had bound himself to afford Miller security supplementary to and connected with the mortgage. The mode agreed on had reference to the mortgaged buildings, and was to be of a nature to keep the mortgaged property itself so far intact as a means of security as to perpetuate the safety of the mortgagee's interest in case the buildings should burn. This stipulation was in equity a sort of adjunct to the mortgage, and was binding on Chapman and on all others in his shoes with notice. When he sold to Aldrich he does not appear to have kept any insurable interest, or to have been in a situation to personally effect insurance to any amount; and Aldrich appears to have taken his place, and to have occupied a situation which required him to recognize and respect the term of the agreement intended to fortify Miller's security under the mortgage. Instead, however, of recognizing and respecting it, he joined in the transaction to set it aside, and to so place himself that, if the mortgaged property should burn, he might put the mortgage money, of which he had already received the benefit, in his own pocket, and leave Miller a remediless loser to that amount. As before intimated, I think equity will not sanction this, but will consider that the agreement between Chapman and Miller in regard to insurance was enforceable by the latter against the former, and that Aldrich's position exposes him to a similar remedy in favor of Miller."

The facts here, I think, make a far stronger case in favor of the mortgagee than did the facts in *Miller v. Aldrich*. The principles there laid down commend themselves to my judgment. If applied here, as I think they should be, they would lead to an affirmance of the decree of the court below

FIRST NAT. BANK OF HOUSTON v. EWING et al. (No. 911). **SMITH v. HOUSE et al.** (No. 912). **GALVESTON, H. & N. RY. CO. v. SAME** (No. 900). **ST. CHARLES CAR CO. v. SAME** (No. 901). **CORBETT v. SAME** (No. 902).

(Circuit Court of Appeals, Fifth Circuit. May 30, 1900.)

1. RAILROADS—FORECLOSURE OF LIENS—EFFECT OF DECREE.

A holder of railroad bonds, who becomes a party by intervention to a suit against the company in which receivers have previously been appointed, and by authority of the court have issued receivers' certificates, is concluded by a subsequent decree which adjudges the validity of such certificates as liens; and unless he takes steps to review such decree, by petition for rehearing or appeal, he cannot contest the question on distribution of the proceeds of the property after sale.

2. SAME—RECEIVERS' CERTIFICATES—PREFERENTIAL LIENS.

Where a railroad was uncompleted at the time it passed into the hands of receivers on the insolvency of the company, and only partially equipped,—lacking terminal connections, bridges, right of way, and rolling stock, as well as ballasting and other materials necessary for its completion, maintenance, and safe operation,—it was proper for the court to authorize the issuance and sale of receivers' certificates to raise money for its completion and further equipment, as well as to pay debts due for labor and operating expenses previously incurred, and to make such certificates, as well as the ordinary and proper expenses of the receivers in operating the road, in excess of its earnings, liens on the property superior to those of prior mortgages.

3. SAME—MECHANICS' LIENS—LACHES IN ASSERTING.

A contractor doing work and furnishing material for the construction of a railroad, if entitled to a mechanic's lien therefor, must, to preserve and enforce such right, comply with the statutory requirements as to filing and recording the contract or claim; and he is not relieved of such duty by the fact that he files his claim in a court of equity, which has taken possession of the property by its receivers, and that such claim is allowed as a valid indebtedness of the company; and, even if the court has power to relieve him from a compliance with the statute, it will not do so where no right to a statutory lien is asserted until after four years of litigation.

4. SAME—PRIORITY OF LIENS—INDEBTEDNESS FOR ORIGINAL CONSTRUCTION.

Indebtedness incurred by a railroad company to a contractor for labor and materials furnished in the work of original construction of its road prior to the time when the property passed into the hands of receivers is not entitled to priority of lien in equity over prior mortgages, or over indebtedness incurred by the receivers for operating expenses.

5. SAME—ESTOPPEL.

A contractor, who at the time a railroad passed into the hands of receivers held a claim against the company for original construction work, and who afterwards, under contracts with the receivers, completed the work of construction, receiving in payment receivers' certificates issued under a decretal order of the court making them first liens on the property, cannot, after disposing of such certificates to others, attack their validity or right of priority in behalf of his original claim, and especially where during the course of the litigation he had maintained such validity and priority.

6. SAME—RIGHTS OF PURCHASER AT FORECLOSURE SALE—ACCRUED TAXES.

A decree directing the sale of railroad property in a foreclosure suit, subject only to certain enumerated liens, which do not include taxes, and free from the liens asserted by any of the parties to the suit, and an order directing its conveyance pursuant to such sale, free "from all claims arising during said receivership or prior thereto," by implication exclude the taxes accruing during and prior to the receivership from the claims

subject to which the property is sold; and the purchaser is entitled to insist upon the payment of such taxes from the earnings of the receivership, or, in default of earnings, from the proceeds of the sale. Maxey, District Judge, dissenting.

7. SAME—PREFERRED CLAIMS—TAXES.

Taxes accruing against the property of an insolvent railroad company constitute a preferred claim, and are entitled to be paid in full, including interest, penalties, and costs, before any other claims, except the judicial costs.

8. SAME—RIGHTS OF PURCHASER AT FORECLOSURE SALE—CLAIMS FOR RIGHT OF WAY.

A purchaser of railroad property at foreclosure sale takes the same subject to such defects of title as exist in reference to land occupied as right of way, in the absence of a provision to the contrary in the decree, and cannot insist that claims for right of way used by the mortgagor company, but not paid for, shall be paid from the proceeds of the sale.

9. SAME—INDEBTEDNESS INCURRED BY RECEIVERS—PURCHASE OF ROLLING STOCK.

Railroad receivers purchased certain rolling stock under authority from the court, paying in part for the same, and executing a contract by which a lien was reserved to the seller for the unpaid purchase money. On default the seller demanded possession of the property under the contract, which was refused; and the receivers continued to use the same for over three years, when the court entered a decree directing its sale for the payment of the lien, and adjudging the deficiency remaining unpaid, if any, to be a valid indebtedness of the receivers, incurred in the operation of the road. *Held*, that such adjudication was conclusive upon all parties to the litigation, and, in the absence of an appeal therefrom, entitled the seller to payment of the deficiency remaining due after sale of the property on the same basis as other claims against the receivers for operating expenses.

10. SAME—PRIORITY OF CLAIMS AGAINST FEDERAL RECEIVERS—LAW GOVERNING.

The classification and right to priority of payment of claims of employees in the immediate service of railroad receivers appointed by a court of the United States are matters for the determination of that court in accordance with the general principles of equity, unaffected by state laws regulating claims of employees and the distribution of funds in the hands of receivers of a state court.

11. SAME.

Act Aug. 13, 1888, § 2 (25 Stat. 436), requiring receivers of federal courts to manage and operate the property in their possession in accordance with the requirements of the laws of the state in which it is situated, and making their willful violation of such requirement a criminal offense, was not designed to interfere with the constitutional jurisdiction of the courts of the United States in matters of equitable cognizance, and does not require them to administer property in their hands in accordance with state laws.

12. SAME—PRIORITY BETWEEN PREFERRED CLAIMS.

Except in the matter of taxes, no priority should be given among the debts and claims, whether receivers' certificates or other debts, which are allowed preference over the mortgage bonds of a railroad company, but all should stand alike.

Appeals from the Circuit Court of the United States for the Eastern District of Texas.

These five appeals are from the final decree of distribution made by the trial court in the main suit of Alonzo J. Tullock v. Galveston, Laporte & Houston Railway Company. It appears from the record that the Galveston, Laporte & Houston Railway Company is the successor of the Laporte, Houston & Northern Railroad Company, which was incorporated October 7, 1892, with authority to construct a railroad from the town of Laporte, Harris county, into the city of Houston, the distance being 22 miles. By an amendment of the charter, which became operative on August 10, 1893, the company was authorized to construct

two branch lines,—one from the town of Laporte to a point on the Sabine river, a distance of about 150 miles, and the other from Laporte to and into the city of Galveston, a distance of about 35 miles. By a further amendment, becoming operative February 23, 1895, authority to construct the road was restricted to the 22 miles above mentioned, and the branch line to Galveston, making a continuous line of railroad from Houston to Galveston, a distance of about fifty-seven miles, with such additional lines for terminal purposes at and in the cities of Galveston, Laporte, and Houston, and at such other stations on the main line as terminals might be necessary for the successful operation of such railroad, exclusive of terminals, sidings, and switches; such railroad to be situated wholly within the limits of Galveston and Harris counties. By an act of the legislature passed on January 30, 1895, the name of the old company was changed to that of Galveston, Laporte & Houston Railway Company, and the right was conferred upon it to purchase the property of, or consolidate with, the North Galveston, Houston & Kansas City Railroad Company and the Houston Belt & Magnolia Park Railway Company. The original company, having entered upon the work of construction, executed and delivered, August 1, 1894, to the Union Trust Company of New York, as trustee, a deed of trust upon all its property then owned or to be thereafter acquired, to secure the payment of bonds to be issued for construction purposes. One hundred and fifty bonds, of \$1,000 each, aggregating \$150,000, were executed by the company and delivered to the trustee; and the same, after having been duly certified and registered, were returned to the railroad company. Of the 150 bonds thus returned, 40 were retained by the company, and the remainder passed to other parties, including 63 claimed by the First National Bank of Houston. On April 1, 1895, the original company, the Galveston, Laporte & Houston Railway Company, executed and delivered to the Continental Trust Company of the city of New York, as trustee, a second mortgage or deed of trust on the property of the company then owned or to be thereafter acquired, to secure an issue of 850 bonds, of \$1,000 each. The bonds were delivered to the trustee, and were by it certified, registered, and returned to the company. Of the number returned, 150 were retained by the railroad company, and the remainder were hypothecated with various parties to secure indebtedness of the company. On January 7, 1896, about the time of the appointment of receivers, the track of the Galveston, Laporte & Houston Railway Company "extended from Brady Junction, in Harris county, about four miles south of the city of Houston, to Virginia Point, in Galveston county, a distance of forty-five miles, and from the south or Galveston Island end of the Galveston Bay Bridge to the city of Galveston, a distance of four and one-half miles, with a branch from Laporte Junction to Laporte, three miles, and another branch from Heffron to North Galveston, about three miles and seven-tenths, making a total track of fifty-six and two-tenths miles." As a creditor of the Galveston, Laporte & Houston Railway Company, Alonzo J. Tullock on January 7, 1896, exhibited his bill, by which he sought to have the property of the company placed in the hands of a receiver; and on the same day T. W. House and M. T. Jones were appointed receivers, who were directed to take charge of the property. On January 13, 1896, an application was made by the receivers for authority to issue receivers' certificates to the amount of \$250,000. The application having been referred to the master, he made his report on January 22d following. In his report he found that the Galveston Bridge would require for its completion \$21,850.81; that other bridges required immediate repairing; that cattle guards should be constructed, and that it was necessary to ballast the road-bed; that rolling stock was needed; that station houses, round houses, repair shops, and other necessary buildings should be erected; that the road should be fenced and terminal facilities acquired, and proper connections should be made with various roads entering the city of Houston; and that the accounts due employes of the company from September 1, 1895, to January 6, 1896, amounted to \$14,484.87. Upon the facts found, the master recommended the issuance of receivers' certificates to an amount not exceeding \$300,000, "for the purpose of completing, operating, and preserving the property."

On January 23, 1896, the court made the following order, authorizing the receivers to issue certificates amounting to \$250,000: "On this 23d day of January, 1896, at chambers, came on to be heard the report of Morgan M.

Mann, master in chancery, herein filed on the 22d day of January, 1896, on the petition of T. W. House and M. T. Jones, receivers, filed herein on the 13th day of January, 1896, asking for authority to borrow two hundred and fifty thousand dollars and to issue receivers' certificates therefor; and it appearing to the court that the complainant and defendant and all intervening creditors were present and represented by their attorneys, and no exceptions having been taken by any of them to the report of said master, and all of the said parties having waived exception thereto, it is therefore considered by the court, and so ordered, adjudged, and decreed, that the master's report be, and the same is hereby, approved and confirmed. It is further ordered, adjudged, and decreed by the court that T. W. House and M. T. Jones, receivers herein, be, and they are hereby, authorized to borrow the sum of two hundred and fifty thousand dollars, for which sum said receivers are empowered to issue receivers' certificates or debentures in such amounts as they may deem proper, not to exceed said sum of two hundred and fifty thousand dollars; said certificates or debentures to fall due on or before three years from and after their respective dates, and to bear interest at a rate not to exceed eight per cent. per annum from date until paid, the interest to be payable at such times as the said receivers shall think best, and to be stated on the face of said certificates. The receivers are further directed to sell said certificates or debentures at a sum not less than par, and to apply the proceeds of the sale thereof to the completion of said Galveston, Laporte & Houston Railway, and ballasting the track of the same; to the purchase of additional rolling stock, ties, lumber, bridges, and any other materials necessary for the completion and the proper maintenance and safe operation of said road; to the construction and repair of such bridges, culverts, depots, and any other structures that the necessities of the road or its traffic, in their judgment, may require; to the purchase, by condemnation or otherwise, of right of way where needed; to the payment of all taxes upon property in the receiver's possession; to the payment of the amount due as shown by the pay rolls of said company from September 1, 1895, to January 6, 1896, amounting to fourteen thousand four hundred and eighty-four $\frac{87}{100}$ dollars; to the payment of the sum of four thousand eight hundred and seventy-nine $\frac{12}{100}$ dollars due the Rogers Locomotive Company, with interest thereon from December 11, 1895, until paid, at the rate of six per cent. per annum; to the payment of operating expenses and such other purposes as the court has heretofore or may hereafter direct: provided that, if said receivers have to purchase said rolling stock with certificates or their proceeds, they shall be limited in the purchase of box cars to ten in number. It is further ordered that said certificates or debentures, when issued, shall become, and they are hereby declared to be, a first lien upon the roadbed, rolling stock, depots, and all other property of said railway company of every character and description, wherever situated, including net earnings after deducting the expenses of this receivership and the operation of the road; said lien to be prior and superior to all other liens upon said property, of whatsoever nature." In obedience to the order, certificates were issued and disposed of to the amount of \$245,279.54.

On the 27th day of March, 1897, L. J. Smith, who had previously intervened in the suit pro interesse suo, exhibited a bill, in the nature of an original bill, making defendants Alonzo J. Tullock, Galveston, Laporte & Houston Railway Company, Union Trust Company of New York, trustee, Continental Trust Company of the City of New York, trustee, and others not necessary to be named. This bill was filed by Smith, as the owner of certain liquidating certificates and receivers' certificates issued to him, on behalf of himself and others similarly situated; and prayed, among other things, for the condemnation and sale of the railway property as a trust fund for equitable administration and distribution. On July 31, 1897, the Union Trust Company of New York filed its cross bill, seeking foreclosure in the usual manner, and making Smith and its co-defendants in Smith's bill parties defendant. The Continental Trust Company of the City of New York also filed its cross bill, seeking foreclosure in the usual manner of the trust deed executed to it, and making parties defendant the defendants named in the cross bill of the Union Trust Company of New York, and also the First National Bank of Houston, and others not necessary to be mentioned. Several of the parties (not, however, including

Smith, the two trust companies, and First National Bank of Houston) were dismissed from the suit. On February 25, 1898, a decree was passed adjudging amounts to be due various parties, ordering a sale of the property, and extending the receivership to the bill filed by Smith and the cross bills exhibited by the two trust companies. In reference to the receivership certificates the decree contained the following finding: "(14) That, to wit, on the 23d day of January, 1896, this court, by an order entered after reference to and report of special master herein, authorized said receivers to borrow the sum of two hundred and fifty thousand dollars (\$250,000), and therefor to issue receivers' certificates or debentures (hereinafter called 'receivers' certificates') in such amounts as they might deem proper, to fall due on or before three years from and after their respective dates, and to bear interest at a rate not to exceed eight per cent. per annum from date until paid,—the interest to be payable at such times as said receivers should think best, and to be stated on the face thereof, and such certificates to be sold for a sum not less than par, and the proceeds thereof to be applied to certain enumerated purposes; and such certificates were, by said order declared to be a first lien, prior and superior to all other liens, of whatsoever nature, upon the roadbed, rolling stock, depots, and all other property of said railway company, of every character and description, wherever situated, including net earnings, after deducting the expenses of the receivership herein and the operation of the road. (15) That said receivers have, pursuant to and by virtue of said authorizing order of, to wit, January 23, 1896, issued, negotiated, sold, and disposed of receivers' certificates of sundry dates, in the aggregate of the principal sum of two hundred forty-five thousand fifty-three dollars and twenty-five cents (\$245,053.25), which certificates recited said authorizing order, and declared upon their face, pursuant to the terms of such order, that they were a first lien, paramount and superior to all other liens, upon the property mentioned in said order, of whatsoever nature; and said certificates are now held by divers and numerous persons, and are unpaid in whole or in part, either principal or interest."

It was declared by the court, in a subsequent clause of the decree, that the receivers' certificates issued and disposed of under the order of January 23, 1896, were, "for the full amount of principal and interest thereof, a valid and subsisting lien upon the railroad, rolling stock, depots, and all other property of said railway company, of every character and description, wherever situated." And the master was directed by the decree to compute and ascertain the amount of interest accrued and unpaid on the receivers' certificates, so far as they had been issued and disposed of. Touching the title to be acquired by the purchaser of the property and the distribution of the proceeds of its sale, the decree contained the following provisions: "(2) It is further ordered, adjudged, and decreed by the court that the purchaser or purchasers of the property herein and hereby ordered to be sold shall, after the delivery of the same to them, hold, possess, and enjoy the said premises and property, and all the rights, privileges, immunities, and franchises appertaining thereto, as fully and completely as the said Galveston, Laporte & Houston Railway Company, the defendant herein, now holds or enjoys, or at the time of the making of the aforesaid mortgage deeds of trust, or at any time before or since then, held or enjoyed, or is or was entitled to hold or enjoy, the same, subject only to the liens, in respect to the portions of property enumerated, to the burden of which such sales were specially herein directed to be made; and all persons who are parties to this cause, or quasi parties, by intervening petitions or otherwise, and all persons claiming under said railway company since the execution of the aforesaid mortgage deeds of trust, are hereby forever barred and foreclosed of all right, title, interest, estate, claim, demand, or equity of redemption of, in, or to any of the property herein directed to be sold, when sold, except as herein otherwise specially provided; and all liens, mortgages, equitable charges, claims, or demands of every nature and description held, owned, or asserted herein by any of such parties or quasi parties to this cause shall be transferred to the proceeds of the sale herein directed to be made, with like but no greater effect than the same appertained to the property itself, and subject to future determination by the court, except as herein otherwise specially provided. (3) And it is further ordered, adjudged, and decreed, that the entire fund to arise from the sale of the property herein directed to be sold

shall be applied as follows: First. To the payment of the costs of this cause, and of all proper expenses attendant upon said sale or sales, including the compensation of the master commissioner making the same; and to the payment of all proper charges, compensations, allowances, and disbursements of the receivers herein, and their counsel and solicitors, respectively; and to the payment of such other proper allowances, compensation, and disbursements to parties or their counsel as may be directed to be paid by the order of this court,—all of such payments to be fixed and allowed by this court or a judge thereof. Second. The remainder of said fund shall be paid into the registry of this court to the credit of this cause, subject to the further directions of this court; and the court hereby reserves all questions as to the classification, rank, and priority of all liens, equitable charges, or other demands, except as herein adjudicated, held, owned, or claimed by any of the parties or quasi parties to this cause, as well as all questions relating to the distribution of such fund among such parties, as well as all questions of marshaling securities, as germane to the matter of distribution; and, to the end of adjusting all such matters on further hearing, the court retains for such purpose the bills and other pleadings herein.”

Under the first advertisement of the property by the master commissioner, there being no bid of the upset price of \$500,000 fixed by the court, the sale was postponed. The upset price was removed by order of the court, and the property exposed again for sale. At this sale Holt bid the sum of \$400,000, but, upon objection to confirmation by Smith and the Beaumont Lumber Company, the court refused to confirm the sale. Another sale was ordered, and the property was purchased by Smith, as the agent of the Galveston, Houston & Northern Railway Company, on October 4, 1898, for the sum of \$425,000. Smith's bid was assigned to Charles S. Broadhead, at whose instance the master commissioner, being thereunto duly authorized, conveyed the property to the said Galveston, Houston & Northern Railway Company. On November 18, 1899, the date of the final decree of distribution, there remained of the proceeds arising from the sale in the registry of the court, to be distributed among the various claimants, the sum of \$380,160.46. The claims entitled to be paid out of the fund in court were designated as class A and class B. The former, which consisted of court costs, fees of attorneys, master and master commissioner's fees, traffic balances accruing during the receivership, and two right of way claims, were given priority and directed to be paid in full. Class B embraced receivers' certificates, labor claims, amounts due for rolling stock, claims arising out of judgments, claims for live stock killed, and “audited vouchers for debts accruing during the receivership and against the receivership.” The remainder of the fund, after paying the claims of class A, being insufficient to pay in full the claims of class B, the decree directed that they should share equally and be paid pro rata. The decree expressly disallowed interest on any of the claims of class B, and it was admitted by counsel on the argument that the claimants in that class would receive only about 77½ per centum of the principal of their indebtedness. The following approximately correct statement shows the aggregate of claims represented by class A and class B, and the amount in the registry of the court:

Fund in court.....	\$380,160 46
Claims in class A.....	49,000 00
Amount applicable to class B.....	331,160 46
Claims in class B.....	421,000 00
Excess of claims over fund.....	\$ 89,839 54
The receivers' certificates bore interest at the rate of 8 per cent. per annum from the date of issuance. They were all issued, except one for \$226.29, prior to June 8, 1897. If interest be added for only two years, it would amount, approximately, to	
	40,000 00
Total excess of claims over fund.....	\$129,839 54

The above figures, while not strictly accurate, are sufficiently so for our purpose.

In the various reports of the receivers, beginning October 19, 1896, and ending October 14, 1899, the receivers' certificates were reported, as they were issued, as a liability against the property. The holders of the outstanding first and second mortgage bonds and Smith were adjudged to have liens upon the property of the railway company, but subordinate and subject to the liens of the claimants named in class A and class B. And it was further adjudged that, owing to the insufficiency of funds to discharge the claims of those two classes, no provision could be made for the payment of the demands held by Smith and the bondholders.

The foregoing statement applies generally to the five appeals. Reference will now be made to such parts of the record as are deemed applicable to each appeal separately considered:

(1) First National Bank of Houston v. Presley K. Ewing et al.

The appellant on May 17, 1897, as the holder of 63 bonds, of \$1,000 each, issued by the Laporte, Houston & Northern Railway Company, intervened in the suit pro interesse suo, seeking to establish its claim as a first lien on the property of the railway company. The petition prayed for an order directing the payment of the claim out of the proceeds of the sale of the property, in preference to all other claims not entitled to priority over its claim. The 63 bonds had been deposited with the appellant by J. Waldo on January 31, 1895, as collateral to secure the payment of a debt due by Waldo to it of \$25,000. On November 3, 1897, the bonds, under the power conferred by the hypothecation clause of the note, were sold at auction, and bought by the appellant. On November 17, 1899, an order was passed that the appellant should be entitled to receive, out of any moneys applicable to the payment of bonds issued by the Laporte, Houston & Northern Railway Company, only so much money as would equal, pay off, and discharge the sum of \$25,000, with interest at 8 per cent. per annum from August 31, 1895. Referring to the 150 bonds issued under the mortgage by the railway company to the Union Trust Company of New York, the decree contained the following provision touching those held by the appellant: "That 63 of said bonds are held by the First National Bank of Houston, upon which said bank is entitled, in pursuance of the decree of court entered on intervention No. 50 on the 17th day of November, 1899, to the sum, of \$25,000, with interest thereon at the rate of 8 per centum per annum from August 1, 1895, out of any amount which may accrue upon said bonds." And it was further ordered: "That the said bonds were a lien upon the property in the hands of the receivers, subject only to a lien and right of priority of payment of the claims adjudged in the preceding paragraphs of this decree; but the said property having been sold, and there being no funds or proceeds thereof in the registry of the court applicable to the payment of said bonds, or the payment of any part thereof, no provision is made herein for their payment, or any part thereof." From this decree the appellant has appealed to this court.

(2) L. J. Smith v. T. W. House et al.

This appellant intervened in the original suit on January 22, 1896. As a contractor, he constructed a large part of the railway, and claimed to have furnished material which had been used in its construction. He stated the amount due him to be \$61,241.21, with interest, and asserted an equitable lien to secure its payment. He also sought to have receivers' certificates issued for the amount due. On January 27th following, he presented the following application, asking for an order authorizing the issuance to him of conditional certificates to the amount of indebtedness due him: "And he now represents and states to this honorable court: That it is conceded and admitted by the railway company and all other persons that are now parties to the record that the sum above stated is actually due to your applicant. That your applicant has received very little money upon work done by him for said company, and has had to secure for himself certain financial backing and credit in order to complete said contract and do said work for the railway company; and, while he does not desire this court at this time to pass upon the question of his preferential rights or priorities against any person, yet, inasmuch as it will be a long space of time before such last-mentioned rights

can and will be determined by the court, and your applicant will be seriously embarrassed, for the reason that his claim against said company is yet in the nature only of an open account, he therefore prays this honorable court, the receivers and all other interested parties being willing, that an order may be made upon the receivers to issue to this applicant receivers' certificates, to be known as 'conditional certificates,' which shall simply certify that there is due your applicant the sum above stated, by the said railway company, subject, however, to the subsequent order and judgment of the court as to the question of preferential rights, priorities, classification for payment, or deduction, as the case may be, for the want of sufficient pro rata funds, and subject to be affected by any order the court may hereafter make pertaining to the effect and force of said certificates, so that said certificates may be practically nothing more than an acknowledgment that the amount of your applicant's claim has been liquidated as to amount, and so that your applicant may be able to use said certificates in the market or elsewhere in a financial way; said certificates to bear upon their face, and have inserted in them and each and all of them, the substance of the above-mentioned qualifications. And he prays that said certificates, to the extent of the said total sum due your applicant, may be issued in denominations of one thousand dollars each, except one for the odd number of dollars to be issued for such amount as even thousand dollars denomination leaves over, and that said certificates be payable on or before three years from their dates, with interest at the rate of six per cent.; that being the interest rate that your applicant's account now draws."

On the same day the application was favorably considered, and the order authorizing the issuance of certificates to the appellant provided as follows: "And whereas, the United States circuit court did on the 23d day of January, 1896, make an order permitting and directing the undersigned receivers to issue certificates to said L. J. Smith for said sum, divided into sixty-one certificates of one thousand dollars each, and one for two hundred and forty-one dollars and twenty-one cents, which certificates were to be issued upon the condition, to be inserted in the body thereof, that the certificates so issued should be taken and accepted as an evidence of the fact that each respective certificate represented an amount actually due and unpaid said L. J. Smith from the railway company, but subject to the preferential rights, priority of payment, and classification thereof as to the payment of the same, and as to the amount or final dividend to be paid thereon from the proceeds of the sale of property, having due regard to the rights of all other creditors as may hereafter be determined, and that the certificates should be conclusive only so far as the amount of the demand of said Smith against the railway company is concerned, and that said certificates should be due and payable on or before three years from their respective dates, and draw six per cent. interest."

The application made by the receivers for the issuance of certificates being before the court, Smith and others on January 27, 1896, executed the following waiver: "Now come the complainant and defendant and all intervening creditors in the above-entitled cause, and waive exceptions to the report of Morgan M. Mann, master in chancery, herein filed on the 22d day of January, 1896, on the petition of T. W. House and M. T. Jones, receivers, filed herein on the 13th day of January, 1896, asking for authority to issue receivers' certificates, and agree that the court may hear and act upon said report at once, and make its decree relative thereto."

After the appointment of receivers the appellant made a contract with them to ballast the roadbed, and on January 27th he presented an application praying for confirmation of the same. An order was duly entered confirming the contract, and the receivers were directed (employing the language of the order) to issue and deliver to the appellant certificates "out of and from the general issue of receivers' certificates heretofore ordered by this court in payment of the amount due him upon shell ballasting up to the time the receivers were appointed, so done under said contract with the railway company, as well, also, receivers' certificates from said general issue for the work to be done, and as done, under the said new contract for the completion of said work with the receivers." On the 12th day of November, 1897, the appellant filed a petition alleging that he was the owner of receivers' certificates of the par value of \$4,200, and of other valid claims against the railway com-

pany amounting to \$68,000. In this petition he sought a sale of all the property of the company, and prayed that "the proceeds of such sale, after deducting therefrom just allowances for all disbursements and expenses of sale, including reasonable attorney's fees incurred by petitioner in this behalf, be applied to the payment of said certificates and receivership charges, and that the overplus, if any, be apportioned by the court among the creditors and claimants of said defendant railway company as their rights, equities, and priorities may be hereafter determined by the court."

The original decree of February 25, 1898, contained the following finding as to the claim of the appellant: "(11) That at the time of the appointment of the receivers herein said railway company was justly indebted to L. J. Smith, complainant, for labor and material performed and supplied by him in construction work on said railroad, in the sum of sixty-one thousand two hundred and forty-one dollars and twenty-one cents (\$61,241.21), which sum of money is due and still unpaid in whole or in part, though frequently demanded. (12) That after the appointment of the receivers herein, to wit, on January 23, 1896, for purpose of judicial ascertainment and liquidation, conditional certificates (hereinafter called 'liquidating certificates') were issued and delivered to said Smith by the receivers herein for the full amount of the indebtedness mentioned in the next preceding paragraph, bearing interest at six per cent. (6%) per annum from the date of their issue, to wit, January 23, 1896, which liquidating certificates were issued pursuant to an order of the court, duly made herein, authorizing their issue, but reserving all questions of rank and priority, etc., in respect thereof."

The Union Trust Company of New York having on February 10, 1898, filed its petition by which it was sought to set aside the previous order of the court authorizing the issuance of receivers' certificates, the appellant on April 16th following answered the petition of the trust company, and, among other averments, he made the following: "This respondent further says that, in reference to the said certificates, the real facts are that when the same were authorized a comparatively small portion of said railroad was uncompleted, in order to the operation of a continuous line, as authorized by said railway company's charter, between said cities of Galveston and Houston; that it then appeared highly advantageous to all parties concerned in interest, in order to the proper management and preservation of said railroad property, that such unfinished portion of said railroad should be speedily completed, and the other expenditures directed by said authorizing order made; that default had already occurred, many months previously, in payment of interest on the mortgage of petitioner, under the provisions of which petitioner had become entitled to take possession of said railroad and operate the same for its benefit, but had failed and neglected so to do; that, in order to the preservation of the charter rights of said railway company, it was highly important and necessary to make said expenditure, to prevent a possible forfeiture of the valuable franchise secured to it, of owning and operating a continuous line of railroad between said cities of Galveston and Houston; that all the funds realized from said receivers' certificates were faithfully expended in and applied to the preservation and management of said railroad property, whereby the good will and integrity of the enterprise were maintained, which was indispensable, and the interests and accommodation of travel and traffic subserved, and the charter rights, franchises, and property of said railway company protected; that all and singular the acts and doings in the premises now complained of were at the time of their occurrence fully known to the mortgage bondholders represented by petitioner, who acquiesced at the time in what was being done, and had ample opportunity to appear and object, had they seen fit to do so, but willfully remained inert and inactive, speculating upon chances, and lying idly by, seeing the receivers and the court dealing with the property in the manner now complained of, without even protesting or disclaiming interest in the receivership; and they now, nevertheless, assert in the cross bill, through the petitioner, that the property acquired by the receivers through such expenditure, which is of great value, is subject to the lien of said mortgage, and they claim, through foreclosure thereof, the proceeds of that property, without paying the debts incurred in its acquisition and necessary preservation, all which acts and doings are contrary to equity and good con-

science, and operate, as this respondent submits, an estoppel upon the petitioner in this behalf."

In an application filed by the appellant on the 8th day of November, 1898, for counsel fees, referring to his answer to the petition of the Union Trust Company of New York, which contested the validity of the receivers' certificates, he alleges that in order to protect the security of said certificates he gave, through his counsel, the matter of priority a careful investigation upon the law and facts, and filed a lengthy response to said contest, involving much labor and research. On October 16, 1899, the master made the following report upon the petition of the Union Trust Company to set aside the receivers' certificates, and the order of court authorizing their issuance: "The undersigned, to whom by the order of March 24, 1899, was referred the matter of the petitions of the Union Trust Company of New York and the Continental Trust Company of New York, attacking the priority of the lien of the receivers' certificates, or other receivers' indebtedness herein, over the mortgage indebtedness represented by them, respectively, begs leave to report: That on January 7, 1896, when the receivers appointed by this honorable court took charge of the properties of the Galveston, Laporte & Houston Railway Company, its track extended from Brady Junction, in Harris county, about four miles south of the city of Houston, to Virginia Point, in Galveston county, a distance of 45 miles, and from the south or Galveston Island end of the Galveston Bay Bridge to the city of Galveston, a distance of $4\frac{1}{2}$ miles, with a branch from Laporte Junction to Laporte, 3 miles, and another branch from Heffron to North Galveston, about $3\frac{7}{10}$ miles, making a total trackage of $56\frac{2}{10}$ miles; that its trains were operated from Virginia Point to the city of Houston, running into Houston from Brady Junction over the tracks of the Magnolia Park Railway Company; that its only railroad connections were at Virginia Point, Texas City Junction, and Houston, making connection at the latter place over the tracks of the Magnolia Park Railroad Company; that the only lines with which it connected were those of the Galveston, Houston & Henderson Railroad Company and the Gulf, Colorado & Santa Fé Railway Company, competitors for business between Galveston and Houston, from whom no through freight could be expected; that the local business along the line of the Galveston, Laporte & Houston Railway Company was so small that it amounted to practically nothing; that the tracks of the Magnolia Park Railway Company were in bad condition; that it had no terminals in Houston, afforded no means of turning trains, and had no yard or place in which to make up trains; that the roadbed of the Galveston, Laporte & Houston Railway Company required ballasting, not only for the proper operation of trains, but to keep it (the ties and steel) from deterioration; that the bridges along its line need repairing, and fences and cattle guards had to be constructed to allow trains to be moved with speed and safety; that the Galveston Bay Bridge was not completed, and completion was necessary to its preservation; that, to compete with the Galveston, Houston & Henderson and Gulf, Colorado & Santa Fé Railway Companies, it was necessary to put the roadbed, bridges, tracks, etc., in proper condition; that, to put the road in a position to get any business whatever, it was necessary to connect with those railroads running into Houston north of Buffalo Bayou, to wit, the Texas & New Orleans, Galveston, Harrisburg & San Antonio, Houston & Texas Central, and Houston East & West, none of which had tracks running from Houston to Galveston, and to connect with the manufacturing industries of Houston, all of which, save one, were situated on the said north side of Buffalo Bayou, to complete the bridge across Galveston Bay, and to connect at Galveston with the tracks of the Galveston Wharf Company; that the Galveston, Laporte & Houston Railway Company, when it went into the hands of the receivers, was practically without rolling stock, owning but 10 flat cars, 5 box cars, 2 passenger coaches, and 1 combination passenger and baggage car, all of which were old and in bad condition; it had two engines, one in fair condition, the other much worn, though the receivers took possession, also, of two Rogers locomotives and tenders, Nos. 3 and 4, the title to which was still in the Rogers Locomotive Company; that on January 13, 1896, the receivers filed in this cause an application for authority to issue receivers' certificates in order to put the railroad in such condition that it could be safely

operated, and could compete for business with the other lines of railroad running from Houston to Galveston; attaching to their application an exhibit setting forth in detail what was needed to effect this, and its approximate cost; that said application came on to be heard before the master on January 20, 1896, and he, after hearing the evidence, reported that the sum of \$299,734.34 was necessary to complete, operate, and preserve the property of this railway company, and that this report of the master was confirmed by this honorable court on January 23, 1896; that thereupon the receivers, in accordance with the authority granted them by this honorable court, proceeded to issue their certificates for the purposes set out in their said application; that they issued certificates for the total sum of \$245,279.54, of which \$75,565.12 were issued for cash; \$3,252.98 to L. J. Smith for work on the Galveston Bay Bridge; \$50,513.98 to L. J. Smith for ballasting the roadbed; \$13,746.39 to pay the employes of the old company, as was provided in the court's order; \$8,471.51 to L. J. Smith for general construction work; \$29,870 for the Buffalo Bayou Bridge; \$14,307.17 for fencing; \$2,226.90 to the Galveston & Western Railway Company for rails; \$9,934.41 for general bridge work; \$13,485.74 to the M. T. Jones Lumber Company for lumber, timber, and ties; \$18,491.85 to M. T. Jones and \$1,124.55 to T. W. Ford for shell for ballast; and \$177.75 for a pile driver. The receivers paid M. T. Jones for 114,163 cubic yards of shell, at the rate of 8¼ cents per cubic yard. They paid T. W. Ford 15 cents a cubic yard for his shell. The difference in price was due to the difference in the quality of the shell, the accessibility of the pit, the amount of labor required to get the material out and load it on the cars, and the general demand for the material. I believe, from the evidence, and I so find, that the prices paid for labor and material, to cover which the above certificates were issued, were just and reasonable, and the best the receivers could get under the circumstances, and particularly in that of having to pay for them in certificates, and not in cash. While the result shows that the road under the receivership was operated at a heavy loss, even after its extension and completion, yet 95 per cent. of the business done by it was derived from those railroads and manufacturing industries on the north side of Buffalo Bayou, in Houston, with which there could have been no connection, and consequently there could have been no opportunity to get business, unless the extension across Buffalo Bayou had been made." To this report the appellant filed exceptions, which, it appears, were not acted upon by the court.

In the final decree of distribution, class A and class B and the bondholders were awarded priority over the claim of the appellant. As to his claim, the decree contained the following clause: "That L. J. Smith is entitled to recover of the defendant the Galveston, La Porte & Houston Railway Company the sum of \$61,241.21, with interest thereon at the rate of 6 per cent. per annum from January 23, 1896, subject to the liens and right of priority of payment of all the claims adjudged in the preceding paragraphs hereof, and had a lien upon the property in the hands of the receivers herein; but said property having been sold, and there being no proceeds thereof in the registry of the court applicable to the payment of his said claim, no provision is herein made for the payment of the same, or any part thereof." From the decree thus rendered, Smith has appealed.

(3) Galveston, Houston & Northern Railway Company v. T. W. House et al.

After the assignment by Smith of his bid for the railway property to Broadhead, the latter, on March 29, 1899, by petition, prayed an order of confirmation of the sale, and for the execution by the master commissioner of a deed to him, or as he might direct. The petition contained the further prayer that Broadhead or his assigns might be held, adjudged, and decreed to be the owner of the property conveyed, "free from the claims of all parties and interveners herein," and for all such other and further orders and relief as to the court should seem just and equitable. In obedience to the prayer of the petition, an order was passed authorizing the master commissioner to execute to Broadhead, or to whomsoever he might direct, a deed to the railway property; the concluding paragraph of the order being in the following words: "And it is further ordered that the receivers herein

do, upon the execution of said special master commissioner's deed, deliver upon demand of said Charles S. Broadhead, or to his order or assigns, the said railroad and properties pertaining thereto, and all and singular the properties in his hands as such receiver, and that said Charles S. Broadhead and his assigns shall take, have, hold, possess, and enjoy the same free from all and singular the claims of the parties complainants, defendants, and interveners herein, as and according to the provisions of the decree and orders of the court in this cause, and from all claims arising during said receivership or prior thereto." In compliance with that order, as previously stated, a conveyance was made by the master commissioner to the appellant. On June 1st following, the county attorney of Galveston county filed a petition in intervention on behalf of the state of Texas and Galveston county, praying an order directing the receivers to pay the taxes due the state and county, which was, in the final order of distribution, dismissed without prejudice "to any right they may have, if any they do have, to enforce a lien for their taxes against the property in the hands of the Galveston, Houston & Northern Railway." On June 12, 1899, the appellant filed a petition in which it was sought to have the taxes due the state and the counties of Galveston and Harris, and certain right of way claims, paid out of the proceeds of the sale of the railway property. The petition having been referred to the master, he reported the total amount of taxes due, including principal, interest, penalty, and costs, for the years 1895, 1896, 1897, and 1898, to be \$14,009.79. He also reported upon the matter of the right of way, including in his report a list which showed the specific portions of the right of way to which title had not been acquired, and the amounts necessary for its acquisition. Upon consideration of the petition and report of the master, the court ordered the payment of right of way claims to the extent of \$1,900, but in other respects denied the relief prayed, in the following language: "Save and except the foregoing provisions of this paragraph, the petition of the Galveston, Houston & Northern Railway Company, asking this court to make provision for the payment of taxes on the property heretofore in the hands of the receiver, and now owned by the Galveston, Houston & Northern Railway Company, and to make provision for the procurement of right of way for the said Galveston, Houston & Northern Railway Company in such cases, where the right of way was not owned by the defendant railway company at the date of the decree of sale, be, and the same is hereby, denied, and the said intervention or petition be, and the same is hereby, dismissed." From the decree dismissing the intervention this appeal has been taken.

(4) *St. Charles Car Company v. T. W. House et al.*

Under the order of the court the receivers procured from the appellant certain passenger coaches, and baggage, express, coal, and box cars, for which they executed two notes, bearing date January 24, 1896, for \$22,066.66 each, payable respectively in one and two years after date. The notes provided for interest at the rate of 7 per cent. per annum from date until paid, and at the rate of 10 per cent. per annum after maturity. In the original decree of February 25, 1898, it was found that, of the rolling stock belonging to the defendant Galveston, Laporte & Houston Railway Company, the following portion, among others, was subject to purchase-money liens upon contracts of conditional sale, to wit: "Six passenger coaches, three combination coaches, two caboose cars, fifty box cars, and fifty coal cars, purchased by said receivers from St. Charles Car Company, subject to a lien for \$44,133.32, as it existed on July 24, 1897, with interest as per contract, accrued and to accrue." The decree ordered the sale of all the property of the railway company, of every nature and description, whether included in the mortgages or not, but the sale was to be made subject to the purchase-money lien held by the appellant on the rolling stock. Smith, the purchaser, declined to take and pay for the rolling stock, subject to which the sale was made, and the appellant presented its petition praying for an order authorizing the master commissioner to sell the rolling stock and apply the proceeds to the payment of its debt. The order made upon the petition, after reciting, among other things, that it was adjudged by the final decree of February 25, 1898, that the receivers of the property and effects of the defendant railway company were justly indebted

to the appellant in the sum of \$44,133.32, for the purchase money of the rolling stock already mentioned, directed a sale thereof in payment of the same. A sale was duly made under the order, and the rolling stock was purchased by the appellant at the sum of \$30,500. Of this amount, \$600 was paid to the master commissioner, as commissions and costs, and the remainder, \$29,900, was credited upon the claim of the appellant. Upon the petition of intervention filed by the appellant the master, to whom it was referred, made the following report: "After hearing the evidence, I find as follows: First. That the receivers on January 24, 1896, in conformity with the order of this court, entered into a contract with interveners for the lease and purchase of the cars mentioned in intervener's petition, for the sum of \$66,200, of which amount they paid \$22,066.66 in cash, and executed their two promissory notes, each for the sum of \$22,066.66, due respectively one and two years from date, with interest at 7 per cent. per annum from date, payable semi-annually. These notes bore interest after maturity at the rate of 10 per cent. per annum, and copies of the contract and notes are attached to the intervenor's petition. Second. That said two promissory notes were not paid in accordance with the terms of the contract of January 24, 1896. Third. That the intervenor, through its attorney, Elenelous Smith, about the 12th day of May, 1897, demanded of these interveners the payment of the money or the return of the cars, as provided in the contract. The receivers were not able to comply with either demand, and retained possession of the cars until the 1st of May, 1899, when they were delivered to John Grant, special master commissioner. Fourth. That the reasonable monthly rental value of said cars was \$1,705; making total rental due intervenor, if entitled to such, from July 24, 1897, to May 1, 1899, \$36,146. Fifth. That it would cost, to put these cars in the condition called for by the contract, the sum of \$7,770. Sixth. That by the final decree in this cause the amount due intervenor was adjudged to be \$44,133.32, with interest at 10 per cent. per annum from July 24, 1897, and that the same was a lien upon said cars. Seventh. That John Grant, special master commissioner, acting under orders of this court, sold on the 23d day of May, 1899, the said cars at public auction, for \$30,500, of which amount the sum of \$29,900 was entered as a credit upon intervenor's claim as of May 24, 1899; leaving balance \$22,324.35, with interest at 10 per cent. per annum from May 24, 1899, still due intervenor. Testimony offered by the intervenor was objected to by the other parties in interest on the ground that, if any rental was due intervenor, the same was fixed by the contract at the rate of 10 per cent. interest on the notes, and on the further ground that the so-called lease to the receivers was, under the Texas laws, a chattel mortgage, and, until a foreclosure was had, the receivers were owners and entitled to the use and possession of the same, without liability for rent. It was further objected that on its face the contract shows that the intervenor was entitled only to proceeds of sale under a foreclosure, and to have no claim against the receivers under the contract, and were limited in their claims against the receivership to this property, and to their claim for depreciation in value, and for repairs necessary to put them in proper condition for use."

Exceptions filed to the master's report were sustained by the court, and the following order was made, allowing the appellant the sum of \$2,868.39: "The court doth further find that intervenor is entitled to interest at the rate of ten (10) per cent. per annum upon his debt of \$44,133.32 from the 29th day of September, 1898, to the 24th day of May, 1899, making the sum of \$2,868.39, and that the same shall be classified and paid as other receivers' obligations, and in all other respects that intervenor take nothing by his intervention." From the final decree of distribution allowing \$2,868.39 the St. Charles Car Company has appealed.

(5) W. C. Corbett v. T. W. House et al.

On June 27, 1898, the appellant filed his petition of intervention, in which he claimed to be the owner by assignment of a number of claims against the Galveston, Laporte & Houston Railway Company for work and labor, amounting in the aggregate to \$7,334.69. It was alleged that vouchers were given to his assignors in payment of their services as clerks, conductors, brakemen, firemen, switchmen, and day laborers; and the petition prayed that the

amounts due him be declared a lien, prior to all others of a different class, on the properties, franchises, and rights of the railway company. Upon the matters referred to him, the master reported as follows: "The undersigned, to whom, by order of date March 24, 1899, was referred, among other matters, that of ascertaining the undisputed indebtedness of the receivers herein, begs leave to submit a statement of the amounts due employes by the receiver, and setting out in detail: (1) The names of the employes to whom such amounts are still due in person, their occupation, month for which said amounts accrued, and the amounts due for the respective months, aggregating \$12,223.13, from which sum there should be deducted \$551.90, assigned since the accompanying statement was prepared, to Allen Paul, by H. C. Arnold, Jas. Cahill, L. B. Cummins, W. H. Ford, and J. F. Green; leaving a balance due employes, direct, \$11,671.23; (2) the amounts due various parties who hold assignments noted on the receiver's pay roll, showing the name of the assignee, name and occupation of the assignor, number of, order of assignment, month in which services were performed, and amounts due for said months; amounting, with assignments to Allen Paul, noted above, to \$35,947." In the detailed statement accompanying the report, it appears that the labor claims assigned to the appellant amounted to \$7,334.15.

The decree of distribution allowed the appellant's claim of \$7,334.15, and assigned it to class B. It was only entitled, as a constituent of that class, to a pro rata payment of about 77½ per cent. From the decree of the court refusing to allow the claim of the appellant to be paid in full, he has appealed.

No. 900:

Wm. T. Austin and Forster Rose, for appellant.

F. C. Dillard, J. W. Terry, T. W. Ford, and H. O. Head, for appellees.

No. 901:

Walter Gresham, for appellant.

F. C. Dillard, J. W. Terry, T. W. Ford, and H. O. Head, for appellees.

No. 902:

D. F. Rowe, for appellant.

F. C. Dillard, J. W. Terry, T. W. Ford, and H. O. Head, for appellees.

No. 911:

L. B. Moody, for appellant.

J. R. Masterson, F. C. Dillard, J. W. Terry, P. K. Ewing, H. F. Ring, Jas. A. Baker, R. S. Lovett, and Frank Andrews, for appellees.

No. 912:

E. L. Scarritt, J. D. Rouse, and Wm. Grant, for appellant.

F. C. Dillard, S. R. Perryman, J. W. Terry, F. W. Ford, B. K. Ewing, H. F. Ring, Jas. J. Baker, R. S. Lovett, Frank Andrews, and J. C. Hutcheson, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge, after stating the case, delivered the opinion of the court.

The records before us embrace five distinct appeals, and each one will be considered in its order.

(1) First National Bank of Houston v. Ewing et al.

This appeal brings up for review that part of the final decree of distribution which postpones the claim of the appellant as a bond-

holder to the payment of receivers' certificates and other claims classed by the court as preferential. The objection of the appellant to the issuance of receivers' certificates will be first considered. In respect of this item, amounting in the aggregate to \$245,279.54, the record shows that the certificates were expressly authorized by an order of court passed January 23, 1896. The statement of the case exhibits the order in its entirety, which discloses clearly the purposes for which the certificates were authorized. By the order it was adjudged that the certificates, when issued, should become a first lien on all the property of the Galveston, La Porte & Houston Railway Company, of every character and description, including net earnings, and that such lien should be prior and superior to all other liens upon the property, of whatsoever nature. While the appellant was not a party to the proceeding which culminated in the order, the record nevertheless shows that its president had full knowledge of the pending receivership, and that he was aware of the application for authority to issue the certificates. On the 17th of May, 1897, as the holder of 63 first mortgage bonds issued by the defendant railway company, and delivered to the Union Trust Company of New York, as trustee, the appellant intervened in the original suit, pro interesse suo, seeking to establish its claim as a first lien on the railway property in preference to all other claims not entitled to priority. Subsequently the Continental Trust Company of the City of New York, as trustee under the second mortgage executed by the defendant railway company, filed a cross bill seeking a foreclosure of its mortgage, and made the appellant and others parties defendant. On February 25, 1898, with the appellant, the two trust companies, and others interested, before the court, a decree of foreclosure was rendered, ordering a sale of the property of the railway company. It was found by the decree that the receivers had been previously, to wit, on January 23, 1896, granted authority to issue interest-bearing certificates not to exceed in amount \$250,000, which should operate as a first lien upon the property, including net earnings, prior and superior to all other liens of whatsoever nature, and that pursuant to such authority they had issued, negotiated, sold, and disposed of receivers' certificates of sundry dates in the aggregate of the principal sum of \$245,053.25, which were outstanding and held by divers and numerous persons. And upon the findings it was declared "that the receivers' certificates or debentures issued and disposed of under the hereinbefore recited order of January 23, 1896, are, for the full amount of principal and interest thereof, a valid and subsisting lien upon the roadbed, rolling stock, depots, and all other property of said railway company, of every character and description, wherever situated." It was further directed that all liens, mortgages, equitable charges, claims, or demands of every nature and description, held, owned, or asserted by any of the parties to the cause, should be transferred to the proceeds of sale, with like but no greater effect than the same appertained to the property itself, and subject to the future determination of the court, except as otherwise specially directed in the decree. And by the decree were reserved for future determination all questions as to the classification, rank, and priority of all liens, equitable charges, or other demands, except

as therein adjudicated, held, owned, or claimed by any of the parties. It is doubtful whether, under a proper construction of the decree, any question whatever was reserved touching the receivers' certificates, as their status seems to have been adjudicated and their priority established. In any event, all questions as to their issuance, their validity, negotiation, and sale, were effectually set at rest, and they were not thereafter subject to attack, except by an appropriate proceeding to review the decree. If the appellant was dissatisfied with the directions of the decree, he had ample remedies at hand to correct any errors which may have been committed. A petition for rehearing (equity rule 88) was available if seasonably presented, and, as the decree rendered was one from which an appeal would lie, that remedy was open to him. *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 Sup. Ct. 736, 34 L. Ed. 97. But the appellant was passive, and failed to contest the validity of the receivers' certificates until the rendition of the final decree of distribution on the 18th of November, 1899. Having had its day in court, it will not now be heard to bring in review questions which were conclusively determined by the decree to which it was a party. *Swann v. Wright's Ex'rs*, 110 U. S. 590, 4 Sup. Ct. 235, 28 L. Ed. 252; *Steamship Co. v. Moran*, 33 C. C. A. 313, 91 Fed. 22; *Bank v. Hazard* (C. C.) 30 Fed. 484. If, however, it be conceded that the classification, rank, and priority of the certificates were left open by the decree of February 25, 1898, there is no doubt that the court was correct in awarding them priority of payment over the first and second mortgage bonds. The certificates, as determined by the last-mentioned decree, were issued, negotiated, and sold pursuant to the decretal order of February 23, 1896. By that order they were directed to be issued for construction and ballasting purposes; for the purchase of rolling stock, ties, lumber, bridges, and other material necessary for the completion, maintenance, and safe operation of the road; for the construction and repair of bridges, culverts, depots, and other structures; for the purchase of right of way and for the payment of taxes; for the payment of the amount due as shown by the pay rolls of the railway from September 1, 1895, to January 6, 1896; for the payment of a debt due to the Rogers Locomotive Company amounting to \$4,879.12; and for the payment of operating expenses. It will be readily seen that the certificates were authorized for lawful and proper purposes. So far as they were issued for work to be done and materials to be supplied during the period of the receivership, the authorities are clear that they were entitled to priority over the mortgage bonds, on the theory that the expenditures resulted in the improvement and betterment of the railway property. And it is equally well settled that such priority exists in the case of expenses incurred by the railway company itself, a few months prior to the receivership, for the necessary labor, materials, rolling stock, and other supplies necessary to operate the railway and maintain it as a going concern. *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; *Miltenberger v. Railway Co.*, 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117; *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663; *Virginia & A. Coal Co. v. Central Railroad & Banking Co.*,

170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068; *Southern Ry. Co. v. Carnegie Steel Co.*, 20 Sup. Ct. 347, Adv. S. U. S. 347, 44 L. Ed. —. The appellant interposed objections to other claims, including audited vouchers amounting to about \$120,000. These claims accrued during the receivership for operating and other necessary expenses incurred by the receivers. They are composed of a large number of items, such as rentals of rolling stock, track material, hardware, castings, stationery, ice for trains, coal, purchase of locomotives, terminal extensions, supplies and repairs, track and bridge iron, and rental of freight terminals. In addition, there are a number of claims for stock killed, judgments rendered, advertising, and various other small items of similar character. On the 25th day of September, 1899, the master filed his report upon the audited vouchers as undisputed indebtedness, and, no objection having been taken, the report, under equity rule 83, stood confirmed. It may be also observed that this report of the master was affirmatively acted upon by the court on November 17, 1899, and to the order made no exceptions were filed. The matters of fact contained in the report were thus foreclosed, and the only question left for determination was one of classification of the claims, which by order of the court were assigned to class B. The claims, with possibly a few exceptions, were for necessary expenses incurred by the receivers in the operation of the road, and, under the foregoing authorities, were manifestly entitled to priority over the mortgage bonds. Several of these claims, including an attorney's fee of \$5,000 allowed to Ewing and Ring, were strenuously objected to by the appellant. While, in view of the facts appearing of record, the claim for the attorney's fee seems to have been properly allowed, we do not deem it necessary to decide the question, as it is apparent that, if all claims about which there is any doubt be stricken out, the remainder of the claims assigned to class B would be largely in excess of the fund in the registry of the court. Hence, in any view that may be taken of the case, there would be nothing left for the bondholders, and the appellant therefore has no interest in the fund to be protected. The conclusion reached by the circuit court was correct, and the decree is accordingly affirmed.

(2) *L. J. Smith v. T. W. House et al.*

The appellant, Smith, intervened in the original suit on January 22, 1896. In his petition, among other allegations, it was alleged that the appellant and the Galveston, Laporte & Houston Railway Company entered into a contract on February 20, 1895, by the terms of which it was agreed that the appellant should do all the clearing, grading, bridging, and track-laying for the railway company necessary to complete the line of railway, including the construction of the bridge over Galveston Bay; the material for the work to be furnished by the railway company, except that the appellant was to furnish all the iron, including bridge iron, bolts, washers, and packers. For the amount due him the appellant sought to establish an equitable lien on the property of the railway company. On January 27th thereafter, the appellant submitted to the court an application alleging that all parties at interest had agreed that the railway company was indebted to

him in the sum of \$61,241.22; and he prayed an order authorizing the issuance of receivers' certificates, to be known as "conditional certificates," which should simply certify that there was due the appellant the amount stated, so that the certificates might be practically nothing more than an acknowledgment that the indebtedness had been liquidated as to amount. Agreeably to the prayer of the application, an order was entered authorizing the receivers to issue certificates to the appellant for the amount claimed, which, however, were to be conclusive only as to the amount of the appellant's indebtedness against the railway company. In the decree of foreclosure, February 25, 1898, it was found by the court that the railway company was indebted to the appellant for labor and material performed and supplied by him for construction work on the railway in the sum of \$61,241.21, and, further, that conditional certificates had been issued for the amount, in which all questions of rank and priority were reserved. In none of the orders mentioned, nor in the decree of February 25th, were the certificates declared to be a lien on the railway property. But in the final decree of distribution the indebtedness of the appellant was adjudged to be entitled to a lien, subject, however, to the liens and right of priority of payment of the claims included in class A and class B, and of the mortgages executed to the two trust companies. The appellant objects to the classification made by the court, and insists that his demand should be preferred to the claims of the bondholders, and that he should stand at least upon an equal footing with the holders of claims in class B in the distribution of the fund. His contention appears to be predicated upon the assumption that in the decree of distribution he was adjudged to have a mechanic's lien. This contention is evidently based upon a misconception of the decree, since throughout this voluminous record there does not appear a petition, application, bill, plea, or other pleading in which the appellant has asserted a claim to a lien of that nature. We have already decided, in the case of the First National Bank of Houston, that the claims of the bondholders were subject and subordinate to the preferential claims embraced in class A and class B. And it would seem to follow that, if the claim of appellant is not superior to the claims of the bondholders, he would not be entitled to relief. He bases his claim of such superiority on two grounds: (1) That he is entitled to a lien under the laws of Texas; and (2) that, having furnished the labor and material to construct the railway before it went into the hands of receivers, he has an equitable lien on the property to secure the payment of the indebtedness thereby incurred.

1. Whether the appellant, as a contractor to construct a railroad, is entitled to a lien under the laws of Texas to enforce the payment of his claim, is a question which need not be determined on this appeal, as it clearly appears that, if such lien exists, in any case, the appellant failed to take the steps provided by those laws to fix and secure it. By article 3295 of the Revised Statutes of Texas, it is provided:

"In order to fix and secure the lien herewith provided for, it shall be the duty of every original contractor, within four months * * * after the indebtedness shall have accrued, to file his or their contract in the office of the

county clerk of the county in which such property is situated, and cause the same to be recorded in a book to be kept by the county clerk for that purpose."

That the contract of appellant was not filed and recorded in the office of the county clerk is not denied. But it is insisted that the strict letter of the law in reference to filing and recording the contract should not be applied, as, by his intervention in the original suit a few days after the appointment of receivers, he brought his claim to the attention of the court, and was awarded, as evidence of it, receivers' conditional certificates. It is doubtless true that a court of equity would relieve a party from a strict compliance with statutory requirements, where he had used due diligence and manifested a purpose to claim the rights arising under the statute. But laches and neglect are always discountenanced by a court of equity, and nothing can call it into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; *Pennsylvania Mut. Life Ins. Co. v. City of Austin*, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626. From the inception of appellant's connection with the case, on January 22, 1896, to the date of the final decree of distribution, November 18, 1899, extending over a period of nearly four years, he never, in any pleading or paper on file, claimed a mechanic's lien. His demand against the railway company was submitted to the court, and promptly recognized as a valid indebtedness against the company. No lien, however, attached under the orders of the court prior to November 18, 1899, nor was the claim awarded preference. And if any statutory lien ever existed in his favor as a contractor, by his long continued silence when he should have spoken, and unexplained laches, he has waived it. "He who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to keep silent."

2. The appellant next insists that as he constructed the railway by his own energy, labor, and money, he is entitled to a lien which should be preferred to that of the bondholders. While it is claimed that the appellant performed work and furnished materials in the work of construction, there is nothing in the record to show how much is due for the one or the other. But, independent of that consideration, it appears that the indebtedness was incurred in the work of original construction, and not for the purpose of operating and maintaining, as a going concern, a railway already in existence. In reference to the latter, the authorities cited in the case of *First Nat. Bank v. Ewing et al.*, ante, announce the doctrine that, within narrow limits, such indebtedness, accruing a short time prior to the receivership, will be given preference over railway mortgages. But, as to indebtedness incurred by a contractor in the work of original construction or reconstruction of the railway, priority of its payment over the mortgage bonds is denied. *Railroad Co. v. Cowdrey*, 11 Wall. 459, 20 L. Ed. 199; *Hale v. Frost*, 99 U. S. 389, 25 L. Ed. 419; *Railroad Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905; *Dunham v. Railway Co.*, 1 Wall. 254, 17 L. Ed. 584; *Porter v. Steel Co.*, 120 U. S. 649, 7 Sup. Ct. 1206, 30 L. Ed. 830; *Penn. v. Calhoun*, 121 U. S. 251, 7 Sup. Ct. 906, 30 L. Ed. 915; *Lackawanna Iron & Coal*

Co. v. Farmers' Loan & Trust Co., 24 C. C. A. 487, 79 Fed. 202; Id., 20 Sup. Ct. 363, Adv. S. U. S. 363, 44 L. Ed. —.

Holding, as we do, that the classification of the claims, as between the appellant and the bondholders, was properly made, it would seem unnecessary to go further. But, as counsel for the appellant contend with earnestness that the receivers' certificates and certain other claims are not entitled to priority over his own, we will briefly consider this contention. We have shown, in the case of First Nat. Bank v. Ewing et al., that these certificates were not open to attack by the bank, and what was there said applies with much greater force to the present appellant. According to the report of the master, the appellant had issued to him during the receivership receivers' certificates amounting to \$62,238.47. Of this amount, \$50,513.98 were for ballasting the roadbed, and \$11,724.49 for general construction and bridge work. It appears that prior to the decree of final distribution he had disposed of the certificates issued to him. He was, therefore, no stranger to these certificates. At the beginning of the proceeding he waived exceptions to the report of the master recommending their issuance, and agreed that the court should hear and act upon the report without delay. The order of court authorizing their issuance was not excepted to by him; and his counsel prepared the decree of foreclosure, which found that the certificates had been regularly issued pursuant to the prior order of the court, and adjudged them a lien upon the property of the railway company. Subsequently, on April 16, 1898, the appellant filed an answer to the petition of the Union Trust Company, in which the trust company assailed the receivers' certificates. In this answer he averred that the issuance of the certificates was necessary for the protection of the property of the railway company, and for the preservation of its rights and franchises. He further averred (using his own language) "that all the funds realized from said receivers' certificates were faithfully expended in and applied to the preservation and management of said railroad property, whereby the good will and integrity of the enterprise were maintained, which was indispensable, and the interests and accommodation of travel and traffic subserved, and the charter rights, franchises, and property of said railway company protected." The answer further averred that the bondholders were aware that the certificates would be issued, and had ample opportunity to appear and make their objection, but that they had willfully remained inert and inactive, speculating upon chances, and lying idly by, seeing the court and receivers dealing with the property, without protest. It was further averred that the acts and doings of the bondholders "are contrary to equity and good conscience, and operate, as this respondent submits, an estoppel upon the petitioner." To obviate the effect of the appellant's own words as employed in the answer, his counsel suggest that the answer was filed before the master made his report upon the certificates. That is true, but, as evidence that the averments of the answer were made after careful investigation and upon mature deliberation, reference may be made to a petition filed in the cause by defendant on November 8, 1898, praying for counsel fees, in which he alleged that, in order to protect the security of the receivers' certificates, he gave, through his solicitor

ors, the matter of priority a careful investigation upon the law and facts, and filed a lengthy response to the contest of the Union Trust Company. Having, while the owner of a part of the certificates, strenuously endeavored to maintain their integrity and validity, we think that it would be inequitable to permit the appellant to assail them after he has parted with the interest which he originally owned.

After what we have said in the foregoing case of *First Nat. Bank v. Ewing et al.* in reference to the claim of Ewing & Ring for fees, and a few other claims in class B, it is not deemed essential to pursue the question further than to say that the operating expenses incurred by the receivers during their management and control of the property are entitled to preference over the claim of this appellant. While the demand of the appellant against the railway company is a meritorious one, we cannot, consistently with established principles, adjudge it priority over claims of higher dignity, and displace liens to which it is subordinate. The decree of the circuit court should be affirmed, and it is so ordered.

(3) *Galveston, Houston & Northern Railway Company v. T. W. House et al.*

Upon this appeal the specifications of error challenge the ruling of the circuit court refusing to allow state and municipal taxes, with interest, penalties, and costs, and certain right of way claims, to be paid out of the fund in court. The contest is between the appellant, to which the railway was conveyed by the master commissioner at the instance of the purchaser, and the holders of claims to which priority was adjudged. It is insisted by the appellant that taxes, the item which we will first consider, constitute a lien upon the corpus of the property and earnings in the hands of the receiver paramount to all others, and, if not paid out of the earnings, should have priority of payment over other claimants and lienholders, out of the proceeds arising from the sale of the property. On the other hand, it is contended by the appellees that there was no warranty of title, and, applying the maxim *caveat emptor*, the purchaser took the property subject to the incumbrances resting upon it, including defects which may have existed in the title. That the taxes in question were, under the laws of Texas, a lien upon the railway property, is not questioned by counsel. And it seems to be settled law that such liens are prior to all other liens whatsoever, except judicial costs, which are first to be paid where the property is rightfully in the custody of the court. "It is the imperative duty of the court," said Mr. Chief Justice Fuller in the case of *In re Tyler*, 149 U. S. 187, 13 Sup. Ct. 791, 37 L. Ed. 696, "to recognize as paramount, and enforce with promptness and vigor, the just claims of the authorities for the prescribed contributions to state and municipal revenue." *Georgia v. Atlantic & G. R. Co.*, 3 Woods, 434, Fed. Cas. No. 5,351; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963. And it is immaterial how the claim for taxes may be brought to the attention of the court,—whether by the receiver, the master appointed in the cause, the tax collector, or through intervening petitions filed by the state and municipalities interested. In any case, and whenever

properly brought to the court's attention, they should be promptly paid. But, notwithstanding the superior dignity of tax claims, the burden of their payment, under some circumstances, may be cast upon the purchaser at a judicial sale, and this upon the principle that at such sale there is no warranty of title. *Osterberg v. Trust Co.*, 93 U. S. 424, 23 L. Ed. 964; *Railway Co. v. Harrison*, 37 C. C. A. 615. 96 Fed. 910, citing authorities. In the latter case it is said by the court:

"The general doctrine is well settled that there is no warranty in judicial sales; that the maxim *caveat emptor* applies, and the purchaser takes the property without recourse for tax liens or other incumbrances or defects in the title."

But the exception to the rule in equity, and recognized in the *Harrison Case*, is where the decree provides for the satisfaction of liens out of the proceeds of sale or other funds in the registry of the court. The exception is thus stated by the court at page 619, 37 C. C. A., and page 911, 96 Fed.:

"In the argument of counsel on behalf of the appellant this rule is recognized, but with the assertion that it operates only to forbid the purchaser 'from asking that prior liens be paid out of the proceeds of the property sold.' No authority is cited for so limiting its effect, and we are of opinion that the rule applies with equal force to any fund which is in the registry of the court, or in the hands of the receiver, as the earnings or other production of the property involved. Exception to this general rule undoubtedly arises in equity in the following instances: First, where the decree or order for the sale expressly provides for discharging liens or other claims against the property out of the proceeds or other funds coming into court, or where the proceedings or provisions are otherwise inconsistent with such rule; and, second, where there is fraud, concealment, or unfair dealing in the proceedings which entitle the purchaser to equitable relief."

It then becomes necessary to ascertain whether, under a proper construction of the decree, the purchaser at the sale of October 4, 1898, took the property subject to the lien for taxes. It was provided by the decree that the purchaser should take the property as it was held and enjoyed by the Galveston, Laporte & Houston Railway Company, "subject only" (following the language of the decree) "to the liens, in respect to the portions of property enumerated, to the burden of which such sales were specially herein directed to be made; and all persons who are parties to this cause, or quasi parties, by intervening petitions or otherwise, and all persons claiming under said railway company since the execution of the aforesaid mortgage deeds of trust, are hereby forever barred and foreclosed of all right, title, interest, estate, claim, demand, or equity of redemption of, in, or to any of the property herein directed to be sold, when sold, except as herein otherwise specially provided; and all liens, mortgages, equitable charges, claims, or demands of every nature and description, held, owned, or asserted herein by any of such parties or quasi parties to this cause shall be transferred to the proceeds of the sale herein directed to be made, with like but no greater effect than the same appertained to the property itself, and subject to future determination by the court, except as herein otherwise specially provided." The decree, it will be observed, does not, in *hæc verba*, provide that the purchaser should take the property relieved of the taxes, but that seems to be the plain

meaning of the language employed. He took it subject only to certain enumerated liens, and, upon the principle that "the expression of one thing is the exclusion of the other," he took the property free from all liens and incumbrances except those specifically mentioned. The tax liens were not embraced in the excepted classes, and therefore the appellant, for whom the property was originally purchased by Smith and Broadhead, has the right to resort to the fund in court to secure the payment of the taxes due, and thus relieve it of the tax incumbrances. This conclusion is strongly supported by the order of the court directing the master commissioner to execute a conveyance of the property to Broadhead. It is there adjudged that Broadhead and his assigns "shall take, have, hold, possess, and enjoy the same free from all and singular the claims of the parties complainants, defendants, and interveners herein, as and according to the provisions of the decree and orders of the court in this cause, and from all claims arising during said receivership or prior thereto."

It is also insisted by the appellees that the claim of the appellant for taxes is barred by the order of June 26, 1899, which directed all parties having claims against the receiver or the fund in court, save those who had already intervened or become parties to the suit, and saving the holders of receivers' certificates and of undisputed indebtedness, to intervene in the suit by the 1st day of September, 1899, under the penalty of having their claims barred. This order obviously is without application to the appellant, as its intervention, seeking payment of the taxes in question, was filed June 12, 1899,—some days prior to the date of the order.

It is further contended by the appellees that in no event should interest, penalties, and costs accruing upon the claim for taxes be allowed. In *Thomas v. Car Co.*, 149 U. S. 116, 117, 13 Sup. Ct. 833, 37 L. Ed. 671, it was said by the court:

"As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law. It is a necessary incident to the settlement of the estate. *Williams v. Bank*, 4 Metc. (Mass.) 317, 323; *Thomas v. Minot*, 10 Gray, 263. We see no reason in departing from this rule in a case like the present, where such a claim would be paid out of moneys that fall far short of paying the mortgage debt."

The general rule announced by the supreme court is applicable to cases where the fund is to be shared by creditors without liens, or by those having liens of equal and common rank. But where there are claims of several classes, with liens of different priorities, the holders thereof are entitled to interest down to the date of the decree. *Jourlmon v. Ewing*, 56 U. S. App. 149, 29 C. C. A. 41, 85 Fed. 103; *Central Trust Co. v. Condon*, 31 U. S. App. 387, 14 C. C. A. 314, 67 Fed. 84. As we have shown, the lien for taxes is superior to all other claims, except for judicial costs, and practically constitutes a class of its own. There being in the registry of the court more than a sufficient amount to pay the state and municipal taxes and judicial costs, the accrued interest, penalties, and costs should be allowed.

As to the contention of the appellant that right of way claims should be paid out of the fund, we shall have but little to say. When the appellant purchased the property, it took it subject to such defects

of title as existed in reference to lands which had been used by the Galveston, Laporte & Houston Railway Company for right of way purposes. As against such imperfect titles there was no warranty (*Waples v. U. S.*, 110 U. S. 630, 4 Sup. Ct. 225, 28 L. Ed. 272), nor anything in the decree to relieve the appellant of the burden of perfecting them.

It is proper to add that the writer, differing with a majority of the court, is of opinion that the appellant purchased the railway property subject to the lien for taxes, which should be paid by it out of its own funds.

The decree appealed from is amended so as to direct the payment out of the fund in court of the state and municipal taxes as found by the master's report, including principal, interest, penalties, and costs; and, as thus amended, quoad this appeal the decree of the circuit court is affirmed. The costs of this appeal will be paid by the receiver out of the funds in court.

(4) *St. Charles Car Company v. T. W. House et al.*

Upon this appeal it becomes our duty to determine whether the claim of the appellant for rolling stock purchased by the receivers should participate with the claims of class B in the distribution of the fund in court. The rolling stock in question, amounting in the aggregate to \$66,200, consisted of first-class coaches, mixed coaches, combination passenger, baggage, and express cars, caboose cars, and coal and box cars. The contract by which it was acquired was made January 24, 1896, upon authority of the order of court granting permission to issue receivers' certificates; and pursuant to the contract the receivers, after paying \$22,066.66 in cash, executed two promissory notes, of \$22,066.66 each, payable to the appellant in one and two years after date, respectively, with interest payable semiannually at the rate of 7 per cent. per annum from date until paid, "and at the rate of ten per centum after maturity." The notes contained the following concluding clause:

"This note is one of two for a like amount * * * this day executed and delivered by us in part payment of the purchase money for certain equipment this day bought by us from the St. Charles Car Company; and the payment of this note is secured by a lease contract or conditional sale of even date herewith, executed by us in favor of the St. Charles Car Company, and of record in the record of chattel mortgages of Harris county, Texas."

The semiannual interest not having been paid at maturity, the appellant, through its attorney, about the 12th day of May, 1897, demanded of the receivers the payment of the money or return of the cars, as provided in the contract. The rolling stock being required in the operation of the railway, the receivers declined to comply with either demand, and retained possession of the cars until May 1, 1899, when they were delivered to the master commissioner as hereinafter mentioned. The decree of foreclosure of February 25, 1898, found:

"That, of the rolling stock belonging to said railway company, the following portions are subject to purchase-money liens upon contracts of conditional sale, viz.: * * * Six passenger coaches, three combination coaches, two caboose cars, fifty box cars, and fifty coal cars, purchased by said receivers from the St. Charles Car Company, subject to a lien for \$44,133.32, as it existed on July 24, 1897, with interest as per contract, accrued and to accrue."

By that decree the property, rights, and franchises of the defendant railway company were ordered sold subject to the lien of the appellant; and the court reserved the right, if the purchaser failed to pay off and satisfy the lien within a stated time, to have the rolling stock sold to discharge the same; saving, however, to the appellant the right to resort to any other appropriate remedy for the enforcement of its lien. The purchaser of the property failing to pay for the rolling stock, the appellant on December 10, 1898, presented a petition seeking to have it sold to satisfy its claim. In this petition the appellant, in addition to other relief, prayed that, should the amount realized from the sale be insufficient to pay off and discharge its indebtedness, the deficiency be ordered to be paid as a part of the operating expenses of the receivership. On May 2, 1899, the court entered a decretal order directing the delivery of the rolling stock to the master commissioner for the purpose of being sold. The order contained the following recitation:

"Whereas, on the hearing of the above entitled and numbered cause a final decree was on the 25th day of February, 1898, rendered by this court, in and by which it was considered, adjudged, and decreed that the receivers of the property and effects of the defendant railway company theretofore appointed by this court were justly indebted to the St. Charles Car Company in the sum of \$44,133.32 for the purchase money of the personal property herein-after described, sold, and delivered by the said St. Charles Car Company to the said receivers, which purchase was made by authority of an order from this court; and whereas, the said St. Charles Car Company was in and by said decree considered and adjudged entitled to have and receive of and from said receivers the said sum of \$44,133.32, with interest thereon at the rate of ten per cent. per annum from July 24, 1897, and that said indebtedness and interest as aforesaid was considered, adjudged, and decreed to be a first lien, prior in right to all other claims of whatever character against either the defendant the Galveston, Laporte & Houston Railway Company or the said receivers, upon the following property, now in possession of T. W. House, receiver, to wit, six passenger coaches, three combination coaches, two caboose cars, fifty box cars, and fifty coal cars, purchased by said receivers from St. Charles Car Company, subject to a lien for \$44,133.32, as it existed on July 24, 1897, with interest as per contract, accrued and to accrue, or such portion thereof as is now in existence."

And it was ordered:

"Should the property sell for more than the amount of the said St. Charles Car Company's judgment, interest, and costs, then the amount in excess thereof shall be paid in cash to the said special master commissioner, to be paid into the registry of the court, as hereinbefore provided. The court reserves the right to accept or reject any and all bids. It is further ordered and decreed that in the event the proceeds from the said sale should prove insufficient to fully pay off, satisfy, and discharge said judgment, then the said St. Charles Car Company shall have the right to present to this court its petition to have the deficiency that may be due and owing it paid out of the funds now in the registry of the court, as a part of the operating expenses of the receivership."

In obedience to the order the receivers delivered the rolling stock to the master commissioner, who sold the same at public auction, where it was purchased by the appellant for the sum of \$30,500; and this amount, less the expenses of sale amounting to \$600, was entered, pursuant to a confirmatory order, as a credit on its claim.

It is obvious that the notes to the appellant and the lease contract contemporaneously executed by the receivers became merged in the

decree of foreclosure and the subsequent order of the court, and since no exceptions were reserved to, nor appeal taken from, them, it is now too late to challenge either their effect or correctness. See above case of First National Bank of Houston v. Ewing & Ring. The decree and subsequent order explicitly adjudged the claim of the appellant to be an indebtedness against the receivers, and the latter by plain inference conferred upon it the right to receive any deficiency resulting from the sale out of the fund in the registry of the court. It is also a significant fact to be considered in this connection that in the reports filed by the receivers from September 1, 1896, to October 14, 1899, the claim of the appellant was invariably referred to as a liability of the receiver; and the rolling stock was used by the receivers in operating the railway for a period exceeding three years, and until its final sale. We have no doubt that this claim is entitled, equally with other claims in class B, to participate in the distribution of the fund.

It is therefore ordered that the final decree of distribution be amended by striking out the item allowing the St. Charles Car Company \$2,868.39, and inserting in lieu thereof, in class B, an allowance to the appellant of \$14,233.32, balance due on car contract, the same being the principal of the indebtedness due the appellant, less \$29,600, the proceeds of the sale of the cars; and, as so amended, the final decree of distribution is affirmed. The costs of this appeal will be paid by the receiver out of the funds in the registry of the court. Ordered accordingly.

(5) W. C. Corbett v. T. W. House et al.

This appeal raises the question whether the claim of appellant shall be paid in full, to the detriment of other claims assigned to class B. The circuit court awarded preference to appellant's claim and classified it with the receivers' certificates, labor claims, and other operating expenses incurred by the receivers in the management of the property. This classification he objects to, since the creditors included in it will be paid only about 77 per cent. of the par value of their indebtedness, exclusive of interest. By his intervention in the suit the appellant sought to establish the priority of his demand on the ground that the claims assigned to him, amounting to \$7,334.15, represented work and labor performed by employes of the receivers during the years 1897 and 1898. Upon an inspection of the master's report it will be observed that, approximately, one-half of the total amount of the claims were severally assigned to him by the superintendent and engineer, the auditor and general freight and passenger agent, station agents, train dispatchers, stenographers, and clerks of the auditor, and superintendent and clerks at stations. The appellant insists that he should be preferred to other creditors in class B, and to certain designated claims in class A, because, under the laws of Texas, laborers' liens are superior to all other liens of every kind and character, and hence the claims thereby secured should be paid in preference to all others except judicial costs. It is questionable whether the assignors, above enumerated, of one-half the claims owned by the appellant, would, in any view of the case, be entitled to laborers' liens under the Texas statutes, which give to mechanics, laborers, and operatives a

lien to secure the payment of their wages. *Milligan v. Railway Co.* (Tex. Civ. App.) 46 S. W. 918; *Krakauer v. Locke*, 6 Tex. Civ. App. 446, 25 S. W. 700; *Malcomson v. Wappoo Mills* (C. C.) 86 Fed. 192; *In re Stryker*, 158 N. Y. 526, 53 N. E. 525. But, however that may be, we do not think that either the laborers' lien law or article 1472 of the Revised Statutes of Texas, regulating the distribution of funds that may come into the hands of a receiver of a state court, should or can be construed to have application to the classification of claims and priority of liens accruing against receivers appointed by the courts of the United States. The claims in question were those of employes performing work in the immediate service of receivers duly appointed by a court of the United States having jurisdiction of the cause; and their relative rank and classification of payment were matters to be determined by the court in accordance with the general principles of equity jurisprudence. Thus, it was said by Mr. Justice Story, speaking for the court, in *Boyle v. Zacharie*, 6 Pet. 658, 8 L. Ed. 536:

"But the acts of Maryland regulating the proceedings on injunctions and other chancery proceedings, and giving certain effects to them in courts of law, are of no force in relation to the courts of the United States. The chancery jurisdiction given by the constitution and laws of the United States is the same in all the states of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction, the courts of the United States are not governed by the state practice; but the act of congress of 1792, c. 36, has provided that the modes of proceeding in equity suits shall be according to the principles, rules, and usages which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law, subject, of course, to the provisions of the acts of congress, and to such alterations and rules as, in the exercise of the powers delegated by those acts, the courts of the United States may from time to time prescribe. *Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372; *U. S. v. Howland*, 4 Wheat. 108, 4 L. Ed. 526. So that, in this view of the matter, the effect of the injunction granted by the circuit court was to be decided by the general principles of courts of equity, and not by any peculiar statute enactments of the state of Maryland."

U. S. v. Howland, 4 Wheat. 108, 4 L. Ed. 526; *Neves v. Scott*, 13 How. 267, 14 L. Ed. 140; *Fordyce v. Du Bose*, 87 Tex. 78, 26 S. W. 1050.

In the case last cited, at page 82, 87 Tex., and page 1051, 26 S. W., it was said by the supreme court of Texas:

"The legislature of a state has no more authority to prescribe rules of procedure for courts of the United States, nor to limit the effect of judgments of such courts rendered in the exercise of their constitutional powers, than congress has to prescribe rules for the state courts, or to place limitations upon their judgments within the bounds of the states. * * * The several acts of the legislature upon the subject of receivers do not purport by their language to affect receivers appointed by the federal courts in their official capacity, and courts will construe them so as to embrace such subjects as the legislature had the authority to legislate upon. *End. Interp. St. § 271*. These acts were not intended to affect the procedure of federal courts as to receivers appointed by such courts."

But it is contended by the appellant that by section 2 of the act of congress of August 13, 1888 (25 Stat. 436), it is made the duty of courts of the United States to obey the directions of the state statutes to which reference has been made. This section provides as follows:

"Sec. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

It will be observed that the receiver or manager is enjoined to manage and operate the property pursuant to the requirements of state laws, and for willful violation of his duty he is subject to severe punishment. There is, however, no duty resting upon the court, by virtue of the act, to administer property in its hands agreeably to the laws of the states; and to give it such a strained and unnatural construction would impute to congress the purpose and intention, without the employment of apt and expressive language, to seriously impair the constitutional jurisdiction of the courts of the United States in matters of equitable cognizance. It is evident that the act of congress has no application to the present case.

In reference to the receivers' certificates to which objection is made by the appellant, we think that enough has been said in the cases of *First Nat. Bank v. Ewing et al.* and *Smith v. House et al.*, ante, to show that the claims thereby represented are entitled to participate in the fund equally with the indebtedness of this appellant. And, after a careful consideration of the points raised and discussed by counsel, we are of opinion, without giving special attention to other assignments of error which are very general in their nature, that, while slight errors may have been committed, the ruling of the court was substantially correct in its classification of claims which accrued for operating expenses while the railway was managed and operated under the direction of the court. The rule for the payment of such claims, and the one which the circuit court seems to have followed, was clearly laid down in *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 481, 6 Sup. Ct. 834, 29 L. Ed. 979, where it was said by Mr. Justice Blatchford, speaking for a unanimous court:

"We are of opinion that (with the exception of debts for taxes and receivers' certificates issued to borrow money to pay taxes, or to discharge tax liens) there should be no priority or preference among the debts and claims, whether receivers' certificates or other debts, which are allowed precedence over the mortgage bonds of any road, but that they should all stand alike."

The decree of the circuit court should be affirmed, and it is so ordered.

MARDEN v. PHILLIPS et al.

(District Court, D. Massachusetts. July 11, 1900.)

No. 1,113.

1. GAMBLING CONTRACTS—CHATTEL MORTGAGES—VALIDITY—BANKRUPTCY.

A bill of sale intended as security for a loan of money to be used in dealing in differences, in the profits of which the vendee is to participate, is invalid as against the trustee in bankruptcy of the vendor.

2. SALES—DELIVERY—EVIDENCE—VALIDITY AGAINST TRUSTEE IN BANKRUPTCY.

Where, after the execution of a bill of sale as security for a loan, the vendor continues in possession and does business as before until adjudicated a bankrupt, and the bill of sale is not recorded, the vendee cannot claim title as against the trustee in bankruptcy of the vendor.

Sherman L. Whipple and Edward W. Goding, for complainant.
Williams & Copeland, for defendants.

BROWN, District Judge. The bill of sale under which the defendant claims title to the goods in question was admittedly given as a mere security for money loaned by Phillips to the bankrupt. At the date of the loan the bankrupt was solvent. The money was borrowed by the bankrupt for the purpose of gambling in stocks. The bankrupt testifies that the transactions were what are "commonly known as 'bucket-shop transactions.'" I think it clear, upon the evidence, that the purpose for which the money was borrowed was for a mere dealing in differences, and that no actual delivery of shares was intended. The master reports:

"I think it may fairly be inferred from all the testimony that Phillips understood that the bankrupt was not purchasing stocks outright for investment, but was in a speculation through Jones, who had been introduced to him by Phillips, and with the nature of whose business Phillips was entirely conversant; and, furthermore, Phillips testified that he had assisted the bankrupt several times previously in similar speculations."

Furthermore, the bankrupt testified that he told Phillips that, if Phillips would loan him the money to put into the speculation, he would "divvy" the profits with Phillips. As the note given by the bankrupt to Phillips for the loan was merely a demand note, on which no demand has ever been made, and as, upon his own statement, it does not appear that Phillips was to receive any compensation for his loan, I think that the bankrupt's testimony on this point is much more probable than Phillips' statement that he had no interest in the speculation. I fully agree with the master's opinion that Phillips knew the nature of the dealings of the bankrupt, and I find, also, as a matter of fact, that the loan was made on condition that Phillips should share in the profits of a mere wagering dealing in differences, to which the money loaned was to be applied. It is improbable that Phillips loaned money for a speculation in which he was interested, without learning the nature of the dealings. It follows that the bill of sale given as a security is invalid as against the trustee in bankruptcy. *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; *Flagg v. Gilpin*, 17 R. I. 10, 19 Atl. 1084; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; *Embrey v. Jemison*, 131 U. S. 336, 9 Sup.

Ct. 776, 33 L. Ed. 172; *Love v. Harvey*, 114 Mass. 80; *Hanauer v. Doane*, 12 Wall. 342, 20 L. Ed. 439.

I am furthermore of the opinion, upon the whole evidence, that no possession of the stock was taken and retained by Phillips prior to January 30th when the goods were removed to Woburn. In the original depositions of Gardner, MacDonald, Romsey, and Phillips, taken on March 1st or prior thereto, no reference is made to a key, or to locking up any part of the goods. Phillips testified that he made a confidential arrangement with Romsey, the bankrupt's clerk, to look out for his (Phillips') interests, but Romsey was not to let MacDonald know that he represented Phillips. This is inconsistent with evidence given at a later date that Romsey had the key to the back room, and that MacDonald only had access thereto with Romsey's consent. Romsey, professing to give a full account of the transaction, does not testify originally that he was put in charge for Phillips, or that he had a key. MacDonald testified originally that after the execution of the bill of sale he did business without change, and that he knew of no arrangement between Phillips and Romsey until January 20th. The testimony as to the key is, in my opinion, inconsistent with the original testimony of these witnesses, and is of little weight. As the bill of sale was a mere security, and was not recorded, and as no possession was taken and retained prior to January 30, 1900, the case seems to fall within *Drury v. Moors*, 171 Mass. 252, 50 N. E. 618; *Moors v. Reading*, 167 Mass. 322, 45 N. E. 760. See, also, *In re Sheridan* (D. C.) 98 Fed. 406; *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779. The decree will be for the complainant.

READ, Collector, v. CERTAIN MERCHANDISE IMPORTED BY O. G. HEMPSTEAD & SON.

(Circuit Court of Appeals, Third Circuit. June 28, 1900.)

No. 17.

CUSTOMS DUTIES—SCIENTIFIC BOOK—FREE LIST—UNBOUND SHEETS—IMPORTATION—STATUTE—CONSTRUCTION.

Act Cong. Aug. 27, 1894 (28 Stat. 509, 538, par. 410), exempts from import duties books devoted to original scientific research. Paragraph 311 makes dutiable all printed matter not specially provided for. *Held*, that printed sheets of a literary work of original scientific research constituted a "book," within paragraph 410, and so were not dutiable under paragraph 311, though imported without being bound or stitched together.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

F. F. Kane, for appellant.

Thomas S. Gates, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. The only question pressed on this appeal is whether printed sheets of a scientific work devoted to orig-

inal scientific research, known as Politzer on the Ear, not bound nor stitched together, is a "book" within the meaning of paragraph 410 of the tariff act of August 27, 1894 (28 Stat. 509, 538), and as such not dutiable. That section is as follows:

"410. Books, engravings, photographs, bound, or unbound, etchings, music, maps and charts, which shall have been printed more than twenty years at the date of importation, and all hydrographic charts, and scientific books and periodicals devoted to original scientific research, and publications issued for their subscribers by scientific and literary associations or academies, or publications of individuals for gratuitous private circulation and public documents issued by foreign Governments."

It is claimed by the appellant that the sheets were dutiable at the rate of twenty-five per cent. ad valorem, by virtue of paragraph 311 of the above act, which reads as follows:

"311. Blank books of all kinds, twenty per centum ad valorem; books, including pamphlets and engravings, bound or unbound, photographs, etchings, maps, music, charts, and all printed matter not specially provided for in this Act, twenty-five per centum ad valorem."

The learned judge below held that the printed sheets were included in the free list, saying:

"As to the third question, that because the book was imported in unbound sheets it was not a book and, therefore, not entitled to free entry, it is not necessary to say more than that no such narrow definition of the word 'book' can be accepted by the Court. The statute itself does not undertake to make any such distinction. The collected sheets containing in orderly and connected fashion the record of the intellectual and literary work of the author is a book unless for some particular and special purpose a narrower definition is prescribed by law. The object of the statute was evidently to remove as far as possible obstructions to the freest possible circulation of the results of original scientific inquiry tending to the advancement of learning and the benefit of humanity." 95 Fed. 967.

We are in entire accord with the views thus expressed. The suggestion of a practical difficulty confronting a United States appraiser in ascertaining from the unbound sheets the character of the work with a view to its classification under the tariff act we regard as devoid of force.

The decree of the circuit court is affirmed.

UNITED STATES ex rel. ALEXANDROFF v. MOTHERWELL, Keeper of the Philadelphia County Prison, et al.

(District Court, E. D. Pennsylvania. July 12, 1900.)

1. TREATIES—CONSULAR POWERS—DESERTER FROM NAVY OF FOREIGN NATION.

A seaman who has deserted from the Russian navy while under assignment to a vessel in course of construction in this country, but which has not as yet been acquired by the Russian government, and whose crew has not yet been organized, is not a deserter from a ship of war, within article 9 of the treaty of December, 1832, between the United States and the empire of Russia, providing that consuls and vice consuls may require the assistance of the local authorities for the arrest and detention of deserters from the ships of war and merchant vessels of their country.

2. SAME—EVIDENCE.

Under article 9 of the treaty of December, 1832, between the United States and the empire of Russia, providing for the arrest and imprison-

ment of deserters from the ships of war of their country upon application of consuls and vice consuls, in writing, to the competent tribunals, and proof, by the exhibition of the registers of vessels, the rolls of the crews, or other official documents, that such individuals formed part of the crews, one who has been imprisoned as an alleged deserter from the Russian navy on application of a Russian vice consul will be released on habeas corpus, where no register or roll of the crew, or other official document substantiating the vice consul's averment, is produced.

Bernard Harris and Isaac Hassler, for relator.

Francis C. Adler and John F. Lewis, for respondents.

McPHERSON, District Judge. The relator, who is conceded to be a deserter from the Russian naval service, is confined in the jail of this county by virtue of a commitment issued by a United States commissioner under section 5280 of the Revised Statutes. This section provides the legal machinery for the arrest of deserting seamen, and for the delivery of such offenders to the consul or vice consul of "any foreign government having a treaty with the United States, stipulating for the restoration of seamen deserting." The proceedings before the commissioner were formally regular, and the testimony taken upon the hearing of this writ of habeas corpus discloses no dispute of fact. The single question for decision is whether article 9 of the treaty with Russia, concluded in December, 1832, under which the arrest was made, justifies the prisoner's detention.

The facts are these: The prisoner is a conscript member of the Russian navy, whose term of service has not expired; his duty being to care for the sick, as an assistant physician. In the fall of last year he was ordered, and thereupon proceeded, to Philadelphia, as one of a squad of seamen who were intended to become part of the crew of the *Variag*, a cruiser then and now in course of construction at the shipyard of Cramp & Sons, in this city. The vessel is being built under a contract with the Russian government, and is nearing completion, but she has not yet been accepted by the Russian authorities. The prisoner has never been on board of her, and there is no proof that her crew has ever been organized. Not long ago, the prisoner deserted the service, and took up his residence in the city of New York, where he was arrested upon the written request of the Russian vice consul in Philadelphia. Article 9 of the treaty is as follows:

"The said consuls, vice-consuls and commercial agents are authorized to require the assistance of the local authorities for the search, arrest, detention, and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges, and officers and shall in writing demand such deserters, proving by the exhibition of the registers of vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused."

Upon these facts, I do not think that discussion is needed. It seems to me to be clear that the prisoner does not fall within the treaty. For this decision there are three reasons. First. The *Variag* is not yet a Russian ship of war. She is an unfinished vessel, intended, no doubt, to become a Russian cruiser; but she has not yet acquired, and she may never acquire, that character. Second. The

prisoner is not yet a member of her crew. So far as disclosed by the evidence, the vessel has no such organization, in the sense intended by the treaty. The prisoner and certain associates were ordered to Philadelphia, to serve as part of the cruiser's complement; but they have not yet begun that service, and may never be called upon to perform it. Third. Even if it be assumed that the prisoner may be treated in this proceeding as a member of a crew, because the Russian government intended that he should hereafter take upon him such status, the kind of proof required by the treaty to prove his status has not been offered. No register or roll of the crew, or other official document substantiating the vice consul's averment, has been produced, and therefore the evidence specifically described and made necessary by the treaty itself has not been produced. It follows that no legal justification for the prisoner's detention has been shown, and that he must be released from custody.

It is proper to add that, while this conclusion seems to me to be unavoidable, I have reached it with some reluctance. The prisoner is a deserter from the naval service of his country, and I do not regard his abandonment of duty with favor. So far as appears, he has violated a high obligation, without sufficient justification, and nothing but a clear conviction of the limited scope of the treaty constrains me to stand between him and the punishment that he apparently deserves. The courts of the United States are bound, and will, no doubt, always be ready, to enforce the treaty stipulations of this government with a friendly nation; but they are equally bound to adhere to the terms of such stipulations, and to go no further than the contracting powers have themselves seen proper to direct. Obviously such a situation as is now presented was not foreseen 70 years ago. The article in question is dealing with completed vessels, manned by organized crews, that may be visiting the ports of the foreign power, and to that subject its provisions must be confined.

It is accordingly ordered that the prisoner be discharged from custody.

KELLOGG v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1900.)

No. 822.

1. CRIMINAL LAW—VERDICT—CONFLICTING EVIDENCE—APPEAL.

Where the evidence in a criminal cause is conflicting, and there is some testimony tending to support the verdict, it will not be reversed on appeal; it not being the province of the appellate court to weigh evidence.

2. SAME—INSANITY—PRESUMPTION AS TO CONTINUANCE.

Where the defense of insanity is interposed to a criminal prosecution, it is proper to instruct that, if the defendant is shown to have been permanently insane before the crime, the presumption would be that it continued and existed at the time of the offense, but that by "permanently insane" is meant insanity not due to a temporary cause, such as delirium tremens, fever, or the like.

3. SAME—ARGUMENT OF COUNSEL—WITHDRAWAL OF REMARK.

Where the prosecuting attorney, in refuting the assertion that he was trying to convict an innocent man, refers to his success in other causes

tried at the term as vindicating his purposes, and the court sustains an objection to such reference, whereupon the prosecutor concedes that he should not have made it, the error is sufficiently corrected, not being so prejudicial in itself as to necessitate a reversal.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

Ellis Cocke and W. H. Washington, for plaintiff.

A. M. Tillman, for defendant.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. Plaintiff in error was indicted and convicted in the circuit court for violation of section 5421, Rev. St. U. S., in forging the affidavit of Carroll Simpson in the matter of the claim for pension of one Melvina Patton, widow. The assignment of error principally argued in the briefs and the oral presentation of the case concerns the defense made in the trial court that the plaintiff in error was insane at the time of the commission of the offense. This was purely a question of fact, and this court cannot determine a mere question of the weight of evidence. It is a well-settled rule that, if the verdict of the jury is supported by any competent evidence, the appellate court will not reverse the case because the verdict may be against the weight of the testimony. *Humes v. U. S.*, 170 U. S. 210, 18 Sup. Ct. 602, 42 L. Ed. 1011; *Crumpton v. U. S.*, 138 U. S. 361, 11 Sup. Ct. 355, 34 L. Ed. 958; *Moore v. U. S.*, 150 U. S. 57, 14 Sup. Ct. 26, 40 L. Ed. 422. It is claimed by counsel for plaintiff in error that there is no testimony in the record contradicting that which showed that the accused was at the time of the commission of the offense of unsound mind, and therefore not responsible for his acts. We have carefully read all the testimony submitted, and are of opinion that there was testimony, competent to go to the jury, tending to show that the accused was of sound mind at the time of the commission of the offense. It is not within our province to review this testimony. It is sufficient to say that there was a conflict in the evidence, which, having been decided in the court below, cannot be brought into review here.

2. At the conclusion of the charge of the court below, which we have also carefully examined, in view of the importance of this case to the accused, counsel for plaintiff in error expressed entire satisfaction with the charge except that he asked an additional one, to wit:

"If insanity is shown to exist at any time, it is presumed to continue."

To this the court responded:

"I will say that, if general insanity is shown at any time, it would be presumed to continue until the contrary is shown. That would be general insanity as distinguished from mere delusion."

This modification seems to have been satisfactory to counsel,—at least, no exception was taken; and the next day, at the request of defendant's counsel, the jury was recalled, and this additional charge was given:

"If the defendant is shown in the proof to have been permanently insane before the commission of the offense, the presumption would be that it continued and existed at the time of its commission. By 'permanently insane' is meant insanity not due to a temporary cause, such as delirium tremens or temporary disease or fever, or other temporary cause which passes away."

In view of this state of the record, treating the case as if an exception had been taken to the modification of the request of counsel for plaintiff in error, we are of opinion that the court did not err in the charge given to the jury. In what was said in response to the request, and the charge given the next day at the request of counsel for plaintiff in error, the jury was given to understand that permanent insanity, once established, might be presumed to continue and still exist at the time of the alleged offense. The difference between such insanity and the temporary want of responsibility, such as one might have when suffering from delirium tremens or temporary delusion, and the like, was properly called to the attention of the jury. The entire charge was fair, and carefully conserved all the rights of the accused.

3. The only other assignment of error relates to the alleged misconduct of the district attorney in the argument. Upon this subject the court found the following facts:

"In the argument of the case, one of the defendant's attorneys said before the jury, in effect, that the prosecution was undertaking to go too far in the case, and was undertaking to convict and punish a man who was in fact insane, and, in effect, that this was carrying zeal in the prosecution too far. In reference to this part of the argument for defendant, the district attorney, in effect, denied that the prosecution had any desire or purpose to convict a man who was not guilty, or to punish a man who was not sane, and that in saying so he spoke, not only for himself, but for the other officers connected with the prosecution, and that the verdicts of the juries in the cases so far tried at this term vindicated them in this respect, and showed that the prosecutions were well founded. Thereupon one of the counsel for defendant objected to this statement in the district attorney's argument, and the court sustained the objection, ruling that such a statement was improper to be made before the jury, whereupon the district attorney, in effect, conceded that the statement should not have been made."

The reference to the trial of other cases and the success of other prosecutions was improper and unnecessary to the proper presentation of the case on trial to the jury. When the remark was made it was objected to by counsel for the prisoner. The court promptly sustained the objection, ruling that such a statement was improper to be made to the jury. The district attorney did not insist upon the argument, but admitted that it should not have been made. No exception was taken to the action of the court. Indeed, none could have been. Had a further instruction been desired upon the subject, the attention of the court should have been called thereto, and doubtless an instruction would have been given in line with the ruling made by the judge when the matter was called to his attention. We perceive no error in the action of the court, or such misconduct in the making of the argument as will permit us to disturb the verdict and judgment of the court below. We think the language of the supreme court in the case of *Dunlop v. U. S.*, 165 U. S. 498, 17 Sup. Ct. 379, 41 L. Ed. 803, applicable to this cause:

"To this language counsel for defendant excepted. The court held that it was improper, and the district attorney immediately withdrew it. The action of the court was commendable in this particular, and we think this ruling, and the immediate withdrawal of the remark by the district attorney, condoned his error in making it. * * * There is no doubt that, in the heat of the argument, counsel do occasionally make remarks that are not justified by the testimony, and which are or may be prejudicial to the accused. In such cases, however, if the court interfere, and counsel promptly withdraw the remark, the error will generally be deemed to be cured. If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since, in the ardor of advocacy and the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation."

See, also, *Crumpton v. U. S.*, 138 U. S. 361, 11 Sup. Ct. 355, 34 L. Ed. 958.

A careful examination of the record discloses no error prejudicial to the plaintiff in error, and the judgment of the court below will be affirmed.

HARPER & BROS. v. LARE et al.

(Circuit Court of Appeals, Third Circuit. June 1, 1900.)

No. 19.

UNFAIR COMPETITION—BOOKS RELATING TO SAME SUBJECT—SIMILARITY OF TITLES.

Complainant published a book entitled: "Farthest North. Nansen,"—composed chiefly by Dr. Nansen in Norwegian, and translated into English. Afterwards defendants published a work under the name: "The 'Fram' Expedition. Nansen in the Frozen World. Including earlier Arctic Explorations,"—which contained part of the same, or substantially the same, literary matter as complainant's book, relating to the polar voyage of Dr. Nansen, and also a number of similar portraits and illustrations, together with an account of sundry earlier expeditions. It differed from complainant's book, however, so much, in cover, outside title, and title page, that no one of ordinary intelligence could mistake the one for the other. *Held* that, in the absence of proof that defendants had practiced fraud or deception in the sale of their book, complainant was not entitled to an injunction on the ground of unfair competition.¹

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

A. T. Gurlitz, for appellant.

Hector T. Fenton, for appellees.

Before ACHESON and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This is an appeal from the decree of the circuit court for the eastern district of Pennsylvania dismissing the bill of the appellant, complainant below. 93 Fed. 989. The bill charges unfair competition in trade and violation of certain alleged

¹ Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper & Bros.*, 30 C. C. A. 376.

copyrights. The case was before this court several terms ago on an appeal from an interlocutory decree awarding a preliminary injunction. *Lare v. Harper & Bros.*, 30 C. C. A. 373, 86 Fed. 481. On the evidence then submitted the court held that the complainant had failed to sustain its bill on either ground, and accordingly reversed the decree. The case is now before us on plenary proofs. The appellant has on the market for sale a book entitled on its outside cover "Farthest North. Nansen," which consists of an English translation of an account of the recent Norwegian polar expedition conducted by Dr. Fridtjof Nansen, composed by him in the Norwegian language, and of the report of Otto Sverdrup relating to the drifting of the steamer *Fram*, composed by the latter in the Norwegian and translated into the English language. The appellees publish and sell a book entitled on its outside cover "The 'Fram' Expedition. Nansen in the Frozen World. Including earlier Arctic Explorations," containing part of the same or of substantially the same literary matter found in the appellant's book, also portraits and pictorial illustrations similar to those made use of by the appellant, and accounts of sundry arctic expeditions prior to Dr. Nansen's polar voyage. The book of the appellees so differs from that of the appellant in cover, outside title and title page that no one of ordinary intelligence seeing both of them could confound the two. This court when the case was last before it said:

"The complainant was not entitled to a monopoly in the subject of arctic explorations; nor had it an exclusive right to publish and sell books relating to Nansen's polar expedition. That subject was open to the world. Nor had the complainant an exclusive right, as against the defendants, to the use of the words 'The "Fram" Expedition. Nansen in the Frozen World,' or of any of them. There can be little doubt that Nansen's exploits served to kindle popular interest in arctic explorations. In fact the record discloses that they were the proximate cause of the publication by the defendants of their book. But this circumstance does not in the least militate against good faith or fair dealing on their part. It appears that months before Nansen began to write an account of the expedition the defendants had determined to publish a book on that and kindred subjects. Nor does the appearance or title of the defendants' book disclose any intent to indulge in unfair competition with the complainant. Certainly the difference between the two books is obvious to any ordinary customer of such works. * * * There is nothing deceptive in the cover, outside title or title page of the defendants' book. Those titles, taken in conjunction, are fairly descriptive of the subject matter of the volume. They radically differ from the outside title and title page of the complainant's book. Comparing the two works, we are unable to perceive that any ordinary customer of such books possessing common intelligence should, in the absence of actual fraud practiced upon him, mistake the one for the other, without gross carelessness on his part."

If it were true that the appellees had practiced fraud or deception in palming off their book as the book of the appellant an injunction undoubtedly would lie against such unfair and fraudulent conduct, but it would by no means follow that the injunction should be so broad as wholly to suppress the publication and sale of a book which the appellees would have a right to put on the market by fair and proper means. On the evidence, however, we are not satisfied that the appellees have practiced fraud or deception in the sale of their

book. Certainly the prospectus they use in selling their book on subscription and which is exhibited by their canvassing agents is not calculated, in the absence of fraudulent representations, to mislead anyone into the belief that he is subscribing for or purchasing the appellant's book. We think that the charge of unfair competition by the appellees has not been sustained. The remaining point in the case relates to alleged violation by the appellees of rights claimed by the appellant to have been secured to it by copyright. Careful examination of the evidence has satisfied us that this charge is not sustainable. All the text, portraits and pictorial illustrations contained in the appellees' book they had a right, certainly as against the appellant, to use and publish. All of them were obtained from sources to which the appellees resorted without involving the breach of any right of the appellant.

The decree of the Circuit Court is affirmed.

THE PENOBSCOT.

(District Court, E. D. North Carolina. July 7, 1900.)

SALVAGE—AMOUNT OF AWARD.

The Penobscot, a schooner, valued, with her cargo, at \$11,750, was on a shoal at the mouth of the Cape Fear river, where she had been for two hours in a position of imminent danger, the wind and tide driving her further ashore; and the testimony showed that, without assistance, she would undoubtedly have been lost. Her crew had hoisted a signal of distress, and were preparing to abandon her. There was no one near, able to render assistance, except libelant, who was owner and master of a passenger steamer worth \$20,000 or \$25,000, lying at a wharf within sight. Seeing the danger of the schooner and her signal, he landed his passengers and went to her relief, at considerable risk to his vessel and crew, and, after half an hour's work, succeeded in pulling her off the bar, and towed her to Wilmington. *Held*, that the services performed were not of a low order of merit, to be compensated by payment for the actual work done, but that libelant and his crew were entitled to a salvage award of \$2,000.¹

In Admiralty. Suit to recover for salvage services.

Geo. Rountree, for libelant.

Thos. Evans, for respondent.

PURNELL, District Judge. John W. Harper, master and owner of the steamer Wilmington, in behalf of himself and other officers and crew of said steamer files this libel against the schooner Penobscot, her tackle, cargo, etc., claiming \$2,500 salvage. On the 3d day of February, 1900, libelant, with the steamer Wilmington, was lying at the wharf at Ft. Caswell, inside the bar and harbor, near the mouth of the Cape Fear river. The Wilmington is a passenger steamer of 200 horse power, 7 feet draft, carries a crew of 7, and

¹ Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

is worth \$20,000 or \$25,000. Seeing a schooner in or near the breakers, where he knew she ought not to be, from his familiarity with the coast after 25 years' service on this bar, with her flag in the rigging, union down, libellant put his passengers ashore, and went to the rescue of the schooner. The schooner was found to be on a sand shoal, head on, pounding heavily, leaking; flag in the rigging, union down; lifeboat in the water, oars adrift; sails down; some of crew's baggage on deck, and some in the small boat. The vessel was not in the breakers, but the breakers were under her bow. The tide was rising, and at that point the current was west. It was about 8 a. m. when the steamer reached the schooner, and high water about 11 a. m. The channel was to westward of schooner. The wind was blowing the schooner on shore. She was drawing 12 feet of water, and her bow was in about 9 feet of water. Wind was blowing 16 miles, W. S. W., and driving schooner onto shoal. Wind and tide were in the same direction, driving the schooner into shoalier water. Wind modified later, then freshened up again. Soon after the Wilmington reached the schooner the life-saving crew, attracted by the situation and signal in the rigging, came through the breakers and boarded the schooner. Among the life-saving crew, such expressions as, "There is one certainly doomed," "She will leave her bones on the beach," etc., were used. This crew could have saved the crew, but could not have saved the schooner. The schooner was in imminent and immediate peril of being driven ashore and wrecked. The U. S. Sandsucker, a steamer much larger than the Wilmington, was at work on the bar, in sight, but not within speaking distance. This steamer, being of 14-foot draft, could not go to the schooner. She did not attempt to do so, or to render any assistance. No other steamers appear to have been in sight. The schooner having all sails set, except gaff topsails and outer jib, struck, head on, in about 9 feet of water, on sand bar about 6 a. m. Centerboard struck first, and is presumed to have been bent, as no one has been able to raise it since. Sails were immediately lowered, and the flag set in the rigging, union down. There were two bow anchors and a kedge anchor aboard, but no attempt to cast either was made. There was much danger to the Wilmington in going to the schooner, under the circumstances. Any breakage in her machinery, or other accident by which the control of the boat was lost, would have, with the wind and tide as it was, caused her to have been driven into the breakers, beached, and wrecked. There was no contract. When the master of the schooner asked Harper what he would charge to pull her off, Harper replied, in substance, that it was not a matter of charge or contract; that, if he did not pull or get him off, there would be no charge. A line was then passed and made fast to the schooner's hawser, and the hawser hauled aboard the steamer. Taking advantage of the rise of the sea, the schooner was pulled off, after about half an hour's pulling, and afterwards towed up to the city of Wilmington. The schooner, her tackle, cargo, etc., are worth \$11,750.

When witnesses on direct examination testify that the wind was not over 3 miles, as the master does, and on cross examination

that it was 12 miles, which is only one of many such discrepancies appearing in the depositions, their testimony does not inspire much confidence or carry conviction. Not being able to observe their manner on the stand, and other indications to courts and juries of the truth of their version of a controverted fact, the court can only draw its conclusions from the recorded testimony. After hearing the witnesses produced, and carefully examining and sifting the depositions, the court finds the foregoing, and no others, as the true and material facts in the case. Expressions of opinion by witnesses not shown to be experts are disregarded. The schooner's crew testify that there were no breakers on a sand bar at the mouth of Cape Fear river, on a flood tide, and wind 12 or 16 miles, in February. The witnesses examined say that there were breakers under the bow of the schooner. The court believes the latter. All the proof, including the testimony and record of the life-saving crew, required to be kept, sustains this conclusion. The depositions, on their face, are unreliable. The testimony of the witnesses examined carries conviction where there is a conflict. Their manner on the stand impressed the court that they were telling the truth.

The facts show salvage services,—that libelant is entitled to an award. This was not controverted at the hearing. Libelant claims \$2,500. Claimants insist that \$50 would be sufficient compensation. An award of salvage is not intended as mere compensation to the salvors for services rendered, except where the salvage service is of a very low grade or order. The coast of North Carolina is not the safest. In fact, one would subject himself to ridicule who expressed an opinion that it is not a dangerous coast to even a well-informed schoolboy. It would not do to tell it to the marines. The sand bars such as the schooner was aground on are the principal cause of danger, and every seafaring man knows it. The Penobscot was on one of these shoals, where she had been for two hours; wind and tide driving her further ashore; no available assistance at hand or in sight. She was flying a signal of distress. Whatever may be thought might have been done, nothing was done to save her from pounding to pieces. Her crew were helpless to save, evidently preparing to abandon her to her fate; and the life-saving crew, having experience in such matters, freely predicted at the time, and in their testimony afterwards, that she was "doomed to leave her bones on the beach." The schooner was in imminent danger. The libelant, with 25 years' experience on that bar, having only a steamer of light draft (and no other could have reached the schooner in her perilous position), built for passenger service, with her decks and cabins high above the water line, worth twenty or twenty-five thousand dollars, at her wharf inside the harbor, seeing the schooner where she should not have been, and the signal of distress, put his passengers ashore, and, at great peril to himself, his steamer, and his crew, went out through the breakers to the schooner, and pulled her off the sand shoal. This is not salvage service of a low order, but a service which required experience, bravery, and good seamanship. It involved risk of both life and property. It was a service for which a court of admiralty

will make an award, not only of compensation for actual services, but for the danger encountered, and to encourage others to render like services under similar circumstances. Salvage services, rendered at risk to life and property, which result in saving a vessel and cargo from a position of imminent peril, cannot be considered of a low order, to be compensated by payment for actual labor expended. *The Thornly*, 39 C. C. A. 248, 98 Fed. 735. The absence of other assistance is an important element to be considered in determining the amount of a salvage award. *The Boyne* (D. C.) 98 Fed. 444; *The Volage*, Id. On the amount of award for salvage services, the authorities differ to such an extent that it may be said that there is no fixed rule; each case depending largely on the facts and circumstances of the case itself, in the sound judicial discretion of the judge sitting in admiralty,—the award being sometimes below a fair quantum meruit, and more frequently, seemingly, much above, that such services may be encouraged. In *The Lamington*, 30 C. C. A. 271, 86 Fed. 675, and *Duff v. Merritt*, Id., the opinion delivered by Lacombe, Judge, for the circuit court of appeals of the Second circuit, discussing the question, is followed by a long list of cases showing such awards to be frequently 50 per cent. and more, and often much less. Applying the rule, if it can be so designated, taking into consideration the value of the ship and cargo saved, the imminent peril in which both were, the absence of other assistance, the risk of life of steamer's crew, and property of libellant, the experience and seamanship required for the service rendered, in the exercise of a sound discretion \$2,000 is adjudged a proper award; and this amount will be awarded the libellant, to be apportioned in equitable amounts to libellant, as master and owner of the salving steamer, *Wilmington*, and the crew of said steamer, as their interest and services may deserve. A decree will be drawn accordingly. It is so ordered.

DUDLEY v. BOARD OF COM'RS OF LAKE COUNTY.

(Circuit Court of Appeals, Eighth Circuit. May 29, 1900.)

No. 1,398.

CIRCUIT COURT OF APPEALS—JURISDICTION.

The circuit court of appeals is without jurisdiction to review the judgment of a circuit court dismissing a suit on a motion challenging its jurisdiction.

In Error to the Circuit Court of the United States for the District of Colorado.

H. B. Johnson, Daniel E. Parks, and Edmund F. Richardson, for plaintiff in error.

C. Cavender, C. S. Thomas, W. H. Bryant, and H. H. Lee, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. A motion is made to dismiss the writ of error in this case on the ground that this court is without jurisdiction to hear and determine the question it presents. In the court below, the jurisdiction of the circuit court was challenged, and was decided in favor of the defendant. As that disposed of the case, the plaintiff should have had the question of jurisdiction certified, and should have taken a writ of error directly to the supreme court. He had that right, and, as he had the absolute right to a review of this question in the supreme court, he had no right to a review of it in this court. The motion to dismiss the writ is granted upon the authority of *Evans-Snyder-Buel Co. v. McCaskill* (C. C. A.) 101 Fed. 658, and *U. S. v. Jahn*, 155 U. S. 109, 114, 15 Sup. Ct. 39, 39 L. Ed. 87.

ELDRED v. AMERICAN PALACE-CAR CO. OF NEW JERSEY et al.

(Circuit Court, D. New Jersey. June 22, 1900.)

1. CIRCUIT COURT—NONRESIDENT CORPORATION—JURISDICTION—BILL—APPARENT DEFECT—REMEDY.

Where the circuit court is without jurisdiction, owing to the nonresidence in the district of a corporation defendant, and this fact is apparent from the face of the bill, advantage may be taken of the defect by a motion to vacate a decree entered pro confesso.

2. SAME—SERVICE—RESIDENT DIRECTOR—SUFFICIENCY.

Act Cong. 1887, as amended by Act 1888, prohibits suit in the circuit court against any person, except in the district of which he is an inhabitant, and, where jurisdiction is founded on diverse citizenship, requires suits to be brought only in the district of the residence of plaintiff or defendant. Act 1872, § 13, as amended by Act 1875, § 8, provides that when, in a suit to enforce a claim to, or remove a cloud or incumbrance from, real or personal property in the district, a defendant shall not be an inhabitant thereof, the court may make an order directing him to appear and plead. *Held*, in a suit by nonresident complainants, that jurisdiction of a defendant corporation not resident in the district where suit was brought was not acquired by service on its resident director, it not being alleged that the property in controversy was within the district.

See 99 Fed. 168.

Robert H. McCarter and Arthur Lord, for the motion.
Edward Q. Keasbey, opposed.

KIRKPATRICK, District Judge. The complainants, who are citizens of Massachusetts, bring suit against the American Palace-Car Company, a corporation organized under the laws of the state of New Jersey, and other citizens of that state, and seek to join as co-defendant in said suit the American Palace-Car Company, a corporation organized under the laws of the state of Maine. A subpoena was issued out of this court, directed to the defendants resident in the district of New Jersey, and to the said Maine corporation, requiring them to answer complainants' bill. The subpoena was returned by the marshal with this indorsement:

"Served the within writ on the defendant Heyward A. Harvey, the American Palace-Car Company of New Jersey, and the American Palace-Car Company of Maine on the 12th day of June, 1899, at East Orange, in the district of New Jersey, by delivering to and leaving with an adult person at the residence of Heyward A. Harvey three copies thereof, and at the same time showing such person this original, with the seal of the court attached, and informing said person of its contents."

It is alleged in the bill of complaint that Heyward A. Harvey, at whose residence the subpoena for the Maine company was left, is a director in said company. It does not appear by said bill of complaint or otherwise that the American Palace-Car Company of Maine transacts or has ever transacted any of its business in the state of New Jersey, nor that it has authorized any person to represent it in said state. On the contrary, the bill recites that its principal office is in the state of Massachusetts, and that it has an office and agent in the state of Maine, where it is incorporated. No appearance has been entered in the cause by the American Palace-Car Company of Maine in response to said subpoena, and in default thereof a decree pro confesso has been entered against it. The motion now is to set aside the said decree as improvidently entered, because no valid service of subpoena has been made upon the Maine company, and the court is asked to dismiss the bill of complaint as to the Maine company for want of jurisdiction. It is suggested by the complainant that the court ought not at this time and in this way entertain a motion to dismiss for want of jurisdiction, but in the case of *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179, Mr. Justice Field, speaking for the supreme court of the United States, says:

"Where the citizenship of the parties is averred in the bill of complaint, and the consequent defect in the jurisdiction of the court is apparent, a defect of this character thus disclosed may be taken advantage of, without demurrer, on motion, at any stage of the proceedings."

The jurisdiction of the circuit court of the United States is purely statutory. The act of 1887, as amended by the act of 1888, provides that:

"No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that of which he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

These statutes have been many times before the courts for interpretation. In *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768, where the plaintiff resided in Massachusetts, and the defendant was a corporation organized under the laws of Michigan, but doing business through an agent in the state of New York, the court held that:

"Corporations can sue and be sued only in the district where incorporated, or in the state in which the other is a citizen."

And Mr. Justice Field said in *Coal Co. v. Blatchford*, *supra*:

"If there are several plaintiffs each plaintiff must be competent to sue, and if there are several defendants each defendant must be liable to be sued, or the jurisdiction cannot be maintained."

In the recent case of *Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964, the supreme court takes occasion to discuss the whole question of the liability of corporations to be sued in United States courts, and says, speaking by Mr. Justice Gray:

"It is well settled that in a suit against a corporation of one state brought in a court of the United States held within another state, in which the corporation neither does business, nor has any person authorized to represent it, service upon one of its officers or employes found within the state will not support the jurisdiction, notwithstanding that such service is recognized as sufficient by the statutes or judicial decisions of the state."

The learned judge quotes as authority *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Goldey v. News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; and other cases.

It is clear that, under the decisions above referred to, the court, upon the facts set out in the bill, is without jurisdiction to consider this case as against the Maine company; but counsel insists that the action is maintainable against them under section 13 of the act of 1872, amended by section 8 of the act of 1875, which provides that:

"When in any suit brought in any circuit court of the United States to enforce any legal or equitable claim to or remove an encumbrance or lien or cloud upon the title to any real or personal property within the district in which the suit is brought one or more of the defendants shall not be an inhabitant of or found within the district or shall not voluntarily appear, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur by a certain day to be designated."

The object of this section of the act was not in any way to change or modify the law as to jurisdiction, nor abrogate any requirement in relation thereto. The case of *Salt Co. v. Brigel*, 14 C. C. A. 577, 67 Fed. 625, was one for the foreclosure of a mortgage on property located in Kentucky. Some of the defendants were citizens of Ohio, the same state as one of the complainants, and for that reason the circuit court of appeals held that the circuit court was without jurisdiction. The location of the property in Kentucky was not effectual to confer jurisdiction there, when the complainant and some of the defendants were citizens of the same state. It is not alleged in the case at bar that the res sought to be affected by the suit is within this district. The car, Boston, is in Massachusetts; and the patents, in the Southern district of New York; and the title to some of the stock in question still in possession of, and the property of, the complainants. I am of the opinion that the court has not ac-

quired jurisdiction over the American Palace-Car Company of Maine by the service of the subpoena in the manner set forth in the marshal's return, and that the court cannot, on the admitted facts, obtain jurisdiction over the said company in this suit. The decree pro confesso against the American Palace-Car Company of Maine must be vacated, and the bill as to it dismissed, but without costs.

PEOPLE'S TELEPHONE & TELEGRAPH CO. et al. v. EAST TENNESSEE TELEPHONE CO.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1900.

No. 786.

1. INJUNCTION—TRESPASS—EVIDENCE

Evidence that defendant, a competing telephone company, sold to those of its patrons using also the plaintiff's telephone, and assisted them in installing, desk telephones, with switches and wires connecting the lines of both companies in such manner as that with one telephone the user could transmit and receive messages through either system at his pleasure, is sufficient to support the granting of a preliminary injunction restraining defendant from installing or maintaining connection with the property of the plaintiff, although the making and using of the connection by the patrons does not in any way benefit the defendant, except as it sells and furnishes material for such purpose.

2. SAME—PARTIES—APPEAL.

The failure of plaintiff to join the patrons using such desk telephone and switch of defendant is not available as an objection to the granting of an injunction, when raised for the first time on appeal, where there are sufficient parties before the court who are amenable to its decree to enable it to award a substantial remedy.

3. SAME—RIGHT TO OBJECT.

Where the facts pleaded in a bill for an injunction show the defendant to be a trespasser, he cannot be heard to complain that his co-trespassers are not joined as defendants.

4. FEDERAL COURTS—JURISDICTION—CITIZENSHIP—PLEADING.

The description of complainant, in the title of a bill filed by a resident of Tennessee, as "duly incorporated under the laws of the state of Kentucky," is a sufficient allegation of citizenship of complainant to support the jurisdiction of the circuit court of the United States, as against an objection raised for the first time on appeal, although there is no direct averment in the bill that complainant is a citizen of a different state from that of the defendant.

5. SAME—AMOUNT IN CONTROVERSY—PLEADING.

Where, in a bill for an injunction and for damages because of defendant's trespass upon plaintiff's right of property, the sum of \$3,000 is claimed, and although there is reasonable ground for believing that the damages already incurred do not amount to the sum necessary to give the circuit court jurisdiction, yet it seems probable that the value of the right of property sought to be preserved from the anticipated disturbance is worth more than that sum, the bill will not be dismissed upon objection, made for the first time upon appeal, that it is not shown that the value of the matter in controversy is sufficient to give the circuit court jurisdiction.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This case is brought here by an appeal taken by the defendants in the court below from an order there entered granting an injunction upon a bill

filed by the East Tennessee Telephone Company for the purpose of restraining said defendants from making or maintaining connections by means of wires, switches, or other devices with the wires or other property of the complainant. The facts material to the question involved in the controversy are these: About 18 years ago the East Tennessee Telephone Company, a corporation organized under the laws of Kentucky, established in the city of Knoxville, Tenn., and other near-by localities, a telephone system for the use of the patrons it secured there. This system was of the usual kind, operated by wires running to the telephones located in the offices or residences of its patrons respectively. The telephones, wires, and all other apparatus employed for the purpose were and continued to be the property of the East Tennessee Telephone Company. The use of the telephone was granted to the patron, and the service of the company's system secured to him, at a certain fixed rental or rate. Four or five years ago the defendant, the People's Telephone & Telegraph Company was incorporated under the laws of Tennessee for the purpose, among others, of furnishing telephone conveniences to people in the same territory, and this company has become a keen competitor with the East Tennessee Telephone Company for the patronage of the public. Many persons used both systems, and some time before the filing of the bill the appellant began selling and assisting those of its patrons using both telephones in installing desk telephones, with switches and wires connecting the lines of both companies in such manner as that with one telephone the user could transmit and receive messages through either system at his pleasure. The appellee complained of this, but the appellant, claiming the right to do what it was doing, persisted, and indicated its purpose to continue its practice. Thereupon the complainant filed this bill, and moved for an injunction. An order to show cause was made, and the defendants filed an answer and accompanying affidavits in opposition. Upon the hearing Judge Clark granted the preliminary injunction prayed, restraining the defendants from installing or maintaining connection by the defendants with the property of the complainant.

Leon Jourolmon, for appellants.

Walter S. Roberts, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, having stated the case as above, delivered the opinion of the court.

The assignments of error, omitting such as are not specific enough to require attention, are all closely related, and may be considered under a few heads. It is urged that there was error in granting the injunction, because it appears from the record that the defendants had not made the connections complained of, and were not intending to do so. The contention is that it is only the patrons who are making these connections, and that, as the answer puts it, "complainant has sued the wrong persons." But it seems to us that no mistake has been made in this particular. The participation of the defendant telephone company in effecting the connections with the complainant's lines is but thinly veiled in the answer. Referring to the first occasion when a subscriber had discovered the way and had effected the connection, the answer states that:

"When defendants learned of this connection, they made no objection to it, and in fact thought it a convenience that its patrons had a right to enjoy, and one that was a real advantage to the complainant company, as it saved the use of its battery and wall 'phone. As various common patrons of the two companies saw and heard of this convenience, they made application to these defendants for desk sets, with the necessary switch and wire to make said connection, and defendants supplied them with the same; but no agent or em-

play⁶ of the defendants has ever made any connection with any wire or instrument of complainant, defendant Duncan having expressly notified parties applying for desk sets that his employ⁶s would not make connection with complainant's wires or 'phones, but that the applicant would have to make same, if he desired it, on his own responsibility."

And again, in paragraph 5 of the answer, it is said:

"As before stated, no employ⁶ of the defendant company nor defendant J. C. Duncan has ever made any connection with complainant's lines, but defendant J. C. Duncan, as general manager, has leased to the subscribers of the defendant company desk sets, switches, and wires, capable of such a connection, and has had his employ⁶s place said desk sets, switches, and wires for connection with defendant's desk 'phones, and upon inquiry and at the request of subscribers to both companies obtaining desk sets, defendant J. C. Duncan explained the practicability and method of connecting a desk 'phone with the lines of both companies,—information that any ordinary mechanic could give,—but in every instance notified the applicant that neither he nor any of his co-defendant's employ⁶s would make any connection with complainant's lines or 'phones. These things defendants had a legal right to do, and still have such right."

The judge before whom the motion was made had, we think, sufficient evidence before him to justify his conclusion that the defendant telephone company was co-operating in the unlawful invasions of the other company's property rights which were alleged in the bill. And he might not unreasonably conclude his inference was right when he perceived the vigor with which the right claimed was defended. In this connection it is proper to take notice of the suggestion in the assignments of error that the making and using the connection by the patrons "had not in any way benefited the defendants except in so far as they sold and furnished material for such purpose." But, if it were material that the defendant company should be benefited in order to make its conduct unjustifiable, it is easy to see the advantage it would gain by thus bringing its lines and telephones into communication with those of the other company. There is evidence in the record, and it seems quite credible, that the bringing into communication of the two systems in this way injuriously affects the apparatus, and disturbs the operation of the service. It is not necessary to go into a discussion to demonstrate so plain a proposition as that the complainant's rights, as the owner of the lines and apparatus installed and operated by it, were not subject to be invaded in the manner complained of. We have already referred to the objection that the patrons are not made defendants. As it is made a distinct ground of one of the assignments of error that they are necessary parties, it seems proper to refer to the subject more at length. In the first place, there was no demurrer to the bill on that ground, nor was it distinctly taken by the answer. The point is first made on the appeal. The courts are not inclined to favor this defense when it is postponed to the hearing in the appellate court. It will not be listened to if there are sufficient parties before the court who are amenable to its decree to enable the court to award a substantial remedy. *Society v. Watson*, 37 U. S. App. 141, 15 C. C. A. 632, 68 Fed. 730; *Cowen v. Adams*, 24 C. C. A. 198, 78 Fed. 536; *McGahan v. Bank*, 156 U. S. 218, 15 Sup. Ct. 347, 39 L. Ed. 403. Besides, the defendant is, if the facts be as they appear on this motion, a tres-

passer, and has no substantial ground for claiming that co-trespassers should be joined with it. The complainant may, if it sees fit, refrain from pursuing them. It owes no duty to the defendant to do so.

Another ground of defense newly raised in this court is that the complainant wholly fails to show diverse citizenship of the parties, and in support of this contention it is urged that "the allegation that complainant is a nonresident of Tennessee is not equivalent to the allegation that it is a citizen of another state,"—a proposition which might be admitted. And it is true that there is no direct averment in the bill that the complainant is a citizen of another state than Tennessee. But this is not indispensably necessary. If it appears by way of description in any part of the pleadings or process that the requisite diversity of citizenship exists, that is sufficient where the question is first raised on an appeal. *Gordon v. Bank*, 144 U. S. 97, 12 Sup. Ct. 657, 36 L. Ed. 360; *Ward v. Manufacturing Co.*, 12 U. S. App. 295, 5 C. C. A. 538, 56 Fed. 437. And see *Maddox v. Thorn*, 23 U. S. App. 189, 8 C. C. A. 574, 60 Fed. 217. The pleader has entitled the bill in the case, and therein described the complainant as "duly incorporated under the laws of the state of Kentucky," and although this may be regarded as informal, it is substantially equivalent to the not unusual preface wherein it is stated that the plaintiff, a citizen of some named state, brings this his bill against, etc. If the allegation of the citizenship of complainant is not technically in due form, we think it sufficient for this belated objection.

A further new objection, not mentioned in the assignment of errors, is that it is not shown by the bill that the value of the matter in controversy requisite to give jurisdiction is at stake. The bill prays for an injunction, and also for a decree for the damages already incurred, and claims for the latter the sum of \$3,000. No estimate is put or amount claimed for the value of the right the invasion of which is anticipated. We should be disposed to agree with counsel for the appellants that there is no reasonable ground shown for believing that the damages already incurred amount to so much as \$2,000, but it seems to us very probable that the value of the right to preserve the property of the complainant from the anticipated disturbance is more than that sum. If this objection had been taken in the court below, it is reasonable to suppose that court would have allowed an amendment which would have made more certain this ground of jurisdiction. And this would have been permissible. *Carr v. Fife* (C. C.) 45 Fed. 209; *Carr v. Fife*, 156 U. S. 494, 15 Sup. Ct. 427, 39 L. Ed. 508. But the rule applicable at this stage of the progress of the case is that, in order to justify this court in directing the dismissal of the bill, we should be clearly satisfied that the necessary amount is not involved. This change in the attitude of the court towards such questions arises upon the presumption that the necessary facts do, in truth, exist, else their existence would have been promptly challenged, instead of being tacitly assented to, and the objection subsequently presented in a court which has no power to amend the record. In the case of *Insurance Co. v. Nobles* (C. C.) 63 Fed. 641, Judge Dallas, at the circuit, declined to dismiss the

bill on account of the defective statement of the facts in reference to the sum involved, and gave the complainant leave to amend his bill in that regard. A similar question to that now presented came before this court in *Butchers' & Drovers' Stock-Yard Co. v. Louisville & N. R. Co.*, 31 U. S. App. 252, 14 C. C. A. 290, 67 Fed. 35, where the jurisdiction was sustained on appeal, although the allegation of the amount involved was quite as defective as in the present instance, it appearing that the point had not been made in the court below. So, also, in the case of *Edison Electric Light Co. v. Peninsular Light, Power & Heat Co.* (C. C.) 95 Fed. 669; s. c. on appeal (C. C. A.) 101 Fed. 831,—a case very similar to this in respect to the present,—where the user of the current was not made a party in a suit for infringement against an alleged contributor, and no objection on that account had been made in the pleadings or at the hearing. The court regarded it as waived, and proceeded to a decree upon the merits. This decree was subsequently affirmed by this court, a course which would not have been permissible if there was a want of parties indispensable to the jurisdiction. In these circumstances we are of opinion that, in the face of the objections taken before the judge who allowed the injunction, his discretion was fairly exercised, and that the objections to the jurisdiction now raised are not fatal. We shall therefore direct the order appealed from to be affirmed, and that the cause be remanded to the circuit court, with instruction to grant leave to the complainant to amend its bill so as to more certainly allege the jurisdictional facts in respect to the value of the matter in controversy and the citizenship of the complainant. It is so ordered.

LOUISVILLE & N. R. CO. v. McCHORD et al. LOUISVILLE, H. & ST. L.
RY. CO. v. SAME. CHESAPEAKE & O. RY. CO. v. SAME.
SOUTHERN RY. CO. v. SAME.

(Circuit Court, D. Kentucky. July 16, 1900.)

1. CARRIERS—STATE REGULATION OF RATES—VALIDITY OF KENTUCKY STATUTE

The Kentucky act of March 10, 1900, relating to the charging of extortionate rates by railroads, provides that upon complaint to the state railroad commission that any railroad company has charged extortionate rates, or when the commission has reason to believe such rates are being charged, it shall be its duty to hear and determine the matter as speedily as possible, giving notice of the time and place of hearing to the company by mailing a letter to an officer or employé thereof; that the commission shall hear such statements, arguments, and evidence offered by the parties as it shall deem relevant, and may take depositions; that, if the commission shall determine that the company has been guilty of extortion, it shall fix a just and reasonable rate which said company may charge thereafter for like services, which rate shall be entered in its order book, and of which the company shall be given notice; that if the company, its officer, agent, or employé, shall thereafter charge a greater rate than that so fixed, such company, officer, agent, or employé shall be guilty of extortion, and shall be fined as provided in the act, upon prosecution by indictment in the courts of the state, which are given jurisdiction of the offense. Under the constitution and laws of the state, the railroad commission is an administrative body, without

judicial powers, and without power, other than that given in the act, to fix rates. *Held*, that such act is in violation of the constitution of the United States, conceding that it was not intended to apply, as it does by its terms, to interstate as well as to local rates—First, because any order made by the commission thereunder fixing a rate is not uniform in its operation throughout the state, but applies to one company alone, and thus denies to such company the equal protection of the laws; second, because any change in a rate established by a railroad company having been made to depend on a precedent decision that it has been guilty of extortion, and to follow such decision as a penalty, such company is entitled to a judicial determination of that question, and such determination by a nonjudicial body, left to its own discretion as to what shall constitute extortion, and authorized to act merely upon a notice sent by mail to any employé of the company, does not constitute due process of law, nor does the act give the courts, in subsequent criminal proceedings instituted thereunder, any power to review such decision, or to determine whether the rate fixed by the commission is reasonable and just.

2. SAME.

Such act is further invalid as to the Louisville & Nashville Railroad Company, whose charter fixes maximum rates which it may charge, because, without attempting to repeal such charter, it empowers the railroad commission to subject the company to criminal prosecution and heavy punishment for charging the rates therein authorized.

3. SAME.

Such act, in attempting to confer judicial powers on the railroad commission, is also in violation of the constitution of Kentucky (sections 27, 28), which provides that the powers of the government shall be divided into three separate departments,—the legislative, the executive, and the judicial,—and each of them be confined to a separate body of magistracy, and that “no person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others.”

4. FEDERAL COURTS—PRELIMINARY INJUNCTION AGAINST ENFORCEMENT OF STATE STATUTE.

Where a state statute, by methods plainly in violation of the constitution of the United States, authorizes a railroad commission to fix a rate of charge for any single railroad company, and the criminal prosecution and punishment by fine or imprisonment of the company or any of its officers or employés for making a charge in excess of such rate, a federal court may properly grant a preliminary injunction against the enforcement of such statute until its validity has been finally determined.

In Equity. On motions for preliminary injunctions.

Helm, Bruce & Helm and Walker D. Hines, for complainant Louisville & N. R. Co.

Helm, Bruce & Helm, for complainant Louisville, H. & St. L. Ry. Co.
Humphrey, Burnett & Humphrey, for complainant Southern Ry. Co.
Wadsworth & Cochran, for complainant Chesapeake & O. Ry. Co.

R. J. Breckinridge, Atty. Gen., Kohn, Baird & Spindle, and Lewis McQuown, for defendants.

EVANS, District Judge. These actions have for a common object the prevention of the threatened enforcement of an act of the general assembly of this state which became a law on the 10th day of March, 1900, and, if constitutional, became effective 90 days thereafter. Including its title, the act is as follows:

"An act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employes, from charging, collecting or receiving extortionate freight or passenger rates in this commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions.

"Be it enacted by the general assembly of the commonwealth of Kentucky:

"Section 1. When complaint shall be made to the railroad commission, accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employe of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant; and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, tolls or compensation so fixed by the commission shall be entered and be an order on the record book of their office, and signed by the commission, and a copy thereof mailed to an officer, agent or employe of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days' thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employe thereof, charge, collect or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employe, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum of not less than \$500 nor more than \$1,000, and upon a second conviction, in any sum, not less than \$1,000 nor more than \$2,000, and for the third and succeeding convictions, in any sum, not less than \$2,000 nor more than \$5,000.

"Sec. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin circuit court shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of county where such offense may be committed by said officer, agent or employe, shall have jurisdiction in all prosecutions against said officer, agent or employe.

"Sec. 3. Prosecutions under this act shall be by indictment.

"Sec. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

"Sec. 5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the state, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

The complainants severally seek the order of this court enjoining and restraining the defendants, who compose the railroad commission of the state, from carrying into effect any of the provisions of the act, upon the ground that it violates the constitution of the United States—First, in authorizing the commission to fix rates in certain instances upon interstate commerce; second, in authorizing the commission to deprive them of their property without due process of law; third, in authorizing the commission to take from them the equal protection of

the law; fourth, in authorizing the commission to take their property for public use without just compensation; fifth, in authorizing all of these things to be done by a body of executive officers who are not a court, and who are without judicial powers; and, sixth, as to the Louisville & Nashville Railroad Company, by authorizing the defendants to fix rates different from those established by the unrepealable charter provisions of that company, thereby impairing the obligations of its contract with the state of Kentucky.

When the act is closely analyzed, it is found to provide: First, that either when complaint shall be made to the railroad commission accusing any railroad or corporation of charging, collecting, or receiving extortionate freight or passenger rates over its line of railroad in this state, or when that commission shall receive information or have reason to believe that such rates are being charged, collected, or received, it shall be, second, its duty to "hear and determine" the matter as speedily as possible; third, the company complained of shall be given not less than 10 days' notice by letter, mailed to an officer or employé of such company, stating the nature of the complaint or matter to be investigated, and the time and place of hearing it; fourth, the commission shall hear such statements, arguments, or evidence offered by the parties as the commission may deem relevant, and may take the depositions of witnesses; fifth, should the commission determine that the company is or has been guilty of extortion, it shall fix a just and reasonable rate of toll or compensation which said company may charge, collect, or receive for like services thereafter rendered; sixth, the rate so fixed shall be entered in its order book, and a copy mailed to an officer, agent, or employé of the railroad company affected thereby, and after 10 days thereafter shall be in full force until changed by the commission on the record; seventh, should any such railroad, its officer, agent, or employé, thereafter charge, collect, or receive a greater rate of compensation for like services than those thus fixed for it by the commission, such railroad, its agent or employé, shall be guilty of extortion, and shall be fined as provided in the act; and, eighth, of the offense of extortion as thus defined, the various circuit courts of the state shall have jurisdiction by indictment.

The supreme court of the United States in many cases has announced certain fundamental principles which have a more or less direct bearing upon the questions involved in these cases. In *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 458, 14 Sup. Ct. 467, 33 L. Ed. 981, the court used this language:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the constitution of the United States, and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

In *Reagan v. Trust Co.*, 154 U. S. 399, 14 Sup. Ct. 1055, 38 L. Ed. 1024, Mr. Justice Brewer, speaking for the court, said:

"These cases all support the proposition that, while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to devalue the other party of any rights of person or property. In every constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another or for the public. This, as has been often observed, is a government of law, and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held."

In *Railway Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, it was held that, when a state legislature establishes a tariff of railroad rates so unreasonable as to practically destroy the value of the property of the company engaged in the carrying business, courts of the United States may treat it as a judicial question, and hold such legislation to be in conflict with the constitution of the United States, as depriving the company of its property without due process of law, and as depriving it of the equal protection of the law. In the case of *Turnpike Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560, it was held that the courts have the power to inquire whether a body of rates prescribed by a legislature is unjust and unreasonable, and such as to work a practical destruction of rights of property, and, if found so to be, to restrain its operation, because such legislation is not due process of law. In *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, after an elaborate review of all the authorities, the court held, as it had done frequently before, that a railroad corporation is a person, within the meaning of the fourteenth amendment, declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law. In that case the court also held that a state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by a railroad, that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the fourteenth amendment of the constitution of the United States. The court held further that, while rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by

regulations adopted under its authority, that the matter may not become the subject of judicial inquiry. The court also held further that the idea that any legislature, state or federal, can conclusively determine for the people or for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of all our institutions, as the duty rests upon all courts, state or federal, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. And Mr. Justice Harlan, in delivering the opinion of the court in that case, at page 528, 169 U. S., page 427, 18 Sup. Ct., and page 842, 42 L. Ed., said:

"The perpetuity of our institutions, and the liberty which is enjoyed under them, depend in no small degree upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

The courts of the United States have not hesitated, and, in order to preserve to all persons, corporations, and individuals, alike, the guaranties of the constitution against invalid legislation, whether state or national, should not hesitate, to enforce the supreme law of the land. If in these cases the legislature or the railroad commission had established any rate, by or through the act complained of, the reasonableness and justness of that rate would be the legitimate subject of judicial inquiry, under the decisions referred to; but no rates have in fact been fixed, and none are authorized to be fixed, except pursuant to the express provisions of the act itself, nor until the commission has, after trial, "determined" that the railroad company has been "guilty of extortion." It will be observed that there is no general power delegated to the commission to fix rates, nor does the statute creating the commission give it any such right. Its sole authority in the premises is stated in the act above set forth, and must be based upon its conviction of the railroad of extortion. It cannot move until what we may call this jurisdictional fact has been ascertained to exist; and then, having proceeded to determine that the railroad has been guilty of extortion, although it has been furnished with no unmistakable statutory standard as to what is to be held to be extortion, it lowers the rate of that road for that particular service. Its own opinion—its own judgment—is the sole guide upon both questions. If the law only conferred on the commission power to fix a schedule of rates for all railroads in the state generally, it would be the duty of the court to await its action in that regard, and then permit those rates, if called in question, to stand or fall as they might, in the court's judgment, be just and reasonable, or the reverse. It might be conceded that, in case a railroad commission was given general power to establish a schedule of rates, a failure on the part of a carrier to conform to those rates when established might be made punishable. *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1055, 38 L. Ed. 1024. But this does not yet reach the cases before us. Here the power given is to be exercised only where the commission has "determined" that the railroad company has been "guilty of extortion" in a given instance or in-

stances complained of, and then apparently only by way of punishment therefor, or as an occasion for laying a foundation for other punishment, although the legislature has established no definite test (unless in the Louisville & Nashville Railroad case) of what is an extortionate rate, and no positive guidance in the case of any of the complainants, unless it be that company whose charges are fixed at the maximum rates stated in its bill. It is frankly and altogether properly conceded upon all hands that the railroad commission is not constitutionally a judicial body, and cannot, under the constitution or laws of Kentucky, rightly exercise judicial functions. Section 27 of the present constitution of the state provides that the powers of the government shall be divided into three separate departments, and each of them be confined to a separate body of magistracy, namely, the legislative, the executive, and the judicial; and section 28 provides that no person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others. Under section 109 to 144, inclusive, the judicial department of the state government is established, and no judicial tribunals except those named therein can lawfully be established in Kentucky. A railroad commission is not one of these. The supreme court of the United States in many cases holds that a railroad commission is a mere administrative body, and part only of the executive department of the government. Our analysis of the act in question, however, has clearly shown that the whole apparent purpose of the act was to give the commission the judicial power, or at least the quasi judicial power, to "hear and determine" whether a railroad has been "guilty of extortion," and as a result to lower the freight rate of that railroad for similar services. The commission could act only upon complaint made to it, unless in the presumably rare instances when information should otherwise come to it. The complaint must show what is loosely called a charging of an "extortionate" freight rate. The company complained of must be notified. This, it is true, must be given, not personally, but only through the mails; and the notice may be sent to a mere employé, who may be the most insignificant laborer, and one who cares nothing for the interests of his employer. But there must be, at the least, this sort of notice through the mails. At the hearing of the complaint, evidence which the commission may adjudge to be "relevant" may be heard. Arguments may be submitted, and depositions may be taken and read. When the commission has "determined" that the company is "guilty of extortion," it shall then fix the rate thereafter to be charged in similar cases by that company only, and not by carriers generally. This shall be entered upon the records of the commission. Afterwards, if the company thus found "guilty of extortion" shall in a like case charge or collect a rate greater than the one thus fixed, or if any of its employés shall do so, it shall be guilty of the crime of extortion. These matters all bear the marks of a judicial proceeding, and the fixing of a lower rate has all the appearance of inflicting that much punishment upon the party found "guilty of extortion" by this nonjudicial body. But the act goes further, and provides that if, after the rate is thus fixed,—after this possible punishment is thus inflicted,—that company charges

a higher rate for similar services, however reasonable it in fact might be in the judgment of a court, the real judicial tribunals of the state are then given the power to punish it or its employes therefor, though the power is apparently withheld from those courts of judicially inquiring whether the rate thus fixed under these circumstances by the commission was just or reasonable, or whether in the case of the Louisville & Nashville Company it exceeded the rate it is expressly authorized to charge by its charter.

It will be seen, too, that the act might literally apply equally and indiscriminately to domestic and to interstate traffic alike, although as to the latter it cannot be pretended that the legislature could give the commission any power whatever. That the commission cannot, upon any complaint or information, lawfully base any action upon charges of freight rates upon interstate commerce, is too clear for argument; but as that may be true, and the commission still has power to fix rates upon local freight, the question yet remains as to the respective rights of the complainants and the commission in respect to domestic commerce. In a line of cases like *Baldwin v. Franks*, 120 U. S. 686, 7 Sup. Ct. 656, 763, 32 L. Ed. 766, the rule is established that where the language of a statute is so broad as to cover cases which are beyond the constitutional limits of legislative power, as well as those which are not, the courts will not attempt to separate them, but will hold the entire statute to be void, and it is insisted that this principle should be applied at this point to these cases. It is, however, conceived that, while the rule must apply to congressional enactments, there may be a difference where state laws are involved where there is a degree of necessity for confining the language used to state concerns,—the presumption being that the legislature, even by the use of language apparently the most general, does not intend to exceed its jurisdiction (End. Interp. St. § 169); but, without deciding the point, and assuming, as is probably fair, that the legislature only meant the act in question to refer to changes of freight rates on local commerce, it still seems to the court that it is subject to several objections which cannot be overcome:

First. If one railroad should be convicted by the commission of having been "guilty of extortion," and if a lower rate should consequently be fixed by it, such rate is prescribed for the guilty railroad alone, and for none of the others. The effect of the determination that the railroad has been guilty of extortion is individual. This being so, the others are still at liberty to charge, as proper, a rate which, if charged by the one thus convicted, would be deemed extortion; thus not merely inflicting a single penalty for a single offense, but placing the guilty railroad at the disadvantage of having a lower rate than its rivals, and depriving it of the equal protection of the laws. It cannot be just, it cannot be an equality of right or of protection, for an act to be unlawful if done by one railroad in Kentucky, and perfectly lawful if done by another railroad in the same state.

Second. The investigation of a complaint, and the decision thereon by the commission that the railroad complained of is "guilty of extortion," being the only way to put the act in motion, the railroad is entitled to first have a judicial determination of the question of its

guilt, before the rate can be lowered as a penalty for the act charged to have been committed. The commission cannot judicially, nor by due process of law, determine the one question upon which its right to fix a lower rate must depend. This is emphasized by the absence of any precise statutory standard by which the commission is to be guided as to what is an extortionate charge. The railroads have the inherent right to charge and collect a just and reasonable rate. Nothing short of a judicial proceeding conforming to due process of law, which not only includes due notice to the company interested, but a tribunal legally competent to act, can find a railroad guilty of extortion, as a basis for imposing the arbitrary penalty of lowering their customary rates, and as furnishing a stepping stone to ulterior penalties of great severity, which it is the obvious purpose of the act to have inflicted. The legislature may delegate to a commission power to establish rates generally, but not the power to try an individual railroad for an offense, and lower its rates, alone, as the penalty of such conviction.

Third. The most prominent feature of this legislation is the manifest purpose, if possible, to regulate rates by severe punishments for single offenses, rather than by means of real attempts to solve the immense problem of fair and reasonable freight and passenger charges, by industrious and earnest efforts to ascertain what they should be. But, even if the spirit of the statute be extreme and harsh, rather than moderate and fair, this would be unavailing to the complainants, if the provisions of the act had been kept within constitutional bounds. As already indicated, the act does not fix nor attempt to fix, nor require the fixing of, rates equally and generally for all. It aims alone at single instances, and, as a condition precedent to the right of the commission to make any change in any existing rate, it requires that the commission shall find the railroad guilty of extortion, without defining in any precise sense what that is. Of the hearing upon the charge before the nonjudicial administrative body, a species of notice and an opportunity to be heard as to the reasonableness and justness of the rates is given. But all that is thus done is preliminary to having a justification for the further step, if the railroad charges an excess rate over that thus fixed, of having it convicted of another and further extortion, without any provision in the act that the judicial tribunal which shall try the accused for that offense may investigate and decide whether the rate fixed in this extraordinary preliminary proceeding before the administrative body was reasonable or just. No opportunity for such an investigation is afforded by the statute when the courts are given jurisdiction of the cases, and it is by no means certain that those courts would feel constrained to give the relief in the absence of an express statutory requirement. These considerations, therefore, seem to bring this case within the principle first above quoted from the opinion of the supreme court in the Minnesota case. If it had been the intention of the legislature to recognize the right to a judicial investigation of the reasonableness of the rates fixed under the provisions of the act, and to afford an opportunity therefor before a conviction upon an indictment for extortion, it would have said so in unmistakable terms, in order that

the accused might not be left to the doubtful chances of mere construction, not only as to the existence of that right, but as to the competency of a criminal court in a criminal case, without a commissioner or adequate equipment to enforce it. It is indeed manifest from the entire scope and plan of the enactment, and its operation upon mere isolated cases only, that it was the purpose to exclude all inquiry upon that subject after the commission had acted, and to enforce by rigorous and extravagant penalties the rates thus fixed, however reasonably and earnestly the railroad might desire to promptly have the question of the justness of those rates finally determined by a judicial inquiry. Upon the principles so often and so emphatically announced by the supreme court, this purpose thus plainly written in the legislation must be fatal to its validity. It is fair to say generally that a railroad should take the penal consequences of charging unlawful rates, but until the customary rates fixed by itself are lawfully and constitutionally changed by the state, or through its agencies, the carrier should not be punished for collecting its own. It may illustrate the subject to inquire whether punishments ought to await a final determination of what are just and reasonable rates, or whether their infliction should begin at once, with the possibility or probability of being entirely unconstitutional. Justice obviously dictates the former course, particularly as the latter might turn out to be utter spoliation. Viewing the act as a whole, and considering the only modes by which it can be put into operation, the court is of opinion that those modes are not due process of law, and that its enforcement would deprive the railroad company of the constitutional guaranty of its rights secured by the fourteenth amendment.

Fourth. And it may be that the principles announced by the court of appeals in *Louisville & N. R. Co. v. Com.*, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, by which section 816 of the Kentucky Statutes, which made it an offense for a carrier to charge more than a "just and reasonable rate," was held to be void for uncertainty, would apply in this connection, particularly as the act before us is supposed to attempt to supply what that decision held to be lacking. It seems to the court that, viewed in the light of the suggestions already made, the act in question is quite subject to some of the criticisms made upon section 816.

Fifth. As applying especially to the Louisville & Nashville Railroad Company, the court is further of opinion that the act cannot be maintained, because, without attempting directly, and probably not at all, to repeal the provision of the charter of that company as to maximum rates, it still leaves it within the power of the commission to make it a crime for that railroad to charge the rates which its charter expressly authorizes. Again, it is not to be inferred that, even if the charter of this company can be amended, it was done by implication by the act before us. And still again, as the charter of that company was passed before 1856, when the general law was first enacted, reserving to the state the power thereafter to amend all charters of corporations, it probably cannot be changed at all without its consent, which it is not pretended has been given. But, whether so or not, it can only be done, if at all, by language which

is plain and unmistakable, and not merely by so doubtful an implication as is presented here.

Sixth. As to the case of the Chesapeake & Ohio Company: This court has jurisdiction of that action, also, by reason of the diverse citizenship of the parties to it, and, in the absence of any construction of the act by the court of appeals of Kentucky, must construe it for itself; and the court is of the opinion that the act violates the constitution of the state, in attempting to confer upon the commission what are judicial powers and functions, to wit, the power, after complaint and notice given, to "hear and determine" that the railroad has been "guilty of extortion," and, as a consequence, after that finding, to further decide that the freight rate of that road for similar services shall be a lower figure. These steps, as they apply only to individual instances, and are not a method of fixing rates generally, constitute the very essence of a judicial proceeding and judgment. Indeed, this ground of relief may possibly broaden out so as, per se, to aid all the others.

The court is always reluctant to interfere with the exercise by any state officer of his official functions, but, in the most eminent degree, the safety of the property and the rights of the citizens of the community depend upon the supremacy of the constitution. The value of these safeguards is not diminished because individuals associate as a body corporate. They are citizens, none the less, and the court must not shrink in clear cases from discharging its plain duty to uphold the dominant authority. If, as before intimated, the act in question only empowered the commission to fix rates generally, and for all alike, which would be a mere administrative work, the court would not interfere until that power had been exercised, and the propriety of the result called in question; but here not only may a rate in a single instance be fixed by a process plainly unconstitutional, but the most serious, not to say excessive, punitive consequences may be visited, not only upon the railroad, but also upon the individual citizen whom it may employ. If any citizen or employé were in the meantime fined and imprisoned for nonpayment of the fines, he might be quite beyond adequate remedy, even if thereafter the question as to this legislation should be judicially and finally determined in accordance with the views we have expressed. Who, for example, is to compensate him for the confinement in jail? Pending this litigation the fining and imprisonment may go on by means of judicial processes entirely beyond the reach of this court if an injunction pendente lite is, at the threshold, refused. This court cannot, except in bankruptcy matters, enjoin a proceeding in a state court. While in a criminal case under the act it might by careful practice be possible to get to the supreme court of the United States, the effort would be most tedious and expensive, and there might be a great multiplicity of cases growing out of numerous separate changes of rates. It seems, therefore, better, pending a final adjudication of these most important questions, to prevent the possibility of irreparable injury to any one by an adequate order. An injunction pendente lite is granted in each case.

LAKE SHORE & M. S. RY. CO. et al. v. FELTON.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1900.)

No. 766.

1. RECEIVERS—REMEDIES—PROCEEDING BY PETITION.

A proceeding by a receiver to enjoin another from interfering with his possession of property may properly be by petition in the suit in which he was appointed, although the proposed defendant is not a party to such suit, where his rights can be as fully protected in such proceeding as in a separate suit, which is a matter to be determined by the court in the exercise of its discretion.

2. INJUNCTION—PRELIMINARY ORDER—REVIEW ON APPEAL.

An order granting a preliminary injunction will not be reversed on appeal because unwarranted by the facts shown, unless the error is clear.

3. SAME—GROUNDS—CONTINUED TRESPASSES.

Equity has jurisdiction to grant relief by injunction against the constant and unauthorized use by one railroad company of the tracks of another, as affording the only adequate remedy.

4. SAME—HEARING ON PRELIMINARY MOTION—PLEADINGS AS EVIDENCE.

An answer verified by the attorney for a defendant on information and belief only is insufficient as proof of the facts alleged for the purposes of a motion for a preliminary injunction.

5. EVIDENCE—BURDEN OF PROOF.

Where the answer of the defendant admits the facts constituting the plaintiff's prima facie case, and then sets up matter in justification by way of defense, the burden of proof of such matter rests upon the former.

Appeal from the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

On the 7th day of July, 1899, there was pending in the circuit court for the Southern district of Ohio, in the Eastern division thereof, a suit in equity, wherein the Metropolitan Trust Company was complainant, and the Columbus, Sandusky & Hocking Railroad Company was defendant, of which latter company Samuel M. Felton had prior to the above-mentioned date been appointed receiver, and was at the said date acting as such. On the day above mentioned the said Felton, as receiver, filed an intervening petition in that suit against the Lake Shore & Michigan Southern Railway Company and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the grounds and objects of which are shown by a copy of the said petition, here set forth (omitting title of the court and cause):

"To the Judges of the Circuit Court of the United States for the Southern District of Ohio, Eastern Division: Your petitioner, S. M. Felton, receiver, shows to the court: Among the property in his possession as such receiver by virtue of his appointment by this court in this case on June 1, 1897, is the railroad track on Railroad street, in the city of Sandusky, Ohio, which extends from the easterly to the westerly ends of said street, the undivided half interest in which your petitioner acquired by deed executed to him by the Baltimore & Ohio Railroad Company, and the receivers of said company, pursuant to the order of this court in that behalf entered in the case of the Mercantile Trust Co. v. Baltimore & Ohio Railroad Company (No. 757) on April 22, 1898. That said Lake Shore & Michigan Southern Railway Company and said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, without any lawful right, and notwithstanding your petitioner's repeated protests to them, now are, and for some time past have been, using said track, running their engines and cars thereon and thereover. That said companies get access to said track with their engines and cars over a connection therewith which it is necessary for your petitioner to use, so that your petitioner cannot forcibly prevent their said unlawful use of said track without danger to life and property. Your petitioner therefore prays that said companies be required to show cause why

they should not be committed for contempt for entering upon and using said property and operating their engines and cars thereover, and that meantime they may be enjoined therefrom, and that your petitioner may have such order and relief as may be proper.

S. M. Felton.

"State of Ohio, Hamilton County—ss.: S. M. Felton, being first duly sworn, says that he believes the allegations of his foregoing petition to be true. Sworn to before me, and subscribed in my presence, this 5th day of July, 1899.

"[Seal.]

S. E. Hibbard, Notary Public,
"Hamilton County, Ohio."

The respondents therein mentioned were not parties to the original suit, but they appeared and answered the petition. Their answers were separate, but were identical. A copy thereof (omitting title of the court and cause, except the name of the answering company in the several answers) is as follows:

"The Lake Shore & Michigan Southern Railway Company, for answer to the petition of S. M. Felton, receiver herein, admits the acquirement by said receiver of an undivided one-half interest in the track named in the petition, as averred therein, and that it has been, and still is, using said track. But this defendant avers that it is making such use under and by virtue of an agreement made by it with the Baltimore & Ohio Railroad Company before such acquisition by said receiver of an interest therein, and while said Baltimore & Ohio Railroad Company was the sole owner thereof, with full power to make such agreement. By said agreement said Baltimore & Ohio Railroad Company pays to this defendant \$600 per annum for the use of this defendant's track in Railroad street, in the city of Sandusky, Ohio, parallel with the track in the petition described; and this defendant pays to said Baltimore & Ohio Railroad Company fifty cents per car, loaded or empty, for all of its cars which use said track in the petition described, one-half of which trackage charge this defendant is advised and believes, and so avers, said Baltimore & Ohio Railroad Company has paid to said receiver since his acquirement of an interest in the track in the petition described. This defendant denies that its use of said track is improper or unlawful, and prays that its interests may be protected."

This answer was sworn to by one of the solicitors for the defendant. The jurat states that he says that he "is the attorney of the above-named defendant, and that all and singular the statements of the foregoing answer are true, as he verily believes."

Subsequently, the court deeming it necessary that the Baltimore & Ohio Railroad Company should be made a party to the proceeding, leave to the receiver was given for that purpose. The last-named company appeared, and adopted the answer which the other two companies had filed. Replication to these answers was duly filed. Thereupon a motion for a preliminary injunction, based upon the showing made by the pleadings, was brought on for hearing. The court, being of opinion that sufficient ground for an injunction was shown, granted an order whereby the defendants were enjoined from entering upon or using said track unless certain privileges on their own tracks should be accorded by the defendants to the petitioner. For the present purpose, it is not necessary to state the privileges mentioned in the proviso, as they are not material to the decision. From this order the several defendants to the intervening petition have appealed, and they assign the following grounds for error: "First, because, upon the face of the intervening petition of S. M. Felton, receiver, filed herein against this defendant, it appeared that the said S. M. Felton was not entitled to relief by injunction; second, because, upon the face of the said record and proceedings, it appeared that S. M. Felton was not entitled to relief by injunction, preliminary or final; third, because no case was made upon the same record or proceedings for a preliminary injunction."

Harmon, Colston, Goldsmith & Hoadly, for appellants.

Lawrence Maxwell, Jr., for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, after having stated the case, delivered the opinion of the court.

In the brief and argument for the appellants it is urged that their rights cannot properly be litigated upon a mere petition filed by the receiver in a suit to which they are not parties, and that they are entitled to the advantage of making their defense in a formal suit upon an independent bill. When the proceeding is taken by a receiver appointed in a suit to which the proposed defendant is a stranger, the question whether it should be by bill or petition is one resting to a certain extent in the discretion of the court, having regard to the particular circumstances. A leading purpose in determining it will always be to afford the defendant full opportunity to assert and obtain the benefit of his defense. Where, as here, the property concerned is already in the possession of the court, and the act complained of is a disturbance of that possession, it is not unusual to allow the receiver to proceed by petition, giving the defendant the opportunity of making defense by answer or other pleading, according to the common course of equity practice. This was the practice sanctioned in *Ex parte Chamberlain* (C. C.) 55 Fed. 704, where the proceeding was taken to prevent the disturbance of the receiver in the possession held by him under the order of the court of certain property upon which the respondent was undertaking to make a tax levy, and *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689, where the respondent, under claim of right, founded upon a state statute, attempted to seize property in the hands of a receiver appointed by the federal circuit court. And see, also, High, Rec. § 777; Beach, Rec. (1st Ed.) § 739. We see no reason for thinking that in the present case any right of appellants could have been compromised by the complaint being preferred by a petition rather than by a bill. They have filed an answer in which they set up the only defense which they claim exists, and the common replication has been filed. It remains to produce the proof, and thereupon a final order or decree can be made upon the merits. If there was any reason why their rights could not be fully protected in the proceeding which was instituted, the objection should have been made in the court below. Instead of that, they were content to answer on the merits, submitting to the judgment of the court, without making any suggestion of difficulty or embarrassment. Nor do they raise such a question by the assignments of error, all of which relate solely to the supposed error of the court in holding that upon the facts shown an injunction should issue. We think that, if the particular mode of obtaining the remedy was mistaken, the defendants have waived the error.

2. Then it is said that there was nothing in the petition which showed that there was any reason for apprehending such immediate and special injury as would justify a preliminary injunction. But the petition stated that the defendants, without any right whatever, were running their engines and cars over the track occupied by the receiver in carrying on his railroad business, and "that said companies get access to said track with their engines and cars over a connection therewith which it is necessary for your petitioner to use, so that your petitioner cannot forcibly prevent their said unlawful use of said track without danger to life and property." It must

be admitted that the allegation is not so specifically directed to the probability of danger in the running of engines and cars over the track by the defendants as it might have been. But the court was bound to take notice of the mode in which railway business is ordinarily conducted, and hence of the danger to life and property in the continued trespassing by another company with their engines and cars upon the track, which was in daily and probably hourly use of the receiver. Certainly we cannot say that the conclusion of the lower court in that regard was so unwarranted as to justify us in reversing its order. In order to reach that result upon a mere question of fact, the error must be very clear. *Thompson v. Nelson*, 37 U. S. App. 478, 18 C. C. A. 137, 71 Fed. 339; *Proctor & Gamble Co. v. Globe Refining Co.*, 34 C. C. A. 405, 92 Fed. 357.

3. The case stated was one within the equitable jurisdiction of the court. The trespasses complained of were of frequent repetition, and would, if continued, give ground for a great multiplicity of suits. Relief in equity by injunction was the only adequate remedy, and it was not necessary to await a trial and judgment at law. *Chessman v. Shreve* (C. C.) 37 Fed. 36; *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; *Coatsworth v. Railroad Co.*, 156 N. Y. 451, 51 N. E. 301; *Musselman v. Marquis*, 1 Bush, 463.

4. The answer of the defendants admitted that the receiver had acquired from the Baltimore & Ohio Railroad Company the interest in the track which he claimed in his petition to have. But it averred that the defendants had themselves acquired the right to make use of the track complained of by the receiver (the particulars of which are set forth) from the said Baltimore & Ohio Railroad Company prior to the date of the acquisition by the receiver of the right on which he relies. It is insisted for the defendants (and perhaps rightly), that, if the fact is as thus averred, the receiver had no ground on which to support his petition. But the difficulty is that, while this may be good as matter of pleading, the answer is not sworn to by any one who professes to have knowledge of the fact pleaded. The answer, for the purposes of the motion for preliminary injunction, may serve as an affidavit, and has only the same effect. The verification of the answer was by one of the solicitors, who made oath that "the statements of the foregoing answer are true, as he verily believes." There is no showing, however, that he had made such investigation of the facts as would enable him to speak with assurance, and his qualified statement rather implies that he had not, and there is no extrinsic showing of the contract. It seems to be settled that such a verification of the answer or of an affidavit is insufficient proof upon the hearing of a motion, either for an injunction, or to dissolve one already granted. *Barb. Ch. Prac.* 156; 2 *High, Inj.* 1514, and the cases there cited; *Campbell v. Morrison*, 7 *Paige*, 157; *Miller v. McDougall*, 44 *Miss.* 682; *Spalding v. Keely*, 7 *Sim.* 377. It is true, there is the same infirmity in the receiver's verification of his petition. But the answer admitted the receiver's *prima facie* case, and it then set up, by way of justification, the defendants' prior right. The burden of proof of this matter thus set up was upon the defendants. *Gresley, Eq. Ev.* (2d Am. Ed.) 16, 468; *Hart v. Ten*

Eyck, 2 Johns. Ch. 62; McCoy v. Rhodes, 11 How. 131, 13 L. Ed. 634; Reid v. McCallister (C. C.) 49 Fed. 16; Jennison, Ch. Prac. 84. The defendants failed to support this burden by any proof sufficient in law. The result is that we find no sufficient reason for disturbing the order of which the appellants complain, and it is accordingly affirmed.

ONTARIO BANK OF TORONTO, CANADA, v. HURST et al.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1900.)

No. 769.

1. FRAUDULENT CONVEYANCES—PREFERENCES BY DEBTOR.

As a general rule, a debtor has a right to secure a bona fide creditor, and, although such action may serve to prefer one creditor over another, such preferences are not regarded as fraudulent.

2. SAME—CONSTRUCTION OF CONVEYANCE—ASSIGNMENT OR MORTGAGE UNDER MICHIGAN STATUTE.

The Michigan statute (How. Ann. St. § 8739) providing that common-law assignments for the benefit of creditors shall be void unless the same shall be without preferences as between such creditors, and shall be of all the property of the assignor not exempt from execution, as construed by the supreme court of the state, does not render void a conveyance of property, either personal or real, in trust to secure bona fide creditors, with power in the trustee to sell the property and pay the debts, with interest, although it provides that certain creditors shall be first paid from the proceeds, and contains no defeasance clause, where it further provides that any surplus shall be returned to the debtor, so that it is in legal effect merely a mortgage, or an instrument creating a trust to sell lands for the benefit of creditors, which does not withdraw the debtor's equity of redemption in the property from the reach of his other creditors, and under which he or they could compel a reconveyance on payment of the debts secured.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

James T. Hurst, a resident of Wayne county, Mich., had conducted a large lumber business for some years preceding the transaction hereinafter recited, extending over the states of Minnesota and Michigan and the dominion of Canada. Being largely indebted, and security having been demanded of him, on the 22d day of July, 1896, Mr. Hurst, joined by his wife, executed and delivered to Harrison Geer, Joseph Turner, and Hezekiah M. Gillett, trustees, a certain instrument, to wit:

"This indenture, made this 22d day of July, A. D. 1896, by and between James T. Hurst and Mary A. Hurst, his wife, of Wyandotte, Wayne county, Mich., parties of the first part, and Harrison Geer, of Detroit, Joseph Turner and Hezekiah M. Gillett, both of Bay City, Mich., together trustees in trust for the uses and purposes hereinafter stated, parties of the second part, witnesseth, that whereas, the said James T. Hurst is obligated and indebted to the following persons, firms, and corporations, either directly or contingently by way of indorsements, as maker or otherwise, in the amounts set opposite their names, respectively, viz.:

Nelson Holland, of Buffalo, N. Y.....	\$118,000
Joseph Turner and Spencer O. Fisher, co-partners as Turner & Fisher.....	264,000
S. O. Fisher.....	50,000
Saginaw Bay Towing Association, a co-partnership.....	26,000
Benjamin Boutell.....	22,500
Hezekiah M. Gillett, of Bay City.....	3,000

Henry M. Campbell, of Detroit.....	13,000
A. L. Nowlin.....	10,000
Delta Lumber Company.....	7,500

—And whereas, the said Hurst desires to pay the said creditors from the property hereinafter described, as far as practicable, or as far as necessary, in the following order, viz.: First. Nelson Holland's claim shall be paid out of the first proceeds derived from said assets, together with interest at 6 per cent. per annum. Second. All the remainder of said creditors shall be paid from the proceeds thereafter derived from said assets pro rata until all of said claims are fully paid, including interest thereon at 6 per cent. per annum: Now, therefore, in consideration of the premises and one dollar to them in hand paid, the said parties of the first part have conveyed, granted, bargained, sold, remised, released, aliened, and confirmed, and by these presents do convey, bargain, sell, remise, release, alien, and confirm, unto the said parties of the second part, to them and their successors and assigns, all the property hereinafter named, in trust, nevertheless, for the following uses and purposes, viz.: (1) To assume possession thereof, to manage and rent, and out of the rents and proceeds of sale to pay taxes, insurance, liens, and incumbrances, if any, and their reasonable expenses. (2) To sell and convey said property, or any part or interest therein, and to make, execute, and deliver deeds of conveyance thereof, at such prices and upon such terms and conditions as they shall deem best. (3) From the proceeds of rents and sales of said property, after the payment of accrued taxes, insurance, and expenses, to first pay the said claim of Nelson Holland, with interest, and from the remainder of such proceeds, as the same shall come to their hands, to pay the balance of said claims pro rata. (4) The surplus, if any, shall be paid to said James T. Hurst, or to such person or persons as he shall direct. The properties conveyed by this instrument are described as follows: All those certain pieces or parcels of land, with the appurtenances thereon, situated, lying, and being in Wayne county, state of Michigan, to wit." (Description of property follows, duly signed and acknowledged.)

At the same time, and in consideration of the foregoing conveyance, said Holland, whose debts were first secured, by his attorney, executed a writing for the benefit of said Hurst, which is as follows:

"In consideration that James T. Hurst has, concurrently with the date hereof, conveyed certain lands in Wayne county, state of Michigan, to Harrison Geer, Joseph Turner, and Hezekiah M. Gillett, as trustees, to first secure Nelson Holland to the extent and amount of one hundred and eighteen thousand dollars (\$118,000), which is in addition to other collateral held and to be retained by said Nelson Holland, the said Nelson Holland agrees to pay and take up fifty-five thousand dollars (\$55,000) of notes, which, although made by Holland, are for Hurst to pay. And the said Holland further agrees that he will procure the Holland & Emery Lumber Company to assume and agree to pay certain other notes amounting to two hundred and thirty-nine thousand and five hundred dollars (\$239,500) upon which, in fact, the said Hurst is primarily liable (a description of all of which notes, aggregating two hundred and ninety-four thousand and five hundred dollars [\$294,500] is hereto attached); and also to procure said company to discharge and satisfy a claim appearing upon the books of said company against said Hurst of about nine thousand dollars (\$9,000), and to cancel and to surrender to said Hurst his note, upon which there was a balance due to said company on July 14, 1895, of fifty-eight thousand eight hundred and ninety-two dollars and thirty-six cents (\$58,892.36). And the said Holland agrees to procure the said Holland & Emery Lumber Company to assume and agree to pay certain other notes amounting to seventy-five thousand dollars (\$75,000), which said last-mentioned notes were made by said company by Remple Emery, president, or by said Hurst, as vice president, but for the accommodation of said Hurst, a statement of which is hereto attached. As additional consideration moving from said Hurst, he has sold and conveyed unto said company whatever title and interest he has in any of the stock of said company.

"Nelson Holland,

"Per H. Geer, His Atty."

On the same day the trustees Geer and Gillett executed an acceptance of the trust in the following language:

"Mr. James T. Hurst—Dear Sir: You having of the date hereof executed and delivered to us a deed of a large amount of land in the county of Wayne, state of Michigan, in trust to secure indebtedness enumerated therein, as follows, to wit:

Nelson Holland.....	\$118,000
Joseph Turner and Spencer O. Fisher, co-partners as Turner & Fisher.....	264,000
S. O. Fisher.....	50,000
Saginaw Bay Towing Association, a co-partnership.....	26,000
Benjamin Boutell.....	22,500
Hezekiah M. Gillett, of Bay City.....	3,000
Henry M. Campbell, of Detroit.....	13,000
A. L. Nowlin.....	10,000
Delta Lumber Company.....	7,500

—The condition of the trust being that we shall assume possession of the property, manage, rent, sell, and convey the same, using the income from the property and the proceeds of sales for the purposes of paying—First, taxes, insurance, expenses of the trust; and, secondly, to pay the claim of Nelson Holland, with interest; and out of the remainder, if any, to pay the balance of the claims above enumerated,—we hereby accept said trust, and jointly and severally undertake to faithfully execute the same in accordance with the letter and spirit of said conveyance to us.

"Harrison Geer.

"Hezekiah M. Gillett."

) Complainant brought an attachment suit in the circuit court of Wayne county, Mich., on the 28th day of July, 1896, on a note given by Hurst, and obtained a judgment on March 9, 1897, against said Hurst for \$79,687.38 and costs, upon which execution was issued, and levied upon the attached property, being the property conveyed by the deed of trust above mentioned. Complainant filed its bill in this case for the purpose of setting aside said conveyance, and asks for a decree declaring the same null and void.

George W. Radford and Henry M. Duffield, for appellant.

H. M. Campbell and Harrison Geer, for appellees.

Before LURTON and DAY, Circuit Judges, and CLARK, District Judge.

DAY, Circuit Judge, after stating the case, delivered the opinion of the court.

The three instruments above recited must be construed together. They are parts of one transaction, and their legal effect is to be gathered upon consideration of all of them, their objects and purposes. *Lumber Co. v. Ott*, 142 U. S. 622, 12 Sup. Ct. 318, 35 L. Ed. 1136. An examination of these instruments and a consideration of the circumstances under which they were executed satisfies us that the purpose and intent of the parties was to secure Holland and the other creditors named for the amount of the indebtedness. Holland had a large claim, which was placed in the hands of his attorney for the purpose of obtaining security. This Hurst finally consented to give in the form in which it was reduced to writing in the documents described. The instruments themselves show this purpose. It is said in the conveyance to the trustees that Hurst desires to pay the said creditors from the property thereafter described, "as far as practicable, or as far as necessary." When sold, the debts are to

be paid from the proceeds of the property, together with interest, in the order named. There is no statement in the conveyance that the writing shall be considered as a satisfaction of the demands of the creditors therein named. While the purpose is expressed that they be paid, the manner of payment is shown to be out of the proceeds of the property. There is nothing in the instruments discharging Hurst from the indebtedness in the event that the property shall prove insufficient to pay the claim. Had it been intended to discharge the claim by the conveyance of the property, certainly interest would not have been provided for, to be paid out of the proceeds of the property sold. Furthermore, the surplus, if any, is to be paid to Hurst, or such person or persons as he shall direct. The trustees, in accepting the trust, say, addressing Hurst:

"You having of the date hereof executed and delivered to us a deed of a large amount of land in the county of Wayne, state of Michigan, in trust to secure indebtedness enumerated therein," etc.

And in a paper executed at the same time of the conveyance, made in behalf of Holland, it is recited that the things which Holland therein obligates himself to do for Hurst are in consideration that the lands have been conveyed to trustees to first secure Holland, etc. Looking at this transaction, we can have no doubt that its real purpose and intent was to secure the payment of the indebtedness in the order named in the instrument, and that it was so understood by all parties thereto. We have no doubt that, had Hurst paid these debts, he would have had a right to compel the trustees to convey the lands to him. The question in the case is, is there anything to prevent the purpose thus manifest from the acts of the parties being carried into effect, or have they failed to effectuate their purpose in the means adopted to carry it out? As a general rule, a debtor has a right to secure a bona fide creditor. Although such action may serve to prefer one creditor over another, such preferences are not regarded as fraudulent. Repeated adjudications in the state of Michigan recognize this right. *Sheldon v. Mann*, 85 Mich. 265, 48 N. W. 573, and cases there cited. We find no proof in the case warranting the conclusion that this conveyance was fraudulent in fact. That Hurst was largely indebted to the creditors whom he attempted to secure there is absolutely no contradiction in the record. There was nothing developed in the proof except that Hurst tried to secure his creditors, which he had a perfect right to do. Nor do we understand that the fact that the surplus, if any there shall be, after the payment of debts, is to be paid to Hurst, would in any wise invalidate the conveyance. This was the rule laid down by the supreme court of the United States in *Huntley v. Kingman & Co.*, 152 U. S. 537, 14 Sup. Ct. 692, 38 L. Ed. 544, in which Mr. Justice Brown used the following language:

"Whatever may be the rule with regard to general assignments for the benefit of creditors, there can be no doubt that in cases of chattel mortgages (and the instrument in question, by whatever name it may be called, is in reality a chattel mortgage) the reservation of a surplus to the mortgagor is only an expression of what the law would imply without a reservation, and is no evidence of a fraudulent intent."

It has been principally argued in the oral discussion of the case that the conveyance by Hurst is void, because it operates as an assignment at common law, and is void under the Michigan statute (section 8739, How. Ann. St.) which enacts:

"All assignments, commonly called 'common-law assignments,' for the benefit of creditors, shall be void, unless the same shall be without preferences as between such creditors, and shall be of all the property of the assignor not exempt from execution."

This statute has been the subject of numerous judicial decisions in the courts of Michigan. The question of its construction and effect is a question upon which the decisions of the highest court of that state are authoritative and binding upon the federal courts. *Lumber Co. v. Ott*, 142 U. S. 622, 12 Sup. Ct. 318, 35 L. Ed. 1136; *Brown v. Furniture Co.*, 7 C. C. A. 225, 58 Fed. 286, 22 L. R. A. 817. It would unnecessarily extend this opinion to review all the cases cited from the Michigan supreme court upon this subject, and perhaps be impossible to reconcile all that has been said by the judges in delivering the opinions, but we think, from the cases, the principle to be adduced is that this statute is one which operates to make void a general assignment for the benefit of creditors, unless the assignment is for the benefit of all creditors without preference. The words "common-law assignment," as construed by the supreme court of Michigan, include such general assignments as were known at the common law, in which the failing debtor undertook to devote his property to the payment of his debts through a trustee, in which case this statute requires that such conveyances shall be without preference as between creditors. The construction of this statute came before this court in *Brown v. Furniture Co.*, supra, and in that case this court followed the case of *Warner v. Littlefield*, 89 Mich. 329, 50 N. W. 721. That is a leading case in the state of Michigan, and the opinion by Chief Justice Champlin is a very thorough and able one. Of that decision Judge Taft said (*Brown v. Furniture Co.*, supra):

"It was decided in *Warner v. Littlefield* that a debtor, though insolvent, might secure a creditor for the payment of a pre-existing debt by mortgage upon all of his property, although he should have numerous creditors who were unsecured, and that neither the fact of the debtor's insolvency nor the knowledge of the creditor of that fact would defeat or impair a mortgage security taken for an honest debt; that the fact that the mortgagee was not the creditor of the mortgagor, and that the mortgage was executed in trust to secure certain specified creditors the amounts of the several claims, did not tend in any degree to give the instrument the character of a common-law assignment; that if the instrument was a conveyance given upon condition as a security for a pre-existing debt, and contained no trust in its body, whereby the property was withdrawn from the right of the mortgagor or others to redeem, who ordinarily have such right in cases of chattel mortgages, or whereby the title of the property was placed beyond the reach of execution as to any surplus, then the instrument was a chattel mortgage, but if it conveyed the absolute title to a trustee for the benefit of creditors, and thus placed the property and surplus beyond the reach of creditors, it was a common-law assignment; that the question whether the instrument was a chattel mortgage, or an assignment for the benefit of creditors, must, in all cases, be determined as a question of law upon the contents of such instrument, and not from any outside testimony; and that unless the conveyance on its face purported to con-

vey all of the debtor's property to secure certain preferred creditors by an absolute title, the court was not at liberty to declare it a common-law assignment. The case of *Warner v. Littlefield* only followed the case of *Sheldon v. Mann*, 85 Mich. 265, 48 N. W. 573, and was followed by the supreme court in *Bank of Montreal v. J. E. Potts Salt & Lumber Co.*, 90 Mich. 345, 51 N. W. 512."

We do not know that there is any necessary conflict in cases decided by the supreme court of Michigan. In those cases in which mortgages have been held invalid as a common-law assignment it will be found that all the property has been conveyed with attempts at preferences among creditors, or that the trustee has been given power and authority over the property conveyed entirely inconsistent with the rights of creditors,—as in *Kendall v. Bishop*, 76 Mich. 634, 43 N. W. 645, where the trustee was empowered to continue the manufacturing business, reinvest the trust funds, buy new stock, mingle the new assets with the old, and was given other powers inconsistent with the idea that he held the title merely as a security or in trust to sell the same to pay debts. Like power was given the trustee in *Pettibone v. Byrne*, 97 Mich. 85, 56 N. W. 236. In *Warner v. Littlefield*, Chief Justice Champlin says (page 347, 89 Mich., and page 727, 50 N. W.):

"There ought to be and is some underlying principle from which to determine whether an instrument is a chattel mortgage or a common-law assignment. If the instrument is a conveyance upon condition, given as a security for a pre-existing debt, and contains no trust in the body of the instrument whereby the property is withdrawn from the right of the mortgagor or others to redeem, who ordinarily have such right in cases of chattel mortgages, or whereby the title of the property is placed beyond the reach of execution as to any surplus, then the instrument is not an assignment, but a chattel mortgage. But if it conveys the absolute title to a trustee for the benefit of creditors, and thus places the property and surplus beyond the reach of creditors, it is a common-law assignment. *Kendall v. Bishop* was determined upon this principle, and so were *Root v. Potter*, 59 Mich. 506, 26 N. W. 682, and *Sheldon v. Mann*. * * * The statute providing that no general assignment for the benefit of creditors shall be valid unless made for the benefit of all the creditors applies only to general assignments, and the same does not apply to other conveyances. * * * The execution of mortgages by an insolvent debtor with the bona fide intention of securing particular creditors does not operate as a general assignment for the benefit of creditors."

The language of Chief Justice Champlin is equally applicable to a real-estate mortgage. Let us apply the tests he lays down. "If the instrument is a conveyance given as security for a pre-existing debt, and contains no trust whereby the property is withdrawn from the right of the mortgagor to redeem, then the instrument is a chattel mortgage." The writing in the present case shows it to be security for a pre-existing debt, and there is nothing in the body of the instrument to prevent Hurst from redeeming. "Or whereby the title of the property is placed beyond the reach of execution as to any surplus." We find nothing in this instrument to prevent creditors from pursuing the surplus by proper proceedings. "But if it conveys the absolute title to a trustee for the benefit of creditors, and thus places the property and surplus beyond the reach of creditors, it is a common-law assignment." We find nothing in this conveyance, as we have said, that does place the surplus or Hurst's equity beyond the reach of creditors. Applying these tests, we are clearly of the

opinion that the instrument in question was a mere security for the benefit of the creditors therein named, and that it is in no sense a common-law assignment, within the meaning of the Michigan statute.

In *Warner v. Littlefield*, it was further said:

"The statute of 1879 does not attempt to compass the object and purpose of the insolvent law. It does not prohibit any preference to creditors, unless the preference is made in a common-law assignment. It contains no provisions for the discharge of a debtor from all liability in case he transfers and delivers over to his assignee, for the benefit of all his creditors, all of his property. If the debtor makes a common-law assignment, he is still liable for any balance that may be due to his creditors after his assets are applied by his assignee to the payment of his debts pro rata. The creditors are not compelled to accept the terms proffered in the assignment. They may stand aloof from the assignment, and may rely upon the liability of their debtor to pay. There is no provision for recovering preferences made on the eve of assignment. It is not either a bankrupt or insolvent law. It is of no particular use, and its only mission seems to be to beget litigation, and afford an opportunity for a creditor to obtain a preference over other creditors by asserting and occupying the inconsistent position that the chattel mortgage given to secure a bona fide debt is a common-law assignment, and therefore ought to be construed as such, and void as to creditors, while he attaches or levies execution, and thus obtains securities and preferences fully as unlawful and against the policy of the law."

In construing this statute in the case of *National Bank of Oshkosh v. First Nat. Bank of Ironwood*, 100 Mich. 485, 59 N. W. 231, Judge Hooker says:

"Our statute prohibiting preferences in cases of assignment is in derogation of the common law. Like all statutes in derogation of the common law, this statute is to be strictly construed. It only applies when the instrument can fairly and legitimately be said to possess all of the essential elements of an assignment; and courts should not permit such essentials to be dispensed with, or substitute real or supposed equities for them, or unduly construe instruments intended for securities to be assignments. In such cases there is usually a contest for the property, which, at most, becomes a question of whether the debtor's preference can be overturned for that of some other creditor, who hopes to make his claim good under an attachment, through a flaw in the instrument made to effectuate the preference of the debtor. Perhaps the equities are quite as likely to be with the creditor preferred by the debtor. At all events, there can be no legal presumption to the contrary."

We are unable to distinguish the case at bar from that of *Austin v. Bank*, 100 Mich. 613, 59 N. W. 597. The instrument therein construed contained no defeasance. It declares a trust, as follows (page 616, 100 Mich., and page 597, 59 N. W.):

"To take possession of all of said property, and receive and collect the rents, issues, and profits therefrom; to sell the same, in bulk or in parcels, in such manner and at such times, for cash, as will enable him to realize the most money therefor; to pay the taxes thereon, and keep the property properly insured. From the proceeds of such sale, and from the proceeds of the personal assets transferred to him by the instrument hereinbefore mentioned, he shall pay and apply the same in the following manner, to wit: First. He shall pay all the expenses incurred by him in the execution of this trust, together with a reasonable compensation for his own services. Second. With the residue and remainder he shall pay in full all the claims hereinbefore mentioned, if sufficient there shall be; and, if not in full, he shall prorate the same among them in proportion to the amount of their respective claims. Third. The surplus, if any, shall be returned to the first parties."

A chattel mortgage was also executed. It provided as follows: "To have and to hold the same forever; provided, however, and these presents are upon the express condition, that if said first party shall pay, or cause to be paid, to said Austin, trustee, the claims and demands aforesaid, and each and all thereof, within ten days from the date hereof, then this obligation shall be void; otherwise, to remain in full force. And the said first party agrees to pay the same accordingly."

The chattel mortgage also gave immediate possession to the trustee, and contained the following provision:

"If default be made in the payment of said debts and the interest thereon, or any portion thereof, within the time or manner herein provided, or in any of the terms and conditions hereof, then the said trustee, his successors or assigns, or his or their authorized agent, is authorized to sell said property, which is capable of direct sale, either by private sale, in bulk or by parcels, or by public auction to the highest bidder, after giving reasonable notice of such sale; and said trustee is also authorized to collect, settle, or compromise, by suit or otherwise, all of the said demands and choses in action capable of collection, in our name or otherwise; and said trustee is also authorized to insure such goods and chattels as he deems wise, and to pay all taxes assessed against the same, and add the charges for such insurance and taxes to the debt hereby secured, to be payable forthwith, with interest. Said trustee is also authorized to gather all of the property of said first party covered hereby, and realize the most possible out of the salvage from the late fire, and to expend all such sums of money as may be necessary therefor, and as may be necessary for the care and preservation thereof; and he may also repair said property, and put the same in the best possible condition for sale, so that the largest amount can be realized therefor."

Both these conveyances were attacked, because, it was claimed, they constituted an assignment of all the property of the company, in violation of the laws of the state of Michigan. Of these conveyances, Judge Hooker, delivering the opinion of the court, said:

"It appears from the foregoing that there is no claim that these instruments amounted to a valid assignment for the benefit of creditors. It is equally clear from the evidence that the company never intended to make such an assignment as would have been valid under How. Ann. St. § 8739, for it is plain that it at all times proposed to prefer certain creditors. The contention is not made that these instruments are, in effect, a valid assignment, so that a court of chancery can take jurisdiction, and enforce them as such, under section 8744. The question is, therefore, whether the instruments can stand as valid mortgages, or whether they must be held void, upon the ground that they attempt to transfer the absolute title to all of the debtor's property, in trust for the payment of preferred creditors, in contravention of Id. § 8739. The instrument covering the real estate contains no defeasance. It does, however, recite that the 'first party is desirous of securing payment of certain debts and indemnifying' certain parties, and requires the surplus to be returned to the company. There can be no doubt that this instrument would be held a mortgage if any question should arise upon it between the parties to it. The mortgagor could pay the indebtedness, and compel a reconveyance; and, if it did not, any attempt by the trustee to sell and convey the lands would be futile, without foreclosure. On the other hand, a court of equity might properly decree foreclosure in a suit between such parties. How, then, can it be said that the instrument itself was effective to convey an absolute title as against creditors, when it did not do so as between the parties; and, if it did not, what is to prevent creditors from reaching the equity of redemption? Manifestly, we cannot say that it is more than a mortgage when other creditors raise the question, and that it is only a mortgage when the secured creditor attempts to sell the property under it."

As we have said, this instrument is practically the same as the one now under consideration. There was not in that case in terms

any clause of defeasance, and the supreme court of Michigan took the view that the conveyance was a mortgage, and that the mortgagor could pay the indebtedness, and redeem the property. But it is said that this case is modified by the later cases of *Webber v. Hayes*, 117 Mich. 256, 75 N. W. 622, and *Conely v. Collins* (decided March 14, 1899) 78 N. W. 555. In *Webber v. Hayes* the instruments in question were held not to be common-law assignments. In speaking of this statute, Judge Hooker, who delivered the opinion in *Austin v. Bank*, *supra*, says:

"By referring to the statute (2 How. Ann. St. § 8739), we shall find that it invalidates such assignments where they create preferences between creditors, or where some of the debtor's property not exempt from execution is omitted from the instrument. In the present case there is no instrument which bears the semblance of a common-law assignment for the benefit of creditors, but a large number of instruments, of different kinds, running to different persons, executed at different times; in addition to which it appears that not all of the property was covered by instruments made before the suit was begun, and that some property was omitted from all of the instruments. The decisions upon this statute are numerous, and they clearly show that, before there is an opportunity for its application, it must appear that there is something in the nature of a common-law assignment to be attacked,—some instrument, the terms of which, but for the statute, would vest the debtor's title in another in trust for one or more creditors, whereby other creditors would be precluded from any remedy against the title or equity of the debtor. In short, attempts to provide for a portion of one's creditors by assignment to a trustee, or when confined to a portion of the debtor's property, are forbidden; but it does not follow that every attempt to dispose of property fraudulently will be construed to be a void common-law assignment for the benefit of creditors. *Sheldon v. Mann*, 85 Mich. 265, 48 N. W. 573; *Warner v. Littlefield*, 89 Mich. 329, 50 N. W. 721; *Armstrong v. Cook*, 95 Mich. 257, 54 N. W. 873; *National Bank of Oshkosh v. First Nat. Bank of Ironwood*, 100 Mich. 485, 59 N. W. 231; *Austin v. Bank*, 100 Mich. 620, 59 N. W. 597. There was, therefore, no occasion to submit this subject to the jury."

In *Conely v. Collins* there was a transfer of all of the property of the lumber company to a trustee, he to sell the same, and use the proceeds to pay the indebtedness. The conveyance was in exact form an assignment for the benefit of creditors. The court said:

"It is, therefore, void, as it makes preferences. The case falls within the rule laid down in *Kendall v. Bishop*, 76 Mich. 634, 43 N. W. 645; *Burnham v. Haskins*, 79 Mich. 35, 44 N. W. 341; *Sheldon v. Mann*, 85 Mich. 265, 48 N. W. 573; *Hill v. Mallory* (Mich.) 70 N. W. 1016. The learned court below was of opinion that the case is ruled by the case of *Austin v. Bank*, 100 Mich. 613, 59 N. W. 597. There the conveyances were worded as mortgages, and authorized the mortgagee to take possession upon default. They were held not to make an absolute title in the mortgagee."

As we have already said, the real-estate conveyance in *Austin v. Bank* contained no clause of defeasance. We do not understand the court, in the language quoted, to have reference to the real-estate mortgage upheld in *Austin v. Bank*; nor is there anything in the case undertaking to overrule that case. The authorities cited by the judge in which conveyances are held void will be found to be with-in the principle already stated, where either an attempt has been made to convey all the property by way of general assignment with preferences, or the trustee has been given title to and control of the property inconsistent with the rights of creditors. There is nothing in that case which requires any departure from the doctrine of *Austin*

v. Bank, nor do we understand the learned judge to intend in any wise to impair the authority of that case. We are, therefore, of opinion, following the decisions of the supreme court of Michigan in construing this statute, that the conveyance in question is not a general assignment for the benefit of creditors, but is in the nature of a mortgage or security for a debt, executed in good faith, and within the power of the party to prefer one creditor over another. Whether the instrument is to be strictly construed as a mortgage or not, it can be maintained as a trust created to sell lands for the benefit of creditors, as we understand the supreme court of Michigan in *Bank v. Chapelle*, 40 Mich. 451, where it was said:

"The statutes of this state expressly authorize trusts to be created to sell lands for the benefit of creditors. * * * If, instead of an absolute trust deed, we hold it to be a mortgage in form, as it was apparently intended to be, and was so held below, then there can be no objection to it unless fraudulent in fact. It certainly may be regarded as a mortgage in equity, because it was intended only as a security for a debt which the debtor may discharge at any time, and so release the land."

It is only where a trust is created in lands which amounts to a general assignment for the benefit of creditors, in which preferences are attempted, or the assigned property is put beyond the reach of creditors as to title and surplus, that it comes within the purview of the statute regulating common-law assignments. These conclusions render unnecessary consideration of the questions raised as to the sufficiency of the allegations of the bill. Finding no error in the conclusion reached by the circuit court, its judgment will be affirmed.

SMITH et al. v. CITY OF SHAKOPEE.

(Circuit Court of Appeals, Eighth Circuit. July 2, 1900.)

No. 1,225.

1. EVIDENCE—JUDICIAL NOTICE—REGULATIONS OF LIGHTHOUSE BOARD.

The courts of admiralty will take judicial notice of the regulations of the lighthouse board, made upon the authority of an act of congress, and prescribing the number and kinds of lights to be placed on the draws of bridges across navigable streams, although they are neither pleaded nor offered in evidence.

2. NEGLIGENCE—LIGHTS ON DRAWBRIDGE—REQUIREMENTS OF STATUTE.

Under the regulations of the lighthouse board, requiring the suspension of lights on drawbridges, so that three red lights will be seen up and down stream when the draw is closed, and three green lights when it is open, the failure of a city to maintain such lights on a drawbridge erected by it is such negligence as will render it liable for damages to a steamer resulting from such omission.

3. SAME—CONTRIBUTORY NEGLIGENCE—DAMAGES.

Where a city is negligent in failing to maintain the lights required by law on a drawbridge, and the pilot and captain of a steamer are also negligent in attempting to take their boat through the draw before they are assured that it is fully swung, the damages sustained should be divided.

Appeal from the District Court of the United States for the District of Minnesota.

John E. Stryker, for appellants.
Charles G. Hinds, City Atty., for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. In our former opinion in this case (97 Fed. 974, 38 C. C. A. 617), we held that we could not take judicial notice of the regulations of the lighthouse board prescribing the number and kinds of lights to be placed on the draws of bridges across navigable streams, because the regulations were neither pleaded nor offered in evidence, so far as the record discloses. In support of that view we cited the following cases: *The E. A. Packer*, 140 U. S. 360, 367, 11 Sup. Ct. 794, 35 L. Ed. 453, and *The Clara*, 14 U. S. App. 346, 5 C. C. A. 390, 55 Fed. 1021. Our attention was called by a petition for a rehearing to certain other cases wherein a different doctrine had been announced, as it was claimed; and on the strength of such references a rehearing was granted, and the case has been reargued.

In the case of *Caha v. U. S.*, 152 U. S. 211, 221, 222, 14 Sup. Ct. 517, 38 L. Ed. 419, certain rules and regulations which had been prescribed by the interior department in respect to contests before the land office were not formally offered in evidence; and it was urged that, because of such omission, judicial notice of the same could not be taken. The court said with reference to this contention:

"We are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which the courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule deducible from the cases that wherever, by the express language of any act of congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

Reference is then made to the following cases: *U. S. v. Teschmaker*, 22 How. 392, 405, 16 L. Ed. 353; *Romero v. U. S.*, 1 Wall. 721, 17 L. Ed. 627; *Armstrong v. U. S.*, 13 Wall. 154, 20 L. Ed. 614; *Jones v. U. S.*, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691; *Knight v. Association*, 142 U. S. 161, 169, 12 Sup. Ct. 258, 35 L. Ed. 974; *Jenkins v. Collard*, 145 U. S. 546, 12 Sup. Ct. 868, 36 L. Ed. 812. The rule above stated in *Caha v. U. S.* was referred to with approval in *Re Kollock*, 165 U. S. 526, 534, 17 Sup. Ct. 444, 41 L. Ed. 813. See, also, *U. S. v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591, and *Wilkins v. U. S.* (D. C.) 96 Fed. 835, 841; also, the recent decision of this court in *Grady v. U. S.*, 39 C. C. A. 42, 98 Fed. 238. We conclude, therefore, that we erred in our former opinion in refusing to take judicial notice of the regulations of the lighthouse board, although they were neither pleaded nor offered in evidence. The regulations of the lighthouse board which are invoked in the present case were prescribed, as it seems, by the board pursuant to authority expressly conferred on that body by an act of congress approved August 7, 1882 (22 Stat. 309, c. 433). It is our duty, therefore, to take judicial notice of such regulations as the board may have made for the lighting of the draws of

bridges across navigable streams pursuant to the authority conferred by the aforesaid statute. Such regulations, it seems, are as follows:

"Every low bridge with a double draw shall have a red light on each end of the draw piers. Each pivot pier shall have one red light on each side where the pier is crossed by the axis of the bridge, and placed below the floor level of the same. In order to make it distinct whether the draw is open or closed, there shall be placed three square lanterns on the top of the drawspan, all of them raised fifteen feet above the top of the draw. These lanterns are to show green along the axis of the draw, and red at right angles to the axis. The result will be that when the draw is shut there will be shown up and down stream three high red lights above the permanent low lights; when open, three green lights will be seen in line up and down stream, with the permanent red lights showing the width of the openings. All of these lights shall be permanent."

The bridge across the Minnesota river at Shakopee, where the accident occurred, was not provided with such lights as the regulations aforesaid require, for which reason it must be adjudged that the city was at fault, and did not exercise that reasonable degree of care and diligence in lighting the draw of the bridge which the law requires of the owner of a drawbridge across a navigable stream.

In our former decision we said, in substance, that the proximate or efficient cause of the collision with the bridge seems to have been that the pilot attempted to pass through the draw before he was assured that it was fully opened. This conclusion was induced, however, by the finding that the bridge was provided with adequate lights, considering its location and the amount of navigation on the Minnesota river, to meet the requirements of the common law. The same conclusion cannot be formed on the present occasion, since it was the duty of the city to provide such lights as are required by the regulations of the lighthouse board, and, if such lights had been provided, the position of the three green lights would have shown at a glance when the draw was fully swung. The city was at fault, therefore, in not furnishing the requisite lights. On the other hand, we think that the pilot and the captain, one or both of them, did not exercise that degree of care and circumspection which they should have exercised, in attempting to pass through the draw before they were assured that it was fully swung. Even if the city was at fault in failing to provide the requisite lights, those in charge of the steamer had no right to attempt to pass through the bridge until they had taken the precaution to ascertain that the passage could be made in safety. The conditions were such that the steamer could have been held at a safe distance from the bridge until the men who were in charge of the draw had advised the pilot that the draw was fully swung and ready for the passage of the steamer; and such action, we think, should have been taken. The case is one, in our judgment, where the accident was occasioned by the concurring negligence of both parties, and in such cases the admiralty rule is to divide the damages. *The Max Morris*, 137 U. S. 1, 9, 11 Sup. Ct. 29, 34 L. Ed. 586; *The Britannia*, 153 U. S. 130, 144, 14 Sup. Ct. 795, 38 L. Ed. 660; *The Lisbonense*, 53 Fed. 293, 3 C. C. A. 539. There is some uncertainty in the proof as to the true amount of the damages that were occasioned by the collision, but we are satisfied by an investigation of the evidence on that point that they did not exceed \$1,000.

The decree of the district court directing that the libel be dismissed is reversed, and the case is remanded to that court with directions to vacate said decree, and in lieu thereof to enter a decree in favor of the libelants for the sum of \$500 and costs.

LOCKWOOD v. OHIO RIVER R. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. July 9, 1900.)

No. 302.

1. CONTRACT TO CONVEY RIGHT OF WAY TO RAILROAD—CONSTRUCTION.

An agreement in writing by a landowner, in consideration of the advantages to accrue to him from the construction of a projected railroad, and of certain covenants on the part of the grantee, granted and conveyed to the railway company "the full and free right of way, of the width of fifty feet," through his land, on a line previously surveyed, and contained covenants for the execution of a deed, when required by the company, conveying the land in fee simple. The agreement was signed by the grantor alone, was acknowledged by him, and filed for record by the company, and not until after 16 years, when it became apparent that the land was valuable for oil and gas, was any request made for a deed. *Held*, that a right of way only was intended to be conveyed, and that the railroad company took only an easement in the land.

2. SAME.

The agreement having been prepared by the railway company, any doubt as to its true meaning should be solved adversely to the company, and not construed most favorably to the grantee under the general rule.

3. SAME—DEPENDENT COVENANTS—EFFECT.

The covenant to execute and acknowledge a deed to the railway company conveying the land in fee simple being a dependent covenant, and the estate or interest conveyed by the agreement being limited to an incorporeal hereditament, the operation of said covenant is necessarily restricted by the granting clause, and cannot require the conveyance of a greater estate.

Appeal from the Circuit Court of the United States for the District of West Virginia.

A charter was issued by the state of West Virginia on April 18, 1881, to the Wheeling, Parkersburg & Charleston Railway Company, for the purpose of constructing and operating a railroad from the city of Wheeling to a point at or near the city of Charleston, in the same state; the name of this company being afterwards changed, by proper proceedings, to the Ohio River Railroad Company. On April 10, 1882, the following agreement was entered into:

"This agreement, made and entered into this 10th day of April, 1882, by and between Jesse Pugh, of the county of —, West Virginia, of the first part, and the Wheeling, Parkersburg & Charleston Railway Company, a corporation under the laws of West Virginia, of the second part, witnesseth that, whereas, the said railroad company proposes to construct and build a road through the said county of Wood: Now, in consideration of the advantages which said road will be to the said party of the first part and to his property, and of the premises, and for the further consideration that the said railroad company agree to make and build a good roadway or crossing where the private road of said Pugh crosses said railroad, and also to put in or build cattle stops wherever said railroad crosses from one field to another; and, if said railroad company shall destroy any fruit trees during the construction of said road, shall pay for the same at the rate of ten dollars (\$10) for each tree so destroyed, the said Jesse Pugh does hereby grant and convey unto the said Wheeling, Parkersburg & Charleston Railway Company the full and free right

of way, of the width of fifty feet, with necessary ground for cuts and fills for the road for the said company, in and upon and through the lands of the said Pugh, on which he now resides, described substantially as follows, to wit: Being the line as surveyed by Engineer Wharton. But it is understood and made a part of this agreement that the said railroad company, in constructing said road, shall either build the said roadbed far enough from the gravel bank along and below which the same runs, to keep the same from washing, or, in lieu thereof, shall protect the same with a wall, it being understood that the said gravel bank shall be undisturbed,—which right of way is hereby granted and conveyed for construction, building, and use of the road of the said company; and the said Pugh hereby releases to the said company all damages which may in any way be sustained by reason of the construction or building of said company's road through the said land, or on account of the temporary use or occupancy of or damage to the land of the said Pugh by the said company, its agents or servants, during the construction of the said railway; and the said Pugh does hereby covenant and agree to execute and acknowledge in due form of law, when required by said company, a deed conveying to said company, in fee simple, the said land hereinbefore described. Witness the following signatures and seals.

Jesse Pugh. [Seal.]

"State of West Virginia, Wood County, to wit.

"I, Patrick V. Dolan, notary public of said county, do certify that Jesse Pugh, whose name is signed to the writing above, bearing date on the 13th day of April, 1882, this day acknowledged the same before me in my said county. Given under my hand this 2nd day of April, 1883.

"Patrick V. Dolan, Notary Public.

"It having been found necessary, in the construction of the railroad and in the protecting of the gravel banks spoken of, to destroy twelve fruit trees, the said Jesse Pugh consents to the same; and said railroad company have paid said Pugh the sum of ninety dollars, the receipt of which is hereby acknowledged, payment in full for said trees.

Jesse Pugh.

"State of West Virginia.

"Wood County Court Clerk's Office, January 5, 1884.

"The foregoing writing, bearing date April 13, 1882, with annexed certificate and receipt, was this day recorded in said office.

"Th. G. Smith, C. W. C. C."

On March 5, 1888, Jesse Pugh and Hannah A., his wife, in consideration of the sum of \$705, conveyed the entire tract of land, upon part of which the railroad was constructed, to Arias N. Pugh and Drucilla C. Pugh, his wife, who on the same day executed a deed of trust to H. C. Henderson to secure the payment of the purchase money, which deed of trust contained, also, certain covenants, which have no bearing on this controversy. After this date Jesse Pugh died, and A. N. Pugh and his wife, being then the owners in fee simple of the tract of land, entered into an agreement, May 31, 1898, with Stephen Lockwood, whereby the said tract of land was leased to Lockwood for the purpose of searching for and producing oil, gas, and other minerals. Under this agreement Lockwood went upon the lands so leased to him, bored for and discovered large deposits of petroleum oil and gas, and commenced producing the same. The wells drilled by Lockwood were adjacent to the right of way of the defendant railroad company. The Ohio River Railroad Company entered into an agreement with Samuel Logan, August 18, 1898, whereby it granted to Logan all the oil and gas in and under the real estate included within this right of way, lessor to receive one-eighth part or share of all the oil produced, and \$50 per annum for each and every gas well drilled, on the premises therein described; and it being expressly stipulated in said agreement that "the lessor does not warrant the title to the said premises in any respect whatever, but the said lessee drills and operates thereon entirely at his own expense and risk." Logan entered into possession of the premises under this agreement, and drilled wells upon the right of way, conducting the oil produced through the pipes belonging to the Eureka Pipe Company. Jesse Pugh, during his lifetime, and A. N. Pugh, since his death, paid taxes on the

whole tract of land; and in 1898 the railroad company demanded of A. N. Pugh a conveyance in fee simple of the right of way above described, which was refused. In November, 1898, Stephen Lockwood filed his bill of complaint in the circuit court of the United States for the district of West Virginia against the Ohio River Railroad Company and Samuel Logan, setting forth the above facts, claiming that the railroad company acquired only an easement on said land, and as such had no right to the oil and gas and other minerals lying thereunder; that it was a corporation whose powers were limited to the building and operating of a railroad, and that it had no right to engage in any other business, and its contract with Logan was ultra vires; and that the well bored, being 15 feet from the eastern line of the complainant's land, would drain the oil from his land,—and praying an injunction and the appointment of a receiver. The court below denied the application for the order of injunction, and refused to appoint a receiver as prayed for, being of opinion that the defendant company acquired an absolute title to the lands under the agreement of April, 1882, and from this decree the appellant has appealed.

James S. McCluer (J. G. McCluer, on the brief), for appellant.
H. P. Camden, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge, after stating the facts as above, delivered the opinion of the court.

This appeal requires us to give interpretation to the instrument of April 10, 1882, which in terms "grants and conveys to the railway company the full and free right of way, of the width of 50 feet, with necessary grounds for cuts and fills for the road of said company in, upon and through the lands of Pugh," upon the line surveyed by the engineer of the company, "which right of way is hereby granted and conveyed for the construction, building, and use of the road of the said company." If it had ended here, there could be no doubt that it was intended to convey simply the right of way, an easement, and not the land itself. The doubt has arisen out of the concluding words, which are as follows:

"And the said Pugh does also hereby covenant and agree to execute and acknowledge in due form of law, when required by said company, a deed conveying to said company in fee simple the land hereinbefore described."

In a clause added at the foot, it is provided that the sum of \$90 should be accepted in full payment for certain trees destroyed upon the right of way. No deed was demanded until shortly before the commencement of these proceedings, and none was ever actually executed. The court below held that it was immaterial whether the deed was called for or not; that the defendants, having taken and held actual possession of the land for over 10 years without interference, had acquired an absolute title to the same; and the appeal impeaches the correctness of that conclusion.

The first rule of exposition, which governs every other, is that contracts should be so interpreted as to give effect to the intention of the parties; and while the words selected by the parties themselves as a symbol to denote their purpose are usually the primary source from which intention is drawn, and the best and surest guide to its discovery, yet being employed sometimes by designing persons to disguise rather than to express the true thought, and being liable to care-

less misuse or ignorant misapplication, it is always the duty of the court, in all cases where they are susceptible of different constructions, to take into consideration the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted, for the purpose of ascertaining the true intent; for the intention of the parties is manifestly paramount to the manner chosen to effect it. The courts therefore may avail themselves of the same light which the parties enjoyed when the contract was executed, and may place themselves in the same situation as the parties who made it, in order that they may view the circumstances as those parties viewed them, and so judge of the meaning of the words and the correct application of the language to the things described; and if any of the terms used seem to contradict the manifest intention, as clearly indicated by the agreement as a whole, the intention must govern. Now, we can have no doubt that the intention of the railway company at the time this instrument was executed was simply to take a right of way, and that the intention of the grantor was simply to give a right of way; for that is all that was actually granted and conveyed in terms by the instrument itself, neither party then knowing that there was a mine of undiscovered wealth lying beneath the right of way. No money consideration was paid to the grantor, the consideration mentioned being the advantage which the road would be to him and to his property. The mere right of way upon which the railway company constructed its road, and the building of the road through his land, fulfill all of the requirements which can be assumed to have been in contemplation of the parties at that time. It is not to be presumed that the railway company desired at that time any more than the right of way or easement. If it had desired an absolute conveyance of the land, nothing would have been simpler than to have taken a conveyance thereof, if the grantor had then been willing to convey it. That the railway company desired nothing more is clear from the fact that it asked nothing more, and for more than 16 years that seemed to suffice. "*Contemporanea expositio est optima et fortissima in lege.*" The familiar rule that where the terms of description are uncertain it shall be construed most favorably to the grantee, inasmuch as it is assumed that the fault is in the grantor, and he shall not take advantage of the difficulty which he himself has created, can have no application here, as against the grantor, because it is manifest that this agreement was prepared by the railway company, it having been brought to our attention in a case cited that words identical with those employed in the concluding covenant in this agreement were used in procuring other rights of way by the same company about the same time; and, if there is doubt as to the true meaning of this covenant, it should be solved adversely to the railway company. It would not be fair to assume that, under the guise of procuring simply a right of way, the railway company intended by the use of these words to take a conveyance in fee simple. The words of the covenant, if separated from the rest of the agreement, are very broad, but they ought not to be taken in their broadest import if they are equally appropriate in the sense limited to the object the parties had in view and their apparent intentions as deduced from the whole instrument; for,

while the maxim is, the grant of the principal carries the incident, the converse of the proposition is not true. General expressions are controlled by special provisions, and the sweeping clause will be limited to the estate and things of the same nature and description as those previously mentioned; and the exposition should be upon the whole contract, and not upon disjointed parts taken separately, in order that you may collect from the whole one uniform and consistent sense, if that may be done. The granting clause of this instrument conveys only a right of way, which is a mere easement, the owner of the soil retaining his exclusive right in all mines, timber, and earth for every purpose not incompatible with the use for which it is granted; and although hereditability cannot strictly be predicable of property held by corporations, which can have no heirs, the rights of way of railroad companies are defined to be incorporeal hereditaments, and such easements, though imposed upon corporeal property, give no right to the property itself. This instrument, although called an "agreement," is signed only by Jesse Pugh, and in its essential elements it is nothing more than a deed of conveyance to the railway company of the right of way therein described. As such it was put upon record by the grantee, and its road constructed upon the right of way so granted. The consideration of the deed was the advantage to accrue to the grantor from the construction of the road, and the interest conveyed was the full and free right of way, of the width of 50 feet. The right to the soil remained in the grantor, and such right was recognized by the grantee in its subsequent payment for the trees destroyed. The consideration was the advantage expected from the construction of the road across the grantor's land. The grant of the surface enabled the grantee to fulfill this consideration. That carried with it the right to use so much of the earth and other material as was necessary to the construction and maintenance of the railroad, and such right of way, with the incidents thereto, was all that was needed to enable the grantee to perform his agreement, which was the construction of the road upon the surface of the land, and for anything more there was no consideration paid or promised. Here we have every element necessary to a deed of a right of way,—consideration, granting and habendum clauses. The description of the thing granted is "the full and free right of way, of the width of fifty feet, * * * described substantially as follows, to wit: Being the line as surveyed by Engineer Wharton." Then, presumably for the purpose of providing for a formal deed after the road was actually located, when the thing granted could be described particularly and not "substantially," there follows the covenant in the words above cited. For more than 16 years no demand was made for the fulfillment of the covenant. The reason is obvious. The instrument called an "agreement," being in substance a deed or conveyance of the right of way, was treated as such. It was put upon record, and the railway company entered under it, and has remained in undisputed possession ever since, and no formal deed was considered necessary; the company having received all that it bargained for, and all that it paid any consideration for. Whether it be considered a covenant for further assurance (that is, a means of enforcing a specific performance of the

grantor's agreement to make a good title), or as a covenant of warranty, it is a dependent covenant; and it is elementary that, however broad and comprehensive the covenants in a conveyance may be, they are to be construed as securing to the grantee only the estate actually limited to him by the conveyance. Their office being merely to assure and defend that which has been granted, they are only co-extensive with the grant, and can have no wider scope and effect than the conveyance to which they are annexed. "In construing and applying covenants, they are intended not to enlarge, but to defend the grantee of the estate granted in the deed, so that, if the grant be of less than a fee, a covenant to warrant it to the grantee and his heirs does not enlarge the estate to a fee." 3 Washb. Real Prop. 448. And courts will limit the operation of the general covenant, however absolute it may be in form, so as to effect the true intention, if it is plainly to be inferred that the covenantor did not intend to use the words in the general sense which they import. There is no room for doubt as to the true intention expressed in the body of the instrument,—that in apt words it conveys only a right of way (that is, an easement),—but the contention is that by the use of the words "fee simple" the grantor bound himself to convey the land itself when so required by the railway company. "A fee simple may be had in incorporeal as well as corporeal hereditaments." 1 Washb. Real Prop. p. 82. "Where the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad, the deed passes an easement only, and not a fee, though it be in the usual form of a full warranty deed." Jones, Easem. p. 212. The estate or interest conveyed being limited to an incorporeal hereditament, the operation of this covenant is necessarily restricted, and cannot require the conveyance of a greater estate, and the grantee can only demand under it a conveyance in fee simple of such incorporeal hereditament. Covenants do not of themselves pass any estate, or enlarge or restrict the estate conveyed.

In *Sweet v. Brown*, 12 Metc. (Mass.) 176, there was an action for alleged breach of covenant; the defendant having conveyed "all my rights, title, and interest in and to" certain real estate, with covenants that he was lawfully seised in fee of said premises, that they were free of all incumbrance, that he had good right to sell and convey the same, and that he would warrant and defend the same against all persons. The court says:

"The covenants are in terms general, but in the construction of a deed we are to look at the whole deed, and the covenants are to be construed so as to give effect to the intention of the parties, so far as it can be done consistently with the rules of law. The warranty is of the premises which were granted and conveyed by the deed. But that was 'all my right, title, and interest in and to that parcel of real estate situate,' etc. It was not a grant of certain land in general terms, but of his title and interest in such land, and this particularly and fully expressed. The warranty must be taken in a limited sense. It must be restricted to his title and interest. The covenant here attaches to the estate and interest conveyed, and is not a general covenant of warranty of the whole parcel particularly described by metes and bounds. Such construction will reconcile all parts of the deed and give effect to each."

The case of *Moore v. McGrath*, 1 Cowp. 9, is cited in *Allen v. Holton*, 20 Pick. 458, to sustain the proposition that every deed is to be construed according to the intention of the parties as manifested by the

entire instrument, although it may not comport with the language of a particular part of it, and shows to what extent a court may go in qualifying and even in rejecting a particular clause in a deed in order to effectuate the intention of the parties. There the lands were minutely described in the premises, and then followed a sweeping clause purporting to convey "all other the donor's land," etc. The court held that nothing passed by this sweeping clause, and that it was probable that the drawer omitted by mistake some words in the sweeping clause. "All the subsequent covenants have reference to the grant, and are qualified and limited by it."

There is no reasonable ground to doubt that the court would have ordered this deed to be reformed at the instance of the grantor, Pugh, if he had made it clearly to appear that it was his intention to grant only a right of way, and that he was misled by the grantee as to the effect of this form of expression, if it was intended to be claimed that by the use of the words "fee simple" he covenanted to convey an absolute estate in the lands, when he was led to believe that its effect was only to carry out the agreement made by him, which was to convey an easement simply. "Courts will reform deeds where by mistake the words are made to convey other estate than the parties intended, even though the mistake consists in the legal effect of the words used, while the words themselves were such as the scrivener intended to make use of." 3 Washb. Real Prop. 381.

We are of opinion that it was the intention of the grantor to convey only a "right of way" and that the words chosen to effectuate that intention have a well-known and universally accepted legal meaning, and describe the tenure, not the land granted; that the railway company therefore took only an easement in the land, and not the land itself; that the covenant is not to be construed so as to enlarge the grant; and that the railway company is not entitled by virtue thereof to anything more than a formal deed in fee simple of an incorporeal hereditament. It follows that the decree of the circuit court is reversed, and the case remanded for further proceedings in conformity with this opinion.

INTERSTATE COMMERCE COMMISSION V. CHICAGO, B. & Q. R.
CO. et al.

(Circuit Court of Appeals, Seventh Circuit. June 15, 1900.)

No. 665.

CARRIERS—REASONABLENESS OF RATES—TERMINAL CHARGES.

A separate and fixed terminal charge of two dollars per car on live stock consigned to or from Chicago, made by the railroads entering that city, in addition to the charge for transportation over their own lines, to cover the cost of transferring such cars from their lines to the Union Stock Yards, which constitute the live-stock market of the city, over the tracks owned by the stock-yards company, and which is shown to be approximately the average cost of such service, when adopted and published as a part of their rates in accordance with the requirements of the interstate commerce law, does not render such rates unreasonable and unjust, although the roads themselves furnish no terminal facilities at

Chicago for handling stock, and the Union Stock Yards were originally established, and have ever since been used, as the general depot for live stock by all the roads.

Grosscup, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

S. H. Cowan and W. A. Day, for appellant.

L. W. Bowers, for appellees.

Before BROWN, Circuit Justice, and WOODS and GROSSCUP, Circuit Judges.

BROWN, Circuit Justice, delivered orally the opinion of the court.

We have come to the conclusion that this case must be affirmed upon the authority of *Walker v. Keenan*, 19 C. C. A. 668, 73 Fed. 755.

While the facts of the two cases differ in some immaterial particulars, the principles involved are practically the same, and a proper deference to the prior decisions of this court requires a similar conclusion.

As this is the first case involving the validity of the terminal charges which has been called to my attention, I have thought it proper to state briefly my reasons for concurring in the conclusion of the court in the prior case.

I have no doubt it is the general duty of railway companies to provide proper facilities for the reception and discharge of freight and passengers at each of their regular stations upon the line of the road. The location of such stations must be determined largely, if not exclusively, by the railway companies themselves. Having regard for their own interests, they would naturally provide such facilities as near the center of the town as they are able, consistently with the price of real estate, the convenience of their customers, and their connection with other railways.

The character of these terminal facilities must be determined by the custom of the place and by the demands of the traffic. So far as passengers are concerned, they usually consist of a platform, a building for the reception of passengers, and a baggage room for the accommodation of luggage. Upon this platform passengers alight, and from that moment the responsibility of the company as a carrier ceases. They separate to different parts of the city, taking their own conveyances; and their luggage is deposited in the baggage room, remaining subject to their call for a reasonable time.

So far as what is known as "dead freight" is concerned, a freight depot is usually provided, in which the freight is deposited, and notice given the consignee, or, under the custom of some places, the property is delivered personally to the consignee, for which an extra charge is made.

But suppose there be an exceptional kind of traffic, such as live cattle. I should have no doubt that, if the transportation of such cattle became a substantial part of the traffic of the road, terminal facilities should be provided for them; and, if it were the custom of the place for the consignee of cattle to call and drive them away, pens should be

built for their immediate confinement until the consignee can be apprised of their arrival, and a sufficient time has elapsed for him to remove them. Until 1865 that seems to have been the custom in Chicago, where there were four or five cattle yards near the principal railway stations. The record does not show whether the consignee came there and drove them away, or whether they were marketed and slaughtered there; but this is immaterial, so far as the duties of the railway company were concerned. So it is usual, in the stock-raising portions of the country, to provide cattle pens for the detention of cattle until they are laden on board the cars, and sometimes for their delivery by the railway company in those yards.

While I do not think railway companies would be bound to furnish terminal facilities of this kind for an occasional horse, or perhaps even for an occasional and wholly exceptional car load of live stock, yet, if cattle became a substantial part of the traffic, I have no doubt provision should be made for their reception.

In 1865 the Union Stock Yards were organized, a large area of lands purchased, and separate tracks laid by the stock-yards company, connecting with practically all the railways running to Chicago. From this time the demand for separate terminal facilities at each of these railways seems to have ceased, and all cattle were consigned for delivery at the stock yards,—not for the purpose of being claimed there by the consignee, but for the purpose of finding a market for them. Here all the cattle consigned to Chicago are deposited for slaughter or for further shipment, and great slaughtering houses have been erected in the vicinity of the yards for the disposition of the cattle. Providing a market for cattle is certainly no part of the business of the railway company; and I think, therefore, any extra expense occasioned from the time the cars containing the cattle leave the tracks of the company, and until they arrive at the stock yards and the empty cars are returned, the company is entitled to make an additional terminal charge, equivalent to the expense occasioned to it by providing these extra facilities.

Prior to June 1, 1894, the railway companies seem to have assumed this burden themselves, but at this time a trackage was imposed by the stock yards of from 40 to 75 cents each way upon every car going and returning from the tracks of the railway company to the stock yards. It is insisted that, as this is the only extra expense then occasioned, any charge beyond that was unreasonable and improper. I do not think that necessarily follows. While the imposition of this trackage charge by the Union Stock Yards was doubtless the immediate occasion for a reformation of its tariff, the railway companies were then at liberty to adopt a new schedule with relation to these terminal facilities, and charge what they actually cost them.

The evidence is that it costs some railways a trifle less than two dollars, and some considerably more than that. The average seems to have been somewhat more than two dollars. But we think it was proper for the railway companies, whether the expense to the companies were a few cents more or less, to adopt this amount as an approximate charge, and that their action in so doing should be sustained.

In the limited time at my disposal, I find myself unable to file a written opinion; and, as the case will doubtless be appealed to the court of last resort, it seems quite unnecessary to do so.

The decree of the circuit court is therefore affirmed.

GROSSCUP, Circuit Judge (dissenting). Prior to 1865 the railways entering Chicago had four separate places for the delivery of live stock, each equipped with the necessary facilities. Considering, for obvious reasons, a union of these facilities desirable, the Union Stock Yards were established by the railways, though as a separate corporation, with such lines of intervening railway as put the yards in connection with all the roads centering in Chicago. It is substantially undisputed that, from the consolidation of these delivery stations until 1894, the chutes, pens, and other equipment at the new stock yards, were the delivery station for live stock of each of the defendant railways; that, although owned by a separate company, no extra compensation was charged for the use of the intervening tracks, or the unloading facilities; that the other live stock stations were abandoned; that no separate stations, except perhaps in mere semblance, have since been established; and that, by this long course of dealing, the shipping public has come to look upon the Union Stock Yards as the destination of cattle shipped to Chicago.

In June, 1894, the Union Stock Yards having passed largely from the ownership of the railways to outside parties, a minimum trackage charge of forty cents per car was imposed upon the railways by the Stock Yards Company. Thereupon the railway companies inserted in the schedules, required by the Interstate Commerce Act, a paragraph to the effect that upon all live stock, or other freight received from, or delivered to, the stock yards, a terminal charge of two dollars per car would be thereafter made, in addition to the flat Chicago rates. It is the lawfulness and reasonableness of this charge that is the subject-matter of this case.

The precise question, so far as it relates to the lawfulness of the charge, has been before the courts of this circuit three times. In the first case, in the circuit court, *Union Trust Co. v. Atchison, T. & S. F. Ry. Co.*, 64 Fed. 992, it was held that, as a matter of public policy, a charge for freight must be held to cover the entire service of the carrier from depot to depot inclusive; that such service and charge include, not only actual carriage, but also the necessary facilities for loading and unloading; that the service being a single one, the compensation is likewise single, and in law incapable of division; that the carrier can not make up its bill of charges in items,—one for loading, one for carriage, one for personal service of attendants, one for delivery, etc. The ruling in that case was supposed to be founded upon the *Covington Stock Yards Case*, 139 U. S. 128, 11 Sup. Ct. 461, 30 L. Ed. 914.

The case was reviewed in the circuit court of appeals under the title of *Walker v. Keenan*, 19 C. C. A. 668, 73 Fed. 755, where it was in effect held that, although, as incidental to its business of transporting cattle, a railway company must provide the means for loading and unloading, there is no reason in law, or in the nature of things,

why the compensation may not be apportioned; that it is lawful, other considerations aside, that a charge may be made for the loading, another and separate charge for the carriage, and still another for the unloading and delivery. The compensation to be received was not looked upon, in this decision, as a single charge; but rather as an aggregation of such separate charges as, being reasonable in themselves, may have been properly inserted in the published schedules.

In the present decision the majority of the court hold it to be the general duty of the railway companies to provide proper facilities for the reception and discharge of freight and passengers at each of their regular stations; and, inferentially, as I read the opinion, that no extra charge may be made for these unloading facilities. But live stock is regarded as an exceptional kind of traffic, and its transportation to, and delivery at the stock yards, as something superadded to the general undertaking of the railway companies to transport live stock from the stations of initiation to Chicago. This opinion seems to me to shift the ground upon which *Walker v. Keenan*, supra, was decided, and while sustaining the general proposition upon which *Union Trust Co. v. Atchison, T. & S. F. Ry. Co.* was decided, to hold that delivery of live stock at the stock yards is an exception to the requirements of the general rule. In view of these rulings, and especially of the change of ground taken by the majority opinion, I look upon the question involved as a more or less open one, and have thought it not improper to restate, in substance, the grounds upon which, in the circuit court, I decided the case of *Union Trust Co. v. Atchison, T. & S. F. Ry. Co.*, and upon the basis of which I am constrained to dissent from the decision in this case.

As common carriers of freight and passengers, railway companies come in touch with every character of shipper and traveler. They deal alike with the unintelligent and the intelligent; with people inexperienced in matters of traffic, as well as with the experienced; with people in haste and uninquiring, as well as with people deliberate and careful.

The usual passenger buys his ticket at the station where he goes aboard, expecting that it will carry him to the general passenger station in the city of destination. He does not consult the rate sheet, and, least of all, does he inquire if the line over which he travels may or may not include rails and stations belonging to another company. The usual shipper is remote from the station of destination. He is unacquainted with local conditions, especially if that station be a great city spreading over a large territory. He has in mind a single place of delivery; and when he inquires respecting the rate of freight, unquestionably conceives that the payment of the sum named will lay down his goods in the general depot of delivery. However much, as a careful man, he ought, perhaps, to consult the posted rates, he does not, as a matter of fact, consult them. Both traveller and shipper, with perhaps a few exceptions, accept without further inquiry the railway agent's general statement respecting the company's charge, and act upon the presumption that the charge is from depot to depot inclusive.

Now what, upon such a state of facts, irrespective of a divisional posted rate, would be the measure of the carrier's undertaking? Could it rightly compel the passenger to alight at a suburban station, geographically within Chicago, and, therefore, in letter, within the terms of its obligation? Could it deposit the freight at some depot other than its general depot, though such other depot was within the city limits? No one, I think, will so contend. The tangible, visible facts relating to the usual places of depositing passengers and freight constitute an element, though unexpressed, in the carrier's undertaking; and its contract will be construed as if such element had been plainly embodied in the ticket, or bill of lading. Any other interpretation would violate a primary rule in arriving at the terms of consent between parties.

The posting of a divisional rate—one item for carriage and another for delivery facilities—may be regarded technically as a purposed exclusion of this unexpressed element; but in practice the traveller and shipper would proceed upon the same conception as if there had been no posting and the rate had remained single. They would still be guided, notwithstanding the divisional rate posted—at least in large numbers—by the visible facts relating to the company's general depot facilities at the city of destination, and would still look upon the flat rate named as inclusive of delivery, as well as of carriage. Passengers from New York, having paid their fare to Chicago, would feel outraged, if, once within the city limits, they were compelled to pay an additional so-called terminal charge, or disembark at a suburban station. The shipper of freight would experience the same feeling, if, in the absence of directions to the contrary, his goods were delivered at some place other than the carrier's general depot. The fact that a divisional rate was formally posted would not disabuse their expectations in time to adjust their course to the real rate thus imposed.

The law, in my judgment, upon considerations of public policy, comes to their rescue. It requires the carrier to do what, in view of this conception in the public mind, respecting travel and shipment—a conception natural and almost universal—the carrier ought, in good conscience, to do. An enforced single charge is no hardship to the carrier; it prevents infinite misunderstanding and inconvenience among its patrons. It is the only method that, treating the carrier fairly, at the same time fairly subverts the interests of the public. It is simply a recognition of an almost universal fact—a fact that is not undone by special provisions written into unnoticed tariff schedules. If the law, irrespective of the carrier's wish or contract, in subserving the public interests, interferes to impose a duty that the appliances shall be reasonably sufficient, and that the freight shall be carried in the customary mode, I can see no reason why, upon analogous motives, it should not recognize the convenience and the justice of the rule here insisted upon, and impose a duty in accordance.

The opinion of the majority, in substance, concedes this general proposition, but escapes its application to the case under consideration, by holding that live stock is an exceptional character of traffic; and that transportation to the stock yards is in the nature of a di-

version, in the interest of the shipper, from the carrier's general depot to the market designated by the shipper. In what respect the traffic is exceptional is not stated. It requires, of course, cars of a special character, and delivery facilities different from those provided for dead freight; but the difference between live stock and dead freight, in these respects, is not so wide as the difference between the equipment necessary to the carriage and delivery of passengers, and the equipment essential to the carriage and delivery of dead freight. Nor is the live stock shipped to Chicago a sporadic kind of traffic, turning up a car load to-day, and possibly not another car load for days to come; it is shown that more than three hundred thousand car loads of live stock (an average of one thousand car loads daily) come into the stock yards each year. No other single source of revenue to the railway companies is perhaps so large and so unfailing. This kind of exceptionalness, it seems to me, emphasizes rather than diminishes, the reason why the rule should be applied to live stock as well as to other freight.

The other reason stated for making live stock an exception—that it is a diversion, in the interest of the shipper, to the shipper's market—ignores the facts found by the Commission, and the undisputed history of the yards. When, in 1865, the yards were established, as the consolidated live stock station of the railway companies, there were at that place no packing houses and no established markets. The locality selected was in the country, centrally located, it is true, for the railways, but still unoccupied by any industry. In course of time, as doubtless the railways anticipated, a market grew up around the station. Here, as elsewhere in industrial evolution, like attracted like. The railways in establishing these yards did not go to the market; the market came to the railways.

As the general Chicago depot for the delivery of live stock, the stock yards remain to-day what they were the day of their establishment, only grown larger. It would be lawful doubtless to change this station, if it were done in substance, not in mere semblance; but the railway companies have not yet chosen to make the change. Why does it not remain their general depot for the delivery of live stock in as full a sense as upon the day it was first established before the surrounding industries had yet gathered; and in as full a sense as during the thirty years succeeding. Is it because the carriers do not own the chutes and pens and the intervening tracks; the same may be said of many passenger lines that come only to the city limits, passing from there over rails, and into the stations belonging to a terminal company. Is it because they pretend to be ready to deliver live stock from their own rails, should the shipper wish; that would be the substitution of a myth, known only on paper, for an actuality, known by the public at large. Is it because they have sold out their holdings in the yards and the intervening rails; that will not entitle them to divide the charge for a service between depot and depot. If, on the day the stock yards were established—before a market was there—they became the depot at which the shipper was entitled to have his stock delivered as a part of the service un-

dertaken, nothing has since transpired to change either the right of the shipper or the obligation of the carriers.

But assuming that the railways went to the markets and established their stations for delivery there, is it any the less, in the public mind, their general depot in Chicago for the delivery of live stock? It seems clear to me that the presence of a market about the stations—the only market of the kind in Chicago—must be taken as a forceful fact, definitely fixing, in the mind of the shipper, the locality of the delivery facilities. Where other than the stock yards, in view of these circumstances, would the shipper reasonably suppose his consignments would go? Would it not take the clearest character of information to convince him that, in the absence of a special direction, the cattle would be unloaded in some unknown place in the city? In this fact, that in the very nature of things live stock must go to the stock yards, will be found strong additional reason for, rather than against, the rule that there should be but a single charge from depot to depot, inclusive.

The general rule invoked is a salutary one, and should not be frittered away upon exceptions not founded upon cogent reasoning. Once open the door to exceptions on easy hinges, and a multitude will find their way in, until, indeed, the rule itself will have become the exception.

UNITED STATES v. BULLARD et al.

(District Court, S. D. Alabama. July 12, 1900.)

PARTIES—JOINDER OF DEFENDANTS—ADMINISTRATOR OF JOINT OBLIGOR.

The administrator of one of several joint contracting parties cannot be jointly sued with the survivors, either at the common law, or under the statute of Alabama which governs in actions in a federal court sitting in that state.

At Law. On motion of defendants for judgment on the ground of misjoinder of parties defendant.

M. D. Wickersham, U. S. Dist. Atty.

Charles J. Torrey, for defendants Agee and Slaughter.

TOULMIN, District Judge. This is a suit brought by the United States against J. B. Bullard, D. A. Frye, W. P. Agee, George Staffens, and C. L. Slaughter, as obligors on a bond executed by said Bullard as principal and the other defendants as sureties. The suit was commenced on August 9, 1899, and on August 13, 1899, service of the summons and complaint was had on all the defendants except C. L. Slaughter, who, it appears, was dead at the time the suit was commenced. Service of the summons and complaint was on the same day (August 13, 1899) had on Lily S. Slaughter, administratrix of C. L. Slaughter, and return made thereof by the marshal. On such return the United States attorney represented to the court that C. L. Slaughter was dead at the commencement of the suit, and moved the court to strike out his name as one of the defendants in the cause, and to add the name of Lily S. Slaughter, as ad-

ministratrix of the estate of said C. L. Slaughter, as a defendant in said cause, which motion was granted, and service of process was by her attorney accepted for Lily S. Slaughter, administratrix. Issue was joined on the complaint by defendants Agee and Slaughter, administratrix, and a trial had by the court without a jury on the suggestion and by consent of parties. On the close of the evidence for the plaintiffs, the defendants, offering no evidence, moved the court for judgment against the plaintiffs on the ground of misjoinder of parties defendant,—the contention being that, it appearing and being admitted that C. L. Slaughter was dead at the time the suit was commenced, his administratrix could not be sued jointly with said Slaughter's surviving co-obligors on the bond sued on; that the plaintiffs are not entitled to maintain this suit; and that the defendants should have judgment in their favor.

The administrator of one of several joint contracting parties cannot be jointly sued with the survivors. *Murphy v. Bank*, 5 Ala. 421; *Rupert v. Elston's Ex'r*, 35 Ala. 79; *Gayle v. Agee*, 4 Port. (Ala.) 507; *Reed v. Summers*, 79 Ala. 522. The personal representative of one of two contractors cannot be sued at common law jointly with the survivor. 8 Enc. Pl. & Prac. p. 680, note 8; *City of Orlando v. Gooding* (Fla.) 15 South. 770. The rule of law on this subject is that, if a joint debtor dies before suit brought, his personal representative cannot be sued with the survivor; but, if he dies after suit brought against all of them, it is optional (under a statute authorizing it) with the plaintiff either to bring in his personal representative, or to proceed against the survivors without doing so. 15 Enc. Pl. & Prac. p. 551; *Id.* p. 554, notes 3, 4; *Githers v. Clarke*, 158 Pa. St. 616, 28 Atl. 232. At common law the death of either party before judgment abated the suit. *Macker v. Thomas*, 7 Wheat. 530, 5 L. Ed. 515; *Ex parte Connaway*, 20 Sup. Ct. 951, Adv. S. U. S. 951, 44 L. Ed. —. At common law all personal actions abated on the death of the defendant, but by aid of the statute an action may be revived against the personal representative of a defendant who dies pending the suit against him. Rev. St. U. S. § 955; Code Ala. §§ 41-43. And it is provided by statute that if there are two or more defendants in a suit where the cause of action survives against the surviving defendant, and one or more of them dies, the action shall not be thereby abated, but such action shall proceed against the surviving defendant. Rev. St. U. S. § 956. The Alabama statute provides that the suit may be revived against the administrator of such deceased and the suit proceed against the survivor or survivors and the representative of the decedent or decedents. The state statute is that the death of one or more defendants jointly sued does not, as to the defendant dying, abate the suit, but it may be revived against the proper representative of such defendant, and may proceed against such representative and the surviving defendant or defendants jointly or severally, at the election of the plaintiff. Code Ala. § 43. In *Ex parte Connaway*, supra, it is held that an administrator of a defendant who dies after the filing of a complaint, which is declared by statute to constitute the commencement of the action, may be made a party, although such defendant dies before summons is served

upon him. *Parker v. Abrams*, 50 Ala. 35, decides the same point. In the latter case there were several defendants, of whom Parker was one. Summons were served on all except Parker, who was not found. About a year subsequent to the commencement of the suit Parker's death was suggested, and the suit was revived against his administrator, who contended that, inasmuch as service of the summons had never been effected on Parker, the action could not be revived against his personal representative, but should abate. The supreme court of Alabama held, in substance, that the filing of the complaint was the commencement of the action, and that Parker was a defendant in the action, whether he had been served with process or not; that, Parker having been sued and having died, the statute, which provides that a suit shall not abate as to one or more defendants or obligors who may die pending the suit, but the same may be revived, etc., applied; and that the judgment seemed regular and was such as the statute allows. The statute determines when the representative of a deceased party may be brought into an action. It is that, where the cause of action survives, the personal representative may be brought into court when the decedent died pending the suit; and the courts hold that this may be done whether the defendant dies before or after service of process on him. This could not be done, except for the statute. In the case of *Schreiber v. Sharpless* (D. C.) 17 Fed. 589, the court says:

"The statute simply provides for bringing in the legal representatives where the party dies pending suit, in cases wherein the cause of action survives by law."

The case of *Reed v. Summers*, *supra*, was a suit brought by Reed, as county superintendent of education, against W. A. Young, as administrator of the estate of J. M. Guyton, deceased, who was former superintendent, and against A. A. Summers and others, sureties on the official bond of said Guyton as such superintendent. All defendants were served with process, and all of them appeared. The court, through Stone, C. J., among other things said:

"Where one of two or more joint obligors dies, the remedy at law for the enforcement of the contract necessarily becomes several, unless there is a statute which authorizes the joint prosecution of such claim. The reason is that no joint judgment can be rendered in a case thus circumstanced. * * * There is no statute authorizing such a suit as this."

It is a case of improper joinder of parties defendant. 15 Enc. Pl. & Prac. 551.

As clearly stated by the attorney for the plaintiffs, the question at issue in this case is whether the personal representative of C. L. Slaughter, one of the joint obligors on the bond sued on, can be jointly sued with one or more of the surviving obligors. And the plaintiff's attorney admits that it is only the law of Alabama that can affect or control the decision in the case. We have already seen that the supreme court of Alabama has decided that no joint judgment can be rendered in a case circumstanced like this, and that there is no statute authorizing a joint suit or joint recovery in such a case as this. *Reed v. Summers*, *supra*. But the attorney for plaintiffs contends that the statute of Alabama (section 43, Code Ala.)

authorizes such suit and recovery. We have seen that the statute provides that "in all suits against two or more defendants, and one or more of such defendants shall die *pending such suit* [italics mine] such suit shall not abate, but it may be revived," etc. The meaning of the statute is plain. It cannot be misunderstood. If C. L. Slaughter died pending this suit (that is, after the suit was commenced), whether he was served with process or not, the statute applies, and the plaintiffs are entitled to a recovery in this case. If said Slaughter died before the commencement of the suit, the plaintiffs cannot maintain the suit. There is no statute authorizing it. *Reed v. Summers*, supra.

The decision in the case of *U. S. v. Tracey*, Fed. Cas. No. 16,536, cited by attorney for the plaintiffs, was based on the statute of the state of New York, which provides, among other things, that all actions upon contract may be maintained by and against executors in all cases in which the same might have been maintained by or against their respective testators. Code Civ. Proc. N. Y. § 120; 2 Rev. St. N. Y. p. 113, § 2. This provision of the law of the state of New York must be considered as the law of the United States court sitting in New York. *U. S. v. Lawrence*, Fed. Cas. No. 15,574; *Sawin v. Kenny*, 93 U. S. 289, 23 L. Ed. 926. We have no such statute in Alabama, and it is conceded that the law of Alabama must control the decision in this case.

That C. L. Slaughter was dead at the time this suit was commenced is conceded both by the admissions of the attorney for the plaintiffs and by the record in the case. There has never been a revival of the suit against the administratrix of said Slaughter. There could be no revival, and none was asked for; but a motion was made by the attorney for the plaintiffs to strike out the name of C. L. Slaughter as a defendant, and to add that of Lily S. Slaughter, administratrix, as a party defendant; the attorney stating to the court that the ground for the motion was that said C. L. Slaughter was dead at the time the suit was brought. Again, on the submission of the motion for judgment against the plaintiffs at the conclusion of the trial of the cause, it was so made to appear. But, besides, it appears from the record that the suit was commenced on August 9, 1899, and that on August 13, 1899, the defendant Lily S. Slaughter, as administratrix of C. L. Slaughter, was served with process by the marshal. By the statute of Alabama, no letters of administration must be granted until the expiration of 15 days after the death of the intestate is known. Code Ala. § 61; *Espalla v. Gottschalk*, 95 Ala. 254, 10 South. 755. Four days after the suit was brought, service of process was made on the administratrix of C. L. Slaughter. Assuming that the law of the state was observed, it follows that administration on the estate of said Slaughter was granted before the suit was brought, and that he was dead at the time the suit was commenced. My conclusion is that the plaintiffs cannot recover in this cause.

WHITE et al. v. GERMAN ALLIANCE INS. CO. OF NEW YORK.

(Circuit Court of Appeals, First Circuit. June 15, 1900.)

No. 304.

1. APPEAL—REVIEW—ACTION TRIED TO COURT.

Where a jury trial is waived by stipulation in an action at law, and the court makes a general finding for one party, a bill of exceptions brings up for review only rulings made in the course of the trial, to which exception was taken, which do not include the general finding, nor the conclusions of the court embodied therein.

2. AGENCY—EVIDENCE TO ESTABLISH.

Letters written by an agent to third persons respecting the cancellation of insurance policies of his principal and the substitution of new policies are admissible in proof of the agent's authority, where it is also shown that the principal knew and acquiesced in his acts.

In Error to the Circuit Court of the United States for the District of Rhode Island.

Wm. G. Roelker and Frank W. Tillinghast, for plaintiffs in error.

E. S. Mansfield (Phillip Mansfield, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

COLT, Circuit Judge. In this case a jury trial was waived, and the court below made a general finding for the defendant. 93 F. 161. Where a case is tried by the court without a jury, the bill of exceptions brings up nothing for revision, except what it would have done had there been a jury trial. Where the finding is general, the parties are concluded by the determination of the court, except in cases where exceptions are taken to the rulings of the court in the progress of the trial. The rulings of the court in the progress of the trial do not include the general finding of the court, nor the conclusions of the court embodied in such general finding. These propositions are laid down in *Insurance Co. v. Folsom*, 18 Wall. 237, 248, 250, 253, 254, 21 L. Ed. 827, and *Cooper v. Omohundro*, 19 Wall. 65, 69, 22 L. Ed. 47. The construction given by the supreme court to the statute relating to jury trial waived cases (Rev. St. §§ 649, 700) confines the questions open for review on this particular writ of error to the exceptions taken in the court below to the admission of certain evidence.

This suit was brought to recover on a policy of fire insurance issued by the defendant upon mill property owned by the plaintiffs. The case turned on the question of cancellation. It appeared that one Tillinghast, an insurance broker, was authorized by the plaintiffs to procure \$40,000 additional insurance on their mill property, and that he placed this insurance in several companies,—the defendant being one,—and sent the policies to the plaintiffs. Within a few days thereafter Tillinghast was notified by the agent of the companies that they did not care to longer continue the risk, and a return of the policies was requested. Thereupon he communicated this to the plaintiffs by letter, and proceeded to replace the insurance in other companies. The ma-

terial issue of fact in the court below was whether Tillinghast was authorized by the plaintiffs to cancel the original policies and substitute new policies. Although the policy contained the usual provision respecting cancellation by the company, or at the request of the insured, by giving five days' notice, it was not necessary to prove that personal notice was given the insured, provided it was shown that Tillinghast had authority to cancel the original policies upon taking out other insurance for a like amount. In support of defendant's contention on this point, it offered in evidence, against the objection of the plaintiffs, certain letters which passed between Tillinghast and the agent of the companies which issued the first policies, respecting the cancellation of those policies; also, certain letters and a telegram which passed between Tillinghast and the agent of the companies which issued the new policies respecting the placing of the substituted insurance,—as bearing upon the authority of Tillinghast to cancel the old policies and to substitute others. This evidence, standing alone, was not admissible; but, as one link in the chain of proof which was presented on this issue, it was, in our opinion, clearly admissible. In addition to this evidence, the record discloses that there was direct evidence, in the form of letters, that the plaintiffs had knowledge of the acts of Tillinghast, and of their acquiescence in what was being done. There was also evidence that the plaintiffs had accepted payment of the substituted policies, and had entered into a contract of adjustment with the substituted companies, under which the present suit was brought in the name of the plaintiffs to enable the substituted companies to work out a contribution from the defendant company, all of which tended to prove an adoption by the plaintiffs of the acts of Tillinghast respecting the substitution of new policies for the old. It is not for this court to pass upon the sufficiency or weight of the evidence. That was for the court below, and we have no power to disturb a general finding by the court on issues of fact, where there is evidence to support the finding.

Assuming that the plaintiffs' requests for certain rulings at the close of the testimony were refused, and that exceptions were duly taken to such refusal, these exceptions cannot be considered by this court, because they seek to review certain conclusions of the court below which were necessarily embodied in the general finding by that court. *Cooper v. Omohundro*, 19 Wall. 65, 69, 22 L. Ed. 47. Judgment affirmed, with costs of this court for the defendant in error.

DEERING HARVESTER CO. v. KELLY et al.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1900.)

No. 800.

1. AGREED STATEMENT OF FACTS—ADMISSION IN EVIDENCE.

Where parties agree to a statement of facts to which is attached, as an exhibit, the findings and decision of a referee thereon, made in pursuance of a reference by the parties, and the statement is signed as approved by counsel for both, an objection to the admission of the exhibit in evi-

- dence is not tenable, especially as the bill of exceptions shows that the statement was offered by consent.
2. **OBJECTION TO EVIDENCE—FAILURE TO ASSIGN GROUND—EFFECT.**
Where no reason or ground is assigned for an objection to evidence, and none is so manifest that the trial court would not fail to understand it, the objection is properly overruled.
 3. **ASSIGNMENT OF ERROR—PARTICULARITY—SUFFICIENCY.**
C. C. A. Rule 11 (31 C. C. A. cxlvi., 90 Fed. cxlvi.) requires that assignments of error shall set out separately and particularly each error asserted and intended to be urged. *Held*, that mere general complaints that judgment was rendered for the wrong party are not a compliance with the rule, and, in the absence of plain error in the record, will be disregarded.
 4. **SALE—DEFERRED PAYMENT—MARKETABLE TITLE—SUFFICIENCY.**
Where by the literal terms of a contract, on reference, by the buyer and seller of a license to use a patent, a deferred payment is to be made only in the event of the seller's being able to show a perfect legal title to the patent, but the context and the circumstances show that a good, sound title was meant, and the referee finds that the seller has a good marketable title, it is not error to render judgment for the seller in the amount of the payment; such finding showing a substantial compliance with the agreement for reference.
 5. **OVERRULING MOTION FOR NEW TRIAL—REVIEW ON WRIT OF ERROR.**
Error in overruling a motion for a new trial cannot be considered on writ of error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Oscar T. Martin and Thomas C. Banning, for plaintiff.
James Johnson, Jr., for defendant.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. This case is brought here on writ of error. The plaintiff, Kelly, for himself and as trustee for certain companies who are named in the title of the action, brought suit in the court of common pleas of Clarke county, Ohio, to recover the sum of \$5,000, part of the purchase price for licenses under certain patents sold by him and the companies for whom he stands as trustee to the Deering Harvester Company, the defendant below and plaintiff in error here. The suit was removed into the circuit court of the United States upon the petition of the Deering Harvester Company, where it was tried before the judge, without a jury, upon evidence with respect to which there was no dispute. It was proven by this evidence that the plaintiff and those for whom he acts as trustee granted licenses to use a large number of patents owned by them to the Deering Harvester Company, and that in consideration therefor the latter company agreed to pay the sum of \$25,000, \$20,000 of which was to be paid down. The Deering Harvester Company having some doubt of the validity of the vendors' title to some of the patents, it was agreed that the payment of the remaining \$5,000 should be deferred, to enable the vendors to demonstrate that they had a good title, or, if they had not, to enable them to perfect it; and six months were allowed for that purpose. A referee was agreed upon, to hear evidence and decide whether "the Deering Harvester Company had reasonable grounds to dispute the full legal

title." If it was shown that no reasonable ground for doubt existed, or if it was shown that such reasonable ground did exist, and the other parties should clear it up to the satisfaction of the referee, then the remaining \$5,000 were to be paid; otherwise, not. So much of the agreement as related to that subject is here quoted:

"It is further agreed that the above-named licensors shall submit all papers showing titles to the patents above enumerated, at their earliest convenience, to said referee, and that the said Deering Harvester Company shall within two weeks thereafter submit its objections to said titles to the said referee, and, if the said referee then decides that the Deering Harvester Company has reasonable grounds to dispute the full legal title, the said licensors shall be given six (6) months in which to protect [perfect] said title or titles. If, within the time last specified, the said licensors perfect the titles to the satisfaction of the said referee, the said Deering Harvester Company shall pay to the said licensors, or their authorized representative, five thousand (\$5,000) dollars. It is mutually understood that, if the said licensors fail to show a perfect legal title to the above patents within the prescribed six months, the said Deering Harvester Company shall not be required to pay the above sum."

A hearing was had before the referee, and he decided, in substance, as the court below held, that the title was not an absolutely perfect title, but was a good, marketable title. Thereupon the plaintiff demanded the payment of the \$5,000, which was refused. The court (Thompson, J.) made and filed its findings of law, upon which it reached the conclusion that the plaintiff was entitled to recover the sum demanded, and entered judgment accordingly. The defendant moved for a new trial, which was denied, and the defendant excepted. A bill of exceptions was settled. Only two exceptions appear therein, one of which is thus stated, and it is all that appears concerning it:

"Counsel for the plaintiff offers the license (Exhibit A), and the award under consideration, and the decision of the referee (Exhibit B), which is received subject to the objection and exception of the defendant, the competency of which to be determined when the case is disposed of."

The other exception was to the overruling of the motion for a new trial. The only other exception appearing in the record is one following the entry of the general finding and judgment, in the following language:

"To which finding and judgment of the court, defendant excepts."

The assignment of errors is as follows:

"First, the court erred in permitting the plaintiff to offer in evidence the award of the referee (Exhibit B); second, the court erred in rendering judgment for the plaintiff upon the evidence; third, the court erred in rendering judgment for plaintiff upon the law of the case; fourth, the court erred in not rendering judgment in favor of the defendant upon the law and evidence; fifth, the court erred in overruling motion for new trial."

Upon this state of the record, there is almost nothing which we are authorized to review. The first assignment of error complains that "the court erred in permitting the plaintiff to offer in evidence the award of the referee (Exhibit B.)" But the bill of exceptions states that "the plaintiff, to maintain the issues on his part to be maintained, offered, with the consent of the defendant, the following agreed statement of facts as the evidence in the case, and the same was so submitted." Then follows "The Statement of Facts,"

in which is the following: "The paper hereto attached, marked 'Exhibit B,' embodies the findings and decisions of the referee." The statement of facts was signed "Approved" by counsel for both parties. After all this, we perceive no standing ground for an exception to the admission of evidence embodied in the agreed statement of facts. Moreover, there was no ground or reason assigned for the objection, and, if there was any, it certainly was not so manifest as that the court could not fail to understand it. In such case the objection and exception come to nothing, and the trial court commits no error in disregarding them. The rule is correctly stated in 8 Enc. Pl. & Prac. 163, where a great number of the cases are collected, thus:

"In examining a question as to whether the rulings of the court below are correct, the appellate court will not consider any other grounds of objection than those urged in the court below. The appellate court is not a forum in which to discuss new points, but merely a court of review to determine whether the rulings of the court below, as presented, were correct or not."

Indeed, we are ourselves unable to perceive any valid ground on which the objection could be supported.

The second, third, and fourth assignments of error are mere general complaints that the judgment was rendered for the wrong party. Such assignments are not such as the rule requires, and they present no question which we can recognize. The eleventh rule of this court (31 C. C. A. cxlvi., 90 Fed. cxlvi.) requires that the assignment "shall set out separately and particularly each error asserted and intended to be urged." "And errors not assigned by this rule will be disregarded, but the court at its option may notice a plain error not assigned." *Railroad Co. v. Cutting*, 16 C. C. A. 597, 68 Fed. 586; *Doe v. Mining Co.*, 17 C. C. A. 190, 70 Fed. 455; *U. S. v. Ferguson*, 24 C. C. A. 1, 78 Fed. 103; *Hart v. Bowen*, 31 C. C. A. 31, 86 Fed. 877,—are some of the cases where similar assignments were held to be ineffective. How easy compliance with the rule would have been is shown by the brief of counsel for the plaintiff in error, wherein the case is put thus:

"The opinion of the circuit court was fundamentally wrong upon three propositions, namely: (1) The issue made was not, alone, what did the referee decide? but, what was submitted to him by the agreement of arbitration for decision? (2) A perfect legal title is more than a good title or a marketable title. (3) The referee did not find that the vendors had a marketable title. The assignments of error will be discussed in the argument upon the above propositions."

We have looked into the record sufficiently to see that there is no "plain error" in the rulings of the court below which would justify us in disregarding the rule. On the contrary, our impression is that the court did not err in its determination of the principal and decisive question in the case, which is whether, upon the proper construction of their agreement for arbitration, it was necessary for the plaintiff to show an absolutely perfect title, or whether, on the other hand, its requirements would be met by the finding of the referee that the title was free from any substantial defect. That the overruling of a motion for a new trial cannot be considered on a writ of error has been so often decided that it is unnecessary to give the assignment relating to it special attention. The judgment must be affirmed.

MASON & O. R. CO. v. YOCKEY.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1900.)

No. 820.

1. DIRECTION OF VERDICT.

A case can be properly withdrawn from the jury only where, on a survey of the whole evidence, and giving effect to every inference fairly or reasonably to be drawn from it, the case is palpably for the party asking a peremptory instruction.

2. SAME—NEGLIGENCE—QUESTIONS OF FACT.

Where fair-minded men may honestly draw different conclusions from the facts in evidence as to the negligence of a master and the contributory negligence of a servant, such questions are of fact for the jury.

3. RAILROAD FIREMAN—MASTER'S NEGLIGENCE—QUESTION FOR JURY.

Plaintiff, as defendant railroad company's fireman, on a cold winter morning was assigned to a certain engine, on which he had not fired since the preceding summer. The engine was defective, in that its valve stem was out of place, and an imperfectly fitting wooden plug had been substituted, permitting a spray of water to escape with the jolting of the engine over the rough roadbed, and fall onto the iron apron connecting the engine and tender, where it froze, creating an icy covering. Plaintiff slipped on this covering, and fell from the cab, receiving serious injury. He was ignorant, at the time of going on the engine, of the substitution of the plug for the valve stem, and had not been warned of the fact. *Held*, that the question of defendant's negligence was properly submitted to the jury.

4. SAME—APPLIANCES—PLACE TO WORK—SAFETY—MASTER'S DUTY.

It is incumbent on an employer to exercise ordinary care to provide and maintain a reasonably safe place and reasonably safe machinery and appliances in which and by means whereof an employé is to perform his service.

5. SAME—DISCHARGE OF DUTY—PRESUMPTION BY SERVANT.

An employé has a right to presume, when directed to work in a particular place, and with machinery furnished by the master, that reasonable care has been exercised by his employer to see that the place is free from danger, and the machinery reasonably safe for use, unless there are dangers so obvious as to lead a reasonably prudent man either to refuse to work or to make complaint to the master.

6. SAME—FIREMAN'S KNOWLEDGE OF DANGER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where water escaped from a locomotive tank owing to the substitution of a wooden plug for the valve stem, and fell on to the iron apron connecting engine and tender, where it froze, creating an icy covering, on which plaintiff fireman slipped, receiving injuries, and plaintiff had observed the escape of water, but not the icy formation on the apron, it was for the jury to say, in view of the engrossing nature of a fireman's duties, whether, in failing to observe the formation of ice, plaintiff was guilty of contributory negligence.

7. SAME—ASSUMPTION OF RISK—ABANDONMENT OF ENGINE—QUESTION FOR JURY.

Where water escaped from a locomotive tank owing to the substitution of a wooden plug for the valve stem, and fell on the iron apron connecting engine and tender, where it froze, creating an icy covering on which plaintiff slipped, receiving injuries, and plaintiff had observed the escape of water, but not the icy formation on the apron, it was for the jury to say whether, on observing the defect, it was plaintiff's duty to forthwith abandon the engine in order to avoid an assumption of risk precluding his recovery.

In Error to the Circuit Court of the United States for the Western District of Michigan.

Lloyd E. Knappen and A. J. Dovel, for plaintiff in error.

Medor E. Louisell and J. Byron Judkins, for defendant in error.

Before LURTON and DAY, Circuit Judges, and RICKS, District Judge.

DAY, Circuit Judge. The defendant in error, a fireman in the employ of the railway company, having, on the 28th of February, 1893, sustained serious injuries while in the service, brought this action to recover against the company for alleged negligence. The case is brought into this court upon the single proposition as to the correctness of the action of the circuit court in submitting the case to the jury, and failing to give a peremptory instruction at the close of the testimony to find a verdict in favor of the railroad company. The case cannot be reviewed here upon the weight of the testimony. Should the court have determined the case for the plaintiff in error as a matter of law, or was it properly left to the jury? A case can be properly withdrawn from the jury only where, on a survey of the whole evidence, and giving effect to every inference fairly or reasonably to be drawn from it, the case is palpably for the party asking a peremptory instruction. *Insurance Co. v. Thornton*, 40 C. C. A. 564, 100 Fed. 582. In *Railway Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463, the cases are fully reviewed, and this court, Judge Lurton giving the opinion, said:

"It is the duty of the court, when a motion is made to direct a verdict, to take that view of the evidence most favorable to the party against whom it is desired that a verdict should be directed, and from the evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for that party."

In the present case, examining the testimony with a view to ascertaining whether a case was made under the rules above laid down, the following facts may be said to have been established: The defendant in error, George L. Yockey, had been in the employ of the company, prior to the time of the injury, about 2½ years, first in the machine shop, and later as a fireman for about 1½ years. The railroad is a short one, and had seven locomotives. The injury happened while the defendant in error was at work on engine No. 7. Yockey had not been at work on this engine before during that winter, but had worked upon it twice during the preceding summer. The morning of the accident he was called by the conductor, and told to hurry up. He got upon the train between 5:30 and 6 o'clock, just at the break of day, a cold, winter morning. The engine left Buttersville, a station on the road, somewhere about 6 o'clock, with two coaches,—a combination baggage and smoking car and one coach. Defendant in error was employed constantly in his duties as a fireman from the time the train started until he was injured, firing every two or three minutes. The engine No. 7 was defective in the want of a valve stem, which is described as an iron rod passing from near the bottom of the tank, where it is fastened to a cock, up through to the top of the tank, and when in place is there operated by a wheel or other appliance whereby the cock is opened or closed to let the water pass in or out of the tank. This valve stem was out of place, and there had been

substituted for it a wooden plug, driven in at the top of the tank. The roadbed was rough, and, owing to that fact, the plug, which was imperfectly fitted and driven in, would permit the water to splash through the opening about it, producing a spray of water, which fell down—perhaps carried by the wind—onto the apron connecting the engine and tender, creating thereon an icy covering. In passing over this apron the fireman fell on the ice, and thence out of the cab, through the opening between the cab and tender, and was very severely injured. The defendant in error had noticed shortly before that the water came out of the tank, and noticed that the valve stem was gone and a wooden plug substituted. The water came near the engine, but the defendant in error did not watch it closely or at all. He had gone out of the engine several times before the injury, and had noticed the splashing of the water. Before going upon the engine that morning, the defendant in error testified he did not know anything about the plug being in that place, and that he received no warning as to the condition of the engine. He testified that he was occupied nearly all of the time; that it was a bad morning, and he was kept pretty busy putting in coal, and that his attention was on his duties as a fireman; that he did not know that the water had fallen on the apron, and paid no attention to it. If, from these facts, fair-minded men might honestly draw different conclusions as to the negligence of the railroad company and the contributory negligence of Yockey, the questions are not of law, but of fact, and are to be settled by the jury under proper instructions. *Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; *Railroad Co. v. Everett*, 152 U. S. 107, 14 Sup. Ct. 474, 38 L. Ed. 373. It is claimed on behalf of plaintiff in error that there is nothing in this testimony tending to show that plaintiff in error was guilty of negligence in permitting the engine to be out of repair, requiring the valve stem to be replaced by the plug; that such condition was not dangerous to the fireman's safety. The duty of the master to supply reasonably safe appliances for the servant has been so frequently stated by the supreme court and by this court as to scarcely require repetition. It is incumbent upon the employer to exercise ordinary care to provide and maintain a reasonably safe place and reasonably safe machinery and appliances, in which and by means whereof an employé is to perform his service, in order that the employé shall not be exposed to unnecessary and unreasonable risks. The employé has the right to presume, when directed to work in a particular place, and with machinery furnished by the master, that reasonable care has been exercised by his employer to see that the place is free from danger, and the machinery reasonably safe for use, and, in reliance on such presumptions, may discharge his duties in such place and with such machinery, unless there are obvious dangers which would lead a reasonably prudent man either to refuse to work in the place or with the machinery, or to make complaint of the same to his master. If, however, the danger is not actually known to the employé, or would not become known to an employé of reasonable prudence performing the duties imposed upon him, he cannot be charged with contributory negligence in the happening of an injury to him by reason of the condition of the place

or machinery in and with which he works for the master. *Norman v. Railroad Co.*, 10 C. C. A. 617, 62 Fed. 727, and cases cited. It was the business, then, of the railroad company, in furnishing this locomotive upon which the work of the fireman was to be performed, to make it reasonably safe, the employé using ordinary care and diligence for his own protection. It may be said that an engine and tender having the valve supplied with a stem, which, when in repair, would prevent the water from splashing, or supplied with a plug which would efficiently answer the purpose, is a reasonably safe mechanism; but when the valve stem has been removed, and the water is liable to splash from the opening between a loosely fitting plug and the top of the tank, can it be said to be safe? Would a reasonably prudent man, exercising care for the safety of his employés, send out a locomotive in this condition, supplied with a metallic apron, on which the water might splash and freeze on a cold day, without warning to the employé? Such conditions make the apron, over which the fireman was obliged to pass, slippery and dangerous. The employer is not permitted to expose the employé to unnecessary danger. He must use care to avoid danger to those in his service. We cannot say that the testimony made a case so palpably for the plaintiff in error that it should be resolved in its favor as a matter of law. Questions of this character must be decided upon the facts of each particular case. The company might have known that it was dangerous in the winter to permit water to escape on the apron, where the employé was constantly obliged to step, and particularly where the track was rough, as it is shown to be in the present case.

2. Next, it is alleged that the defendant in error was guilty of contributory negligence. Care is no less obligatory upon the employé than upon the employer. He is bound to use his senses for his own protection. The testimony shows that the defendant in error had been ordered upon this engine; that he did not know of any defect in it; and that he discovered a short time before the injury that water was splashing, but he did not notice the formation of ice. Under these circumstances we think it was properly left to the jury to say whether he was guilty of contributory negligence in failing to discover the ice and avoid injury therefrom. He had no notice of the defect until shortly before the injury, and continued in the discharge of his duties. The only contributory negligence that could fairly be ascribed to him would be failing to observe the formation of ice upon the apron, and stepping thereon. We think it was in the province of the jury to decide this question, in view of the engrossing nature of the fireman's duty constantly requiring his attention in its proper discharge.

3. Another proposition urged is that defendant in error assumed the risk after he became aware of the escaping water and saw it splashing from the tank. As a general proposition of law, one who continues in the employ of another with knowledge of defects, and without complaining thereof, assumes the dangers incident thereto. But in the present case we think it was for the jury to say whether the defendant in error should have abandoned his post, and quit the

train, after he had learned of the defect in question. Would a reasonably prudent man have done so? And did his duty require him to do so? We think this question was fairly left to the jury. The company required the services of defendant in error during that trip. He owed a duty to the company to remain in its service for the time being. We do not think there was anything in the circumstances which required the defendant in error to suddenly abandon the service of the company. At least, this duty was not so self-evident as to require the question to be taken from the jury. In *Kane v. Railway Co.*, 128 U. S. 94, 9 Sup. Ct. 16, 32 L. Ed. 339, it is said:

"It is undoubtedly the law that an employé is guilty of contributory negligence which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if in his power to do so. He will be deemed, in such case, to have assumed the risks involved in such heedless exposure of himself to danger. *Hough v. Railroad Co.*, 100 U. S. 224, 25 L. Ed. 612; *District of Columbia v. McElligott*, 117 U. S. 621, 631, 6 Sup. Ct. 884, 29 L. Ed. 946; *Goodlet v. Railroad Co.*, 122 U. S. 391, 411, 7 Sup. Ct. 1254, 30 L. Ed. 1230; and *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755. But in determining whether an employé has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position; indeed, to all the circumstances of the particular occasion."

Under the circumstances shown in this case we think the question as to whether the defect in the engine was a dangerous one, as to whether the defendant in error was guilty of contributory negligence, and whether he assumed the risks incident to a danger of which he was aware or ought to have known, were all properly left to the jury.

There is no complaint of the charge. A perusal of it shows that it was a very fair and comprehensive one, fully instructing the jury as to the rules of law applicable to the circumstances of the case. As there was testimony sufficient to permit the case to go to the jury, we think the court did not err in thus submitting it, and the judgment of the circuit court is affirmed.

IN RE FELDSTEIN.

(District Court, S. D. New York. July 17, 1900.)

1. EVIDENCE—PRIVILEGE OF WITNESSES—EXPOSURE TO CRIMINAL PROSECUTION—BANKRUPTCY PROCEEDINGS.

Under Const. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself, a witness in proceedings before a referee in bankruptcy cannot be compelled to testify to the consideration given for certain bank checks made to the witness by a bankrupt, where he states that his answers might tend to criminate him, and the evident purpose of the examination is to show that the checks were given for gambling debts, the receipt of which, under the laws of the state, is a criminal offense.

2. SAME—IMMUNITY FROM PROSECUTION.

Bankr. Act, § 7a, subd. 9, providing that no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding, even if applicable in favor of a witness other than the bank-

rupt in bankruptcy proceedings, is not sufficient to secure the full protection intended to be afforded a witness under Const. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself.

In Bankruptcy.

Blumenstiel & Hirsch, for receiver.

Lenehan & Dowley, for witness.

BROWN, District Judge. Application is made for an order to commit the witness A. C. Maynard for contempt in refusing to answer certain questions put to him in an examination at the instance of the receiver of the bankrupt, pending before the referee, which questions the witness refused to answer on the ground that his answer would or might tend to criminate him.

The subjects of inquiry were some 35 checks, amounting altogether to \$72,486.53, which had been given by the bankrupt to the witness between September 19, 1898, and August 10, 1899. The object of the examination was to ascertain the consideration for those checks, and in fact to ascertain whether they were not given for gambling debts which the trustee might recover by action against the witness. Two actions of that kind on various other checks had already been brought by the bankrupt's receiver in the state court, and are still pending there.

By the Penal Code of the state of New York, gambling is a criminal offense. Section 340 provides that any person exacting or receiving anything from another won by any game of chance, shall forfeit five times the value thereof; section 341 provides that a person who wins or loses at play by betting at any time the sum of \$25 or upward, within 24 hours, is punishable by a fine of five times the value or sum so lost or won. Various other sections make it penal to keep a room or building to use for gambling purposes, or tables, apparatus or other implements for such purposes.

The witness had stated in general that the checks referred to were given to him in payment of moneys loaned to the bankrupt at the times mentioned in the checks; or rather that each check was given the next time he saw the bankrupt after the loan. Numerous other questions were asked, some of which were answered, the purpose of which evidently was to show that the checks were really given to pay gambling debts, and that the so-called loans by the witness were a device to conceal that fact. Among the questions which the witness declined to answer were: Whether he slept at any other place than his ordinary place of abode; whether he had played cards with the bankrupt; whether he had seen the bankrupt playing roulette during the time which was covered by the checks; why his answer to such questions might tend to criminate him; whether during this period he was interested in an establishment where roulette was played; whether he had seen the bankrupt in certain premises named; whether any of the checks referred to were given to the witness at that place; whether all the checks were not given to him by the bankrupt for losses incurred by him in games of chance at the establishment conducted by the witness, or in which the witness was interested; whether

the witness had any business at this period other than the carriage business in which he had stated he was interested; whether he had ever seen the bankrupt use any of the money loaned to him by the witness for any purpose; whether the greater part of the money was not used in settling up losses which the bankrupt had incurred in a gaming establishment in which the witness was interested, and the checks given on each occasion of a loss; whether the bankrupt had won any money of the witness during the same period; whether during this period the witness resided temporarily or otherwise at the place indicated; whether the bankrupt was not in the habit of continually during that period visiting the premises and gambling there with the witness.

It is evident from these questions that the object of the examination was to require the witness to furnish evidence which would enable the receiver to recover back money of the bankrupt lost in gambling and paid by him to the witness. Under the Penal Code of this state such acts are made punishable as offenses. The witness is therefore protected not only by the constitution of the state, but also by the United States constitution, from any compulsory answers to such inquiries, unless perfect statutory immunity is afforded to the witness in answering such questions. Section 7a (9) of the present bankrupt act provides as respects the bankrupt himself, that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." This provision, even if applicable in favor of a witness (which it is not in terms), seems to be no stronger or more effective as a protection than section 860 of the Revised Statutes, which in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, was on full discussion held insufficient. This was followed in *People v. Forbes*, 143 N. Y. 219, 38 N. E. 303, and reiterated in *Brown v. Walker*, 161 U. S. 591, 16 Sup. St. 644, 40 L. Ed. 819. The same ruling upon clauses of this character has been made in several bankruptcy cases. In *re Hathorn*, 2 Am. Bankr. R. 298; In *re Rosser*, 2 Am. Bankr. R. 755, 96 Fed. 305; In *re Scott*, 1 Am. Bankr. R. 49, 95 Fed. 815. Section 342 of the New York Penal Code and section 10 of the Code of Criminal Procedure are no broader in their provisions than those above referred to, and are consequently insufficient to afford the complete immunity required by the constitution. In the case of *Brown v. Walker*, however, the statutory exemption had been extended by amendment so as to afford complete immunity from prosecution in respect to the subjects of the witness' testimony; and on the ground of that extension alone the statutory immunity of the witness was held to be complete, and he was accordingly held bound to answer.

By a recent similar amendment in the law of the state of New York, applicable to the examination of witnesses in certain proceedings to prevent monopolies, etc. (Laws 1899, c. 690, § 6), complete immunity from prosecution is similarly afforded; and on that ground it was recently decided by Chester, J., in the *Ice Cases*, so called (*Morse v. Nussbaum*, 32 Misc. Rep. 1, 66 N. Y. Supp. 129), that the witness must answer.

There is no general provision, however, in the laws of the state of New York or in the statutes of the United States which furnishes immunity from prosecution to a witness interrogated in respect to his participation in gambling or moneys thereby acquired. At most the exclusion extends only to the particular evidence given by the witness, and this being held to be insufficient according to the authorities above cited, the witness must be held privileged from testifying to the matters certified.

In re ABRAM.

(District Court, N. D. California. July 9, 1900.)

No. 3,265.

BANKRUPTCY—TRUSTEE—EMPLOYMENT OF COUNSEL.

A court will not undertake to give any direction in advance to a trustee in bankruptcy in the matter of the employment of an attorney, but he must exercise his own judgment in the first instance as to the necessity for such employment.

In Bankruptcy.

DE HAVEN, District Judge. The trustee of an estate in bankruptcy is entitled to the advice and assistance of counsel when necessary for the proper discharge of his duties as such trustee, and the reasonable expense incurred by him for such a purpose may be allowed as a charge against the estate; but the court will not, ordinarily, in the first instance, undertake to give any direction to the trustee in the matter of the employment of an attorney. The trustee must exercise a reasonable judgment in that matter; that is, he must exercise a reasonable judgment as to the necessity for securing the assistance of counsel,—such judgment as a man of ordinary prudence would use in the transaction of his own business. When professional services have been rendered by an attorney to the trustee in his official capacity, the court will, in a proper proceeding, determine whether the employment of such an attorney was necessary, and, if found necessary, the reasonable value of his services. The petition of the trustee for authority to employ an attorney is denied.

In re THOMAS.

(District Court, W. D. Pennsylvania. July 23, 1900.)

No. 331.

BANKRUPTCY—ACT OF INSOLVENCY—SALE OF PROPERTY ON EXECUTION.

For an insolvent debtor to suffer an execution to issue on a judgment, and to permit his personal property to be levied on and sold thereunder, without taking affirmative action to pay said judgments and to vacate and discharge said executions, is an act of bankruptcy, within Bankr. Act 1898, § 3, providing that acts of bankruptcy shall consist of an insolvent debtor's

having suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, five days before a sale, vacated or discharged such preference.

In Bankruptcy. Sur report of commissioner.

Q. A. Gordon and C. N. McClure, for execution creditors.

W. C. Pettit and A. W. Williams, for petitioning creditors.

BUFFINGTON, District Judge. In this case certain judgments were entered against Mrs. Rose Thomas, and executions thereon issued on May 1, 1899, and her personal property, consisting of the stock in her store and household goods, levied on and advertised for sale on May 9th. On May 6th an involuntary petition in bankruptcy was filed against her, alleging she had taken no steps to vacate or discharge the executions. To this she made answer, not denying her alleged insolvency, but averring she had not committed an act of bankruptcy. By agreement of counsel the personalty levied on was sold by the sheriff, the proceeds held subject to the order of this court, and a commissioner appointed to take testimony both as to the question of the validity of the executions and of adjudication on the petition, and report the facts, with his conclusions of law thereon. In pursuance of this appointment the commissioner makes report that the executions were valid liens, and the petition in bankruptcy should be dismissed. The facts are that on May 1, 1899, Mrs. Thomas was, inter alia, indebted upon several judgment notes to these execution creditors. These notes were past due, and she seemed to have taken no steps whatever providing for their payment or renewal. Judgments were entered and executions issued on these notes without the knowledge or solicitation of Mrs. Thomas. By her failure to pay her matured obligations, which contained warrants of attorney to confess judgments and issue executions, she suffered and permitted such creditors to obtain a levy on her insolvent estate, which, under the Pennsylvania practice, gave such executions a preference thereon; and by her failure to pay or otherwise vacate or discharge such executions she made possible a sale of her entire personal estate, and the absorption of its entire proceeds by such preferred creditors. The answer does not deny her alleged insolvency, and the fact of insolvency is patent. The bankrupt act provides (section 3) that:

"Acts of bankruptcy by a person shall consist of his having * * * suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

The preference in the present case does not consist in the entry of the judgment. No preference was obtained thereby. It consists in the levy upon personal property enforced by a subsequent sale. Did the defendant, within the meaning of the bankrupt act, thereby suffer or permit a preference through legal proceedings? It is true she took no active, affirmative steps to create such preference, other than the failure to meet a matured judgment note or provide for its extension; but inasmuch as she took no steps to prevent the enforcement, by sale, of such preference, she must be held to have suffered or permitted

these creditors to obtain preference. "To permit" is defined as not to hinder. Webster defines "permit" as more negative than "allow"; that it imports only acquiescence or an abstinence from prevention,—while "suffer" he defines as having an even stronger passive and negative sense than permit, and as implying sometimes mere indifference. It would seem, therefore, that to permit or suffer implies no affirmative act,—involves no intent. It is mere passivity, indifference, abstaining from preventive action. The distinction between procuring a thing to be done and suffering it was drawn in *Gore v. Lloyd*, 12 Mees. & W. 497, where, in considering the English bankruptcy law, it was said:

"The act of parliament speaks of two different classes of acts of bankruptcy. One is by the party's suffering, the other by his procuring, certain acts to be done. Surely this is only suffering. It cannot be procuring, because a person's procuring his goods to be taken in execution means that the initiative comes from him. He is the person who begins to procure, who initiates the proceedings, and causes the thing to be done, in the ordinary sense of the word. We should make no distinction between a party's suffering and procuring, if we were to say that the doing of an act of this kind was procuring. It can be nothing more than suffering."

In considering decisions involving the construction of analogous questions under the bankrupt act of 1867, due regard must be given to the material difference between that act and the present one. In the former the intent of both debtor and creditor were made express elements and conditions. Such intent fixed the character of the act of preference. By section 35 of that act, relating to liens, it was provided:

"That if any person being insolvent * * * within four months * * * with a view to give a preference to any creditor * * * procures any part of his property to be * * * seized on execution * * * the same shall be void."

By section 39, relating to acts of bankruptcy:

"That any person who * * * shall procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors * * * or with the intent by such disposition of his property, to defeat or delay the operation of this act," etc.

In *Wilson v. Bank*, 17 Wall. 483, 21 L. Ed. 727, it was held that these provisions made the act of bankruptcy and the invalidity of the lien "to depend on the intent with which the act was done by the bankrupt, and the knowledge of the bankrupt's insolvent condition by the other party to the transaction." The court say:

"In both cases it must be accompanied by an intent. In section 35 it is to give a preference to a creditor. In section 39 it must be to give a preference to a creditor, or to defeat or delay the operation of the bankrupt act. In both there must be the positive purpose of doing an act prohibited by that statute, and the thing described must be done in the promotion of that unlawful purpose."

Moreover, in *Clark v. Iselin*, 21 Wall. 376, 22 L. Ed. 573, it was further said by the supreme court of the United States:

"The preference must be accompanied by a fraudulent intent, and it is that intent that taints the transaction."

Presumably with knowledge of these decisions, congress enacted the present law. Not only does the particular subdivision now under consideration omit the element of the intent of either creditor or debtor, but that such omission was purposeful and significant is evidenced by the fact that in the acts of bankruptcy defined by the two preceding subdivisions an intent to hinder, delay, or defraud creditors in the one, and to prefer a creditor in the other, is expressly required. It is clear that, by the purposeful omission of the element of intent in this class, congress has made facts, and not intent, the test of this particular act of bankruptcy. Such facts are insolvency of the debtor, preference through legal proceedings, nonvacation or discharge of such preference five days before sale, etc. This view has the support of authority. In *Manufacturing Co. v. Stoeve*, 38 C. C. A. 200, 97 Fed. 330, this section was considered by the circuit court of appeals of the First circuit with reference to the four-months limit from the act of bankruptcy within which insolvency petitions must be filed. It was there said:

"Regard, however, must be had to the whole of clause 3; and, in view of that, what the appellant 'suffered or permitted' was the sale of its property through legal proceedings. This was clearly the true act of bankruptcy, within the contemplation of the statute, although the statute is somewhat awkwardly expressed. In like manner, as the failure to vacate the execution before the sale was the act of bankruptcy, it is clear the four-months period runs, not from the attachment, but from a date connected with the proceedings after the attachment."

To this may be added *In re Moyer*, 1 Am. Bankr. Rep. 577 (D. C.) 93 Fed. 188; *In re Reichman*, 1 Am. Bankr. Rep. 17, 91 Fed. 624. Nor is the case *In re Nelson* (D. C.) 98 Fed. 76, 1 Am. Bankr. Rep. 63, to the contrary, when its facts are examined. In it no execution had issued. There was no threatened sale. The alleged bankrupt had not, and could not have, failed in the statutory requirement of vacating or discharging the preference five days before the sale.

In conclusion, we may say, if judicial construction shall inject into this subdivision the element of intent which congress must have purposely left out,—if it shall require the element of active participation and positive acts on the debtor's part, when congress has said the negative, nonactive passiveness of the debtor is the test,—then assuredly courts, rather than congress, will in fact enact a bankrupt law. Moreover, if such be the construction, the practical result would be that an insolvent debtor has it in his power, by masterly inactivity,—by abstaining from filing a voluntary petition,—to prefer his favored creditors, and, as a practical result, to permit a sale of his property within a few days, and its purchase by such creditors at a sacrifice price.

We are of opinion the liens of these executions are invalid, and the case is one for an adjudication. Let a decree of adjudication be drawn, and the fund in question be paid to the trustee when chosen.

ROBARDS TOBACCO CO. v. FRANKS, Collector.

(Circuit Court, D. Kentucky. June 5, 1900.)

1. INTERNAL REVENUE—TAX ON MANUFACTURED TOBACCO—CONSTRUCTION OF WAR REVENUE ACT.

A manufacturer of tobacco after April 14, 1898, placed stamps on a quantity of manufactured tobacco at the existing rate of tax of 6 cents per pound; and such tobacco remained in its factory at the time of the passage of the war revenue act of June 13, 1898, by section 3 of which the tax was increased to 12 cents per pound, with a proviso that upon articles manufactured and removed from the factory before the passage of the act, bearing tax stamps affixed and canceled subsequent to April 14th and which articles were at the time of the passage of the act held and intended for sale, a tax equal to one-half the difference between the tax paid and that levied by the act should be levied and collected. *Held*, that the affixing and canceling of stamps thereon amounted constructively to a removal of such tobacco for sale, within the meaning of the new act, and that it was subject only to an additional tax of 3 cents per pound, the same as could have been assessed upon it had it been physically removed from the factory.

2. SAME—ASSESSMENT OF ADDITIONAL TAX.

The collector having assessed and collected an additional tax of 6 cents per pound on such tobacco while it still remained in the factory, whereas it was not subject to the payment of any tax until its removal for consumption or sale, his action amounted to a finding of the jurisdictional fact that it had been removed and was being held for sale, which, as against the government, fixed its status for taxation under the act, and rendered the collection of any additional tax above 3 cents per pound illegal, and such excess recoverable by the taxpayer.

Action against a collector of internal revenue to recover a tax alleged to have been illegally collected. On demurrer to petition.

Powers & Atchison, for plaintiffs.

R. D. Hill, U. S. Dist. Atty., for defendant.

EVANS, District Judge. The plaintiffs are manufacturers of tobacco, and the defendant is collector of internal revenue for the Second Kentucky district. Previous to the going into effect of the act of congress approved June 13, 1898, and commonly known as the "War Revenue Act," but after April 14, 1898, the plaintiffs paid to the United States the tax of six cents per pound upon 18,935 pounds of manufactured tobacco then in their factory, and, in due form, affixed the proper tax-paid stamps to the packages containing the same. This tobacco, while thus tax-paid and stamped, was not physically removed from the factory; and after the war revenue act went into effect the commissioner of internal revenue made an assessment against the same of six cents per pound additional tax, instead of three cents per pound, as the rate would have been had the tobacco been actually removed from the factory prior to June 14, 1898, when the act went into effect. Having paid this assessment of six cents per pound under protest, the plaintiffs have sued the collector to recover it back upon two grounds, namely: First, because, as alleged, the commissioner had no power, lawfully, to make the assessment upon the tobacco, if it had not been removed from the factory of the maker; and, second, that the rate of taxation, under the circum-

stances as they actually existed in this case, was only three cents per pound, and the assessment, if made at all, should have been limited to that figure. The defendant has demurred to the plaintiffs' petition, and it is conceded that the disposition of the demurrer will settle the legal propositions involved.

Prior to the war revenue act the tax on manufactured tobacco was six cents per pound, and the language imposing it was this:

"Upon tobacco and snuff manufactured and sold, or removed for consumption and use, there shall be levied and collected the following taxes: * * * on all chewing and smoking tobacco * * * a tax of six cents per pound." Rev. St. § 3368, as amended by 26 Stat. 619.

Section 3355, Rev. St., as amended in 1879, prescribes the duties of any person who desires to become a manufacturer of tobacco, among which are that he shall file a description of his place of business, the number of presses, cutting machines, etc., and give bond not to attempt to defraud the United States of the taxes due, and "that he shall stamp, in accordance with law, all tobacco and snuff manufactured by him, before he removes any part thereof from the place of manufacture." He is also required to make sundry reports at stated periods, and to keep certain books. By section 3369, Id., it is made the duty of the commissioner of internal revenue to prepare proper tax-paid stamps, and to sell the same to manufacturers of tobacco; and by other sections all persons are forbidden, under severe penalties, to remove manufactured tobacco until the tax is paid, and the stamps duly affixed to the packages containing the tobacco. The power to make assessment is given by section 3371, as amended in 1879, in the following language:

"Sec. 3371. Whenever any manufacturer of tobacco, snuff or cigars, sells, or removes for sale or consumption, any tobacco, snuff or cigars, upon which a tax is required to be paid by stamps, without the use of the proper stamps, it shall be the duty of the commissioner of internal revenue within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefor, and certify the same to the collector. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal: provided, however, that no such assessment shall be made until after notice to the manufacturers of the alleged sale and removal to show cause against said assessment; and the commissioner of internal revenue shall, upon a full hearing of all the evidence, determine what assessment, if any, should be made."

It will be seen at once that this last section only authorized the commissioner to make assessments, after giving the required notice, when the manufacturer "sells, or removes for sale or consumption, any tobacco." So that the first claim of the plaintiffs is, in a measure, maintained by the contention of the defendant himself, to the effect that the mere payment of the original tax did not ipso facto remove the tobacco from the factory, within the meaning of the statutes. This may serve as a basis for the remark that each of the parties to the suit takes two positions, and that each position so taken is logically antagonistic to the other. To illustrate, the plaintiffs contend that the commissioner could not lawfully make the assessment, because the tobacco was still actually at the place where manufactured, and might lawfully remain there without paying taxes, at plaintiffs'

option, while the defendant contends that the commissioner could lawfully make the assessment, though without stating expressly any grounds for the contention, other than such as must grow out of the fact that the tobacco had been at least potentially removed from the premises by payment of the old rate of tax. On the other hand, the plaintiffs insist that, as there was at least a constructive removal, the rate is only three cents, while the defendant contends that there was no removal, and consequently that the rate is six cents.

The law, as above stated, was in force up to the time of the approval of the act of June 13, 1898, by the third section of which it was provided:

"That there shall, in lieu of the tax now imposed by law, be levied and collected a tax of twelve cents per pound upon all tobacco and snuff, however prepared, and sold, or removed for consumption, or sale. * * * And there shall also be assessed and collected, with the exception hereinafter in this section provided for, upon all articles enumerated in this section which were manufactured, imported and removed from factories or custom houses before the passage of this act, bearing tax stamps affixed to such articles for the payment of the taxes thereon, and canceled subsequent to April 14th, 1898, and which articles were, at the time of the passage of this act, held and intended for sale by any person, a tax equal to one half of the difference between the tax already paid on such articles at the time of the removal from the factory or custom house and the tax levied in this act upon such articles."

Construing, as we must, this clause to embrace both imported and domestic tobacco, if in this instance it was not sold, or removed for sale or consumption, within the meaning of section 3371, or held for sale, within the meaning of the new law, we might well hesitate before saying that the assessment made by the commissioner was valid and within his power; but, the tax-paid stamps having been affixed and canceled, if the tobacco had been "removed" from the factory, or held for sale, within the meaning of the last clause of section 3 of the war revenue act, then the commissioner would have the right to make an assessment upon it for an additional tax at the rate of one-half the increase; that is to say, at the rate of three cents per pound. If not removed, then the manufacturer had the right to keep it in his factory free from taxation until he got ready to remove it. Under the law as it has always existed, manufactured tobacco may remain at the factory of the maker as long as he chooses, and not be liable for taxation or to any assessment. It only becomes liable to the tax when he desires to use it or sell it, or to remove it for consumption or sale, and the act of 1898 does not in any wise change the law in these respects. It seems to the court that the intent of the plaintiffs was sufficiently manifested when they applied for the stamps, paid the taxes on the tobacco, and affixed and canceled the stamps, and that a fair construction of the statutes requires that we should hold that this conduct of the plaintiffs was a "removal" of the tobacco for sale or use, or a holding thereof for sale, within the meaning of the act. If on June 13, 1898, the tobacco, stamped as it was, had been taken by the plaintiffs to the store of their next-door neighbor, however near by, or if any wise it had been removed off the premises of the plaintiffs, even temporarily, the rate of additional tax would be three cents, instead of six. If the most insignificant act of physical removal had actually

taken place after the tax-paid stamps, at the old rate, had been affixed and canceled, and after the plaintiffs had thus manifested their purpose with regard to the tobacco, the increase tax would have been only three cents per pound; but here, while the plaintiffs had indicated their purpose by paying the taxes and affixing and canceling the stamps, but had not accompanied this by an actual physical displacement and change of location, it is contended that six cents per pound is the proper rate of taxation, although it is probably a matter of public, current history that nearly all of the manufacturers of tobacco in the United States escaped with only three cents taxation upon unsold tobacco, by reason of some slight, though literal, removal. It seems to the court that congress meant no such injustice or inequality, but intended to provide for an increase of only three cents in all cases where the tax had been already paid at the old rate, and for an increase of six cents per pound where no tax at all had been paid. The strongest possible considerations lead to the conclusion that the statutes should be given this equitable construction. Any other would work the absurd and unjust results already alluded to, and make the plaintiffs pay an increase of six cents per pound, and their rivals, under substantially similar circumstances, only three cents. In the case of *Lau Ow Bew v. U. S.*, 144 U. S. 59, 12 Sup. Ct. 520, 36 L. Ed. 344, the supreme court said:

"Nothing is better settled than that statutes shall receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion."

In *Washington & I. R. Co. v. Coeur D'Alene R. & Nav. Co.*, 160 U. S., at page 101, 16 Sup. Ct., at page 239, 40 L. Ed., at page 355, the court said:

"When a court of law is construing an instrument, whether a public or a private contract, it is legitimate, if two constructions are fairly possible, to adopt that one which equity would favor."

It seems to the court, upon these general principles, that a construction should be adopted in this case which would promote the equitable result of imposing additional taxation on the same article at equal rates, instead of making one increase double as much as the other under substantially similar conditions.

But there is another reason for the general conclusion reached, which seems to leave the subject free from any doubt. Unless the tobacco had been "removed" from the factory or place of manufacture, the commissioner, under the statutes, had no jurisdiction or power to make any assessment upon it. The assessment, of itself, therefore imports a finding by that officer of the jurisdictional fact of removal; otherwise the assessment is void, for want of any legal warrant for making it. The conclusion, then, must be that the jurisdictional fact of removal was found to exist, though the judgment of the commissioner as to the rate and amount of tax assessable was erroneous. He having found that there was a removal, the law then fixed a rate of taxation per pound to be assessed against the tobacco. That rate in this instance was only half of six cents per pound, and for the sum assessed in excess of that lawful rate the assessment is unsupported by any provision of law, and must fail.

The general rule referred to is stated in many cases relating to the operations of the general land office, and is precisely as operative here. *Burfenning v. Railroad Co.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; *McCormick v. Hayes*, 159 U. S. 332, 16 Sup. Ct. 37, 40 L. Ed. 171; *Heath v. Wallace*, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063.

The same result will be reached when we approach the subject from another standpoint. If the plaintiffs are correct in their most radical contention, that the whole assessment was absolutely void, because there had been no removal, then they are entitled to recover the full amount sued for; and the tobacco will remain in their factory, partly tax-paid, until they get ready to remove it, and in fact do so, however far ahead that may be. After such removal, what would then be the rate of taxation? Evidently, three cents. It must be apparent from these considerations that congress intended that if six cents was paid after April 13, but before June 14, 1898, then that upon all such tobacco only three cents additional should be collected. While it is true that the assessment of the commissioner was without legal warrant as to the excess over six cents, and without legal warrant as to any part of the assessment if the first contention of the plaintiffs is correct, yet, as the court is of opinion that that contention is not sound, the measure of their recovery in this case must be one-half of the sum sued for. It is a general and just principle of law, applicable, no doubt, to a case like this, that, where a taxpayer insists upon relief, he should be required to settle the amount fairly due from him, whether the proper technical steps have been taken or not, before any relief is granted to him as to the remainder. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 669, may be quoted as an authority indicative of the soundness of this general proposition. The money in this case has been paid, and the plaintiffs are seeking to recover it back. What is justly due should be retained by the government, instead of its being required to collect it again through another process.

The court is of opinion: First, that the payment of the six cents on a date between April 14 and June 14, 1898, and then affixing and canceling the stamps, in all essential respects satisfied the whole legislative intent and purpose as expressed in the word "removal"; second, that the commissioner must be considered as having found that there had been a removal; third, that for that reason, and upon that ground alone, he had jurisdiction and authority to make an assessment for taxes; but, fourth, that in making it he erroneously fixed a rate at six cents per pound, when it should have been three. It results that the demurrer to the petition must be overruled. The defendants electing not to plead further, judgment may be entered for one-half the sum sued for, which was paid under protest, and due appeal to the commissioner of internal revenue having been made, and relief denied, with interest from the time of payment, and for costs.

AMERICAN WASHBOARD CO. v. SAGINAW MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1900.)

No. 780.

1. TRADE-NAMES—DESCRIPTIVE WORDS.

The word "Aluminum," as applied to an article of manufacture composed in part of that metal, cannot be monopolized as a technical trade-mark.

2. SAME—UNFAIR COMPETITION—BASIS OF RIGHT OF ACTION.

The only basis for a private suit for an injunction against unfair competition is the injury to the property rights of the complainant. The fact that the defendant deceives the public as to his goods by fraudulent means, while an important factor in such a suit, does not give a right of action unless it results in the sale of such goods as those of the complainant.¹

3. SAME—RIGHT TO PROTECTION.

The fact that one has obtained a monopoly in the material of which his goods are made does not give him any broader rights to protection in his trade-name or against unfair competition.

4. SAME.

To entitle one to protection in the use of a trade-name, he must not only have been the first to use it, but must have established a business under it. His adoption of the name with the intention of using it gives him no exclusive right therein as against one who actually uses it before he has carried his intention into practical effect.

5. SAME.

A bill for an injunction against unfair competition alleged that complainant was the manufacturer of a washboard having the rubbing face made of aluminum, and upon which it used the word "Aluminum" as a trade-name; that it was the only manufacturer of such boards in the country, having secured a monopoly of all the sheet aluminum produced which was suitable for use in their manufacture. It also alleged that defendant had placed on the market a washboard on which it used the word "Aluminum," by reason of which the public was deceived into buying it as a genuine aluminum washboard, although there was in fact none of that metal in its composition. *Held*, that such bill did not state facts which entitled complainant to relief, since it was not shown that purchasers bought defendant's boards in the belief that they were made by complainant, and any direct injury resulting to complainant could only be by reason of its monopoly, which could not afford ground for equitable relief against a competitor.

Appeal from the Circuit Court of the United States for the Northern Division of the Eastern District of Michigan.

George H. Christy, for appellant.

Edward Rector, for appellee.

Before TAFT,² LURTON, and DAY, Circuit Judges.

DAY, Circuit Judge. This cause is in this court on appeal from an order of the circuit court denying an injunction as prayed for in the bill, and also to reverse the decree sustaining a demurrer to the bill, and dismissing the same. A perusal of the bill discloses a case which invokes the equitable jurisdiction of the court because of the

¹ Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper & Bros.*, 30 C. C. A. 376.

² This case was decided before Judge Taft retired from the court.

interference of the defendant with the trade and good will of complainant in the manufacture and sale of certain aluminum washboards, for which complainant claims to have adopted as a trade-name the word "Aluminum," stamped upon the washboards. It may be stated at the outset that the case is not one for the protection of a trade-mark. It is well settled that a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, cannot be employed as a trade-mark, and the exclusive use of it entitled to legal protection. *Canal Co. v. Clark*, 13 Wall. 322, 20 L. Ed. 581. It was said by the supreme court, in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 547, 11 Sup. Ct. 400, 34 L. Ed. 1003:

"Nothing is better settled than that an exclusive right to the use of letters, words, or symbols to indicate merely the quality of the goods to which they are affixed cannot be acquired."

To the same effect is the case of *Chemical Co. v. Meyer*, 139 U. S. 542, 11 Sup. Ct. 626, 35 L. Ed. 248, in which it was said:

"The general proposition is well established that words which are merely descriptive of the character, qualities, or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade-mark."

Indeed, we do not understand that the learned counsel who represents appellant in this case makes any claim that his client is entitled to protection upon the ground that it has adopted the word "Aluminum" as a technical trade-mark. In the brief for appellant it is stated that the case is one of unlawful competition in trade, and it has been argued upon that basis. A brief summary of the bill shows that it contains the following statements: That the complainant is engaged in the manufacture and sale of washboards. That its goods enjoy a high reputation in the market of the United States and elsewhere, having been sold in large quantities. That the superior quality of the washboard so manufactured and sold by complainant had acquired a high reputation with the public. That the complainant, at some date prior to the date of the wrongs complained of in the bill (the exact time not being stated), had devised and manufactured a washboard, the rubbing face of which was made of aluminum. That said metal, on account of its cost, was regarded as one of the precious metals. That its capacity and adaptability to said purpose was unknown up to and at the time complainant adopted it, and by a trial and test showed its adaptability for that purpose. That, the word "Aluminum" never having been used in connection with or applied to a washboard, complainant adopted the word as a trade-mark or trade-name for its aluminum washboards, but did not then go into the business of making and selling said washboards, but, owing to the high price of sheet aluminum, its use was at that time, from a commercial standpoint, practically prohibitive, for which reason complainant suspended the manufacture of such washboards. Afterwards the selling price of aluminum became materially reduced, and though the defendant, about that time, made and sold aluminum washboards,—perhaps 50 or 100,—and represented that it had adopted the word "Aluminum" as a trade-mark or trade-name, defendant never engaged generally in the business and did not secure any rights to said name.

That the selling price of aluminum became so low that it was profitable to resume the manufacture of aluminum washboards, which complainant did, and stenciled the name on each washboard, which trade-mark or trade-name it has since continuously used to its great benefit and advantage. The public has recognized the fitness of the name, the exclusive right of complainant thereto, and said complainant has made large sales of boards thus branded, and has demonstrated the capability of such washboards. Complainant made only the rubbing face of such washboards of pure aluminum, so that purchasers have come to know or distinguish them by that name; and, but for the illegal acts of defendant, washboards so branded would be recognized as containing a rubbing face of pure aluminum. That complainant, upon entering upon the manufacture of such washboards, made a contract with the Pittsburg Reduction Company, which is a large producer of aluminum, and the only producer of said metal in the United States, whereby it contracted for and purchased and has acquired and will continue to acquire the entire output of sheet aluminum suitable for forming the rubbing sheets of washboards produced or on sale in the United States. That by extensive advertising it built up its present business. That it has expended large sums of money and much time in introducing such washboard under such trade-name. Complainant avers that defendant, well knowing the facts set forth in the bill, has been and now is engaged in the manufacture of washboards in the Eastern district of Michigan and elsewhere, which are branded "Aluminum," advertised by said defendant as aluminum, and sold under that name. That said washboards are not made of aluminum in any part. That in fact no ascertainable quantity is used in the manufacture, particularly in the rubbing sheet thereof. That, being thus branded with the word "Aluminum," and so advertised, purchasers and users are induced to believe that the rubbing sheet is made of aluminum, and induced to buy them from that belief. The fact is that the rubbing sheet of said washboard is made of zinc, long used for such purpose, and containing no aluminum. The washboards manufactured by defendant are approximately the same size and shape as complainant's, and being branded with the word "Aluminum" further tends to mislead purchasers, "so that, when intending to purchase a genuine article (of which complainant is the sole manufacturer), they are led to purchase a fraudulent and falsely branded article of defendant's manufacture, to the great and irreparable injury of your orator therein, as also to the great and lasting injury of the public." And further complainant says it has a right to represent truthfully the quality of its manufacture by the word "Aluminum"; that so long as it continues to be the sole manufacturer of washboards made of pure aluminum, as it expects to continue to be, it has a right to the exclusive use of said name as a trade-mark or trade-name for a washboard, especially as against defendant's misleading use of the same word. The bill prays for the protection of complainant's alleged exclusive right.

The question presented is, is the case thus stated one which entitles complainant to a remedy by injunction and accounting against the defendants? There are numerous cases in the reports upon the sub-

ject of unfair competition in trade. From the general principle running through them all it may be said that when one has established a trade or business in which he has used a particular device, symbol, or name so that it has become known in trade as a designation of such person's goods, equity will protect him in the use thereof. Such person has a right to complain when another adopts this symbol or manner of marking his goods so as to mislead the public into purchasing the same as and for the goods of complainant. Plaintiff comes into a court of equity in such cases for the protection of his property, rights. The private action is given, not for the benefit of the public, although that may be its incidental effect, but because of the invasion by defendant of that which is the exclusive property of complainant. In *Canal Co. v. Clark*, 13 Wall. 322, 20 L. Ed. 583, the court said:

"It is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another."

Mr. Justice Field, in *Goodyear India-Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 604, 9 Sup. Ct. 168, 32 L. Ed. 537, said:

"The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacturer, to the injury of the plaintiff."

See, also, *McLean v. Fleming*, 96 U. S. 251, 24 L. Ed. 828, and *Chemical Co. v. Meyer*, 139 U. S. 544, 11 Sup. Ct. 627, 35 L. Ed. 249. In the latter case it was said:

"The theory of a trade-mark proper being, then, untenable, this case resolves itself into the question whether the defendants have, by means of simulating the name of plaintiff's preparation, putting up their own medicine in bottles or packages bearing a close resemblance to those of plaintiff, or by the use of misleading labels or colors, endeavored to palm off their goods as those of plaintiff."

The doctrine is well stated in *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523. Lord Cranworth said:

"The right which a manufacturer has in his trade-mark is the exclusive right to use it for the purpose of indicating where or by whom or at what manufactory the article to which it is affixed was manufactured. The gist of the complaint in all of these cases is that the defendant, by placing the complainant's trade-mark on goods not manufactured by the plaintiff, has induced persons to purchase them, relying on the trade-mark as proving them to be of plaintiff's manufacture."

Applying this doctrine to the allegations of complainant's bill, we do not find it anywhere averred that the defendant, by means of its imitation of complainant's trade-mark, is palming off its goods on the public as and for the goods of complainant. The bill is not predicated upon that theory. It undertakes to make a case, not because the defendant is selling its goods as and for the goods of complainant, but because it is the manufacturer of a genuine aluminum board, and the defendant is deceiving the public by selling to it a board not made of aluminum, although falsely branded as such, being in fact a board made of zinc material; that is to say, the theory of the case seems to be that complainant, manufacturing a genuine aluminum board, has

a right to enjoin others from branding any board "Aluminum" not so in fact, although there is no attempt on the part of such wrongdoer to impose upon the public the belief that the goods thus manufactured are the goods of complainant. We are not referred to any case going to the length required to support such a bill. It loses sight of the thoroughly established principle that the private right of action in such cases is not based upon fraud or imposition upon the public, but is maintained solely for the protection of the property rights of complainant. It is true that in these cases it is an important factor that the public are deceived, but it is only where this deception induces the public to buy the goods as those of complainant that a private right of action arises. In the case of *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De Gex, J. & S. 137, 11 H. L. Cas. 523, Lord Chancellor Westbury said:

"Imposition on the public, occasioned by one man selling his goods as the goods of another, cannot be ground of private action or suit."

To the same effect is the case of *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640, where the court said:

"The jurisdiction of a court of equity to restrain wrongful use of such trade-marks by persons not entitled thereto is founded, not upon the imposition upon the public, but on the wrongful invasion of the right of property therein which has been acquired by others. A remedy is offered only to the owner of the right of property in such trade-marks on account of the injury which is thus done to him. The wrong done to him consists in misrepresenting the vendable articles sold as being those of the true owner of the trade-mark, and thus to a greater or less extent depriving him of the benefit of the reputation he has given to the articles made or dealt in by him."

It is doubtless morally wrong and improper to impose upon the public by the sale of spurious goods, but this does not give rise to a private right of action unless the property rights of the plaintiff are thereby invaded. There are many wrongs which can only be righted through public prosecution, and for which the legislature, and not the courts, must provide a remedy. Courts of equity, in granting relief by injunction, are concerned with the property rights of complainant. The true rule was stated by Lord Chancellor Westbury in *Leather Cloth Co. v. American Leather Cloth Co.*, above quoted, in which the Lord Chancellor says:

"It is, indeed, true that, unless the mark used by the defendant be applied by him to the same kind of goods as the goods of the plaintiff, and be in itself such that it might be and is mistaken in the market for the trade-mark of the plaintiff, the court will not interfere, because there is no invasion of the plaintiff's right; and thus the mistake of buyers in the market under which they in fact take defendant's goods as the goods of the plaintiff—that is to say, imposition on the public—becomes the test of the property in the trade-mark having been invaded and injured, and not the ground on which the court rests its jurisdiction. * * * The true principle, therefore, would seem to be that the jurisdiction of the court in the protection given trade-marks rests upon property, and that the court interferes by injunction, because that is the only mode by which property of this description can be effectually protected. The same things are necessary to constitute a title to relief in equity in the case of the infringement of a right to a trade-mark as in the case of the violation of any other right of property."

If the doctrine contended for by complainant in this case was to be carried to its legitimate results, we should, as suggested by Mr.

Justice Bradley in the case of *New York & R. Cement Co. v. Coplay Cement Co.* (C. C.) 44 Fed. 277, open a Pandora's box of litigation. A person who undertook to manufacture a genuine article could suppress the business of all untruthful dealers, although they were in no wise undertaking to pirate his trade. Says Mr. Justice Bradley:

"The principle for which counsel for complainant contends would enable any crockery merchant of Dresden or elsewhere interested in the particular trade to sue a dealer of New York or Philadelphia who should sell an article as Dresden china, when it is not Dresden china. * * * A dry-goods merchant selling an article of linen as Irish linen could be sued by all the haberdashers of Ireland and all the linen dealers of the United States."

Take the metal which is the subject-matter of the controversy in this case. Many articles are now being put upon the market under the name of aluminum, because of the attractive qualities of that metal, which are not made of pure aluminum, yet they answer the purpose for which they are made and are useful. Can it be that the courts have the power to suppress such trade at the instance of others starting in the same business who use only pure aluminum? There is a wide-spread suspicion that many articles sold as being manufactured of wool are not entirely made of that material. Can it be that a dealer who should make such articles only of pure wool could invoke the equitable jurisdiction of the courts to suppress the trade and business of all persons whose goods may deceive the public? We find no such authority in the books, and are clear in the opinion that, if the doctrine is to be thus extended, and all persons compelled to deal solely in goods which are exactly what they are represented to be, the remedy must come from the legislature, and not from the courts. A class of cases is cited and much relied upon wherein geographical names have been sustained as trade-names in cases of unfair competition in trade, although not technically trade-marks. These cases seem to establish the doctrine that geographical names, such as "Minneapolis," applied to flour, may be adopted as a trade-name, so that one who undertakes to pirate the trade of another who has established among purchasers this designation of his goods will be entitled to an injunction against one who seeks to avail himself of the reputation thus acquired by imposing upon the public his goods as the goods of complainant. An examination of these cases shows that they are based upon the doctrine which we have already shown to be the basis of equitable interference. See *Pillsbury-Washburn Flour-Mills Co. v. Eagle*, 30 C. C. A. 386, 86 Fed. 608, and cases therein cited. The doctrine is well stated in the syllabus of the case of *Gage-Downs Co. v. Featherbone Corset Co.* (C. C.) 83 Fed. 213:

"One making corset waists at Chicago, and selling them as 'Chicago Waists,' so that this designation has come to denote among purchasers the goods made by him, is entitled to an injunction against another who makes similar waists in a different state and city, and sells them as 'Chicago Waists,' with the manifest intent of availing himself of the reputation acquired by the other's goods."

As was said by Judge Severens in that case (page 214):

"The circumstances vary greatly, but the underlying principle which is effective in the solution of such cases is that a party may not adopt a mark or symbol which has been employed by another manufacturer, and by long use and employment on the part of that other has come to be recognized by the

public as denoting the origin of the manufacture, and thus impose upon the public by inducing them to believe that the goods which this new party thus offers are the goods of the original party. In other words, it is a fundamental principle that a man cannot make use of a reputation which another manufacturer has acquired in a trade-mark or trade-name, and, by inducing the public to act upon a misapprehension as to the source of the origin, deprive the other party of the good will and reputation which he has acquired, and to which he is entitled."

Nor do we find anything in the allegations of the bill as to complainant's monopoly in the use of the metal aluminum for washboard purposes which would extend its rights. We are not referred to any case, nor can we think of any reason why one who has obtained a monopoly in the material of which his goods are made should have any broader rights in protecting his trade-name than another who is engaged in competition in the same line of business. The intended adoption of the word "Aluminum" as a trade-mark prior to its use in the manufacture and sale of washboards fails to strengthen the case of complainants, as was said by Judge Coxe in *George v. Smith* (C. C.) 52 Fed. 830:

"It is the party who uses it first as a brand for his goods, and builds up a business under it, who is entitled to protection, and not the one who first thought of using it on similar goods, but did not use it. The law deals with acts, not intentions."

See, also, *Schneider v. Williams*, 44 N. J. Eq. 391, 14 Atl. 812, and *Manufacturing Co. v. Beeshore*, 8 C. C. A. 215, 59 Fed. 572.

The allegations of complainant's bill in this case show that it did not establish its right to use the trade-name "Aluminum" until after the manufacture of boards by defendant. Upon the whole case we are of opinion that complainant's bill lacks the essential allegations necessary to make the case entitling it to the relief sought, and we are of opinion that the demurrer to the bill was properly sustained. This decision makes it unnecessary to pass upon the ruling on the motion for a preliminary injunction. If the bill was demurrable, it cannot authorize the granting of an injunction, and therefore the ruling of the court below was correct in that respect. The decree and order of the court will be affirmed.

EXPANDED METAL CO. et al. v. BOARD OF EDUCATION OF CITY OF ST. LOUIS et al.

No. 4,218.

(Circuit Court, E. D. Missouri, E. D. June 30, 1900.)

1. PATENTS—CONSTRUCTION OF CLAIMS.

Where an article of manufacture, as described in the claim of a patent therefor, does not differ from the same article as previously known in the art, the only novelty being in the process of manufacture as described in the specification, such process is an essential element of the invention, and the specification must be read as a part of the claim.

2. SAME—INFRINGEMENT—METALLIC SCREENING.

The Golding patent, No. 297,382, for an improvement in slashed metallic screening, while for a product as an article of manufacture, is limited to the article described in the claim, when made by the process described in the specification, and is not infringed unless such process is employed.

In Equity. Suit for infringement of a patent. On final hearing.

Carr & Carr and Munday, Evarts & Adcock, for complainants.

R. E. Rombauer, Rassieur & Rassieur, and Geo. H. Knight, for defendants.

ADAMS, District Judge. The claim of the patent alleged to be infringed by the defendants in this case reads as follows: "As an article of manufacture, metallic screening, formed of slashed and stretched metal, substantially as hereinbefore set forth." This claim, taken by itself, without reference to the description, is for an old and well-known thing,—“metallic screening.” It, in terms, is for an article of manufacture, but the object of the invention, as stated in the specification, is “to produce a slashed metal screening.” While it is stated in the patent “that the process hereinbefore described of producing the article is reserved for a separate application for letters patent,” it is nevertheless clear that the method of producing the screening involved in the patent is descriptive of the thing or article patented. The patentee obviously so considered it. His claim covers no physical elements separate from the process of producing the article. He says that what he claims as new is not metallic screening as such (for that, of course, is old), but metallic screening “formed * * * substantially as hereinbefore set forth”; that is, formed or made in a particular way. Turning now to the description referred to in the claim, it is found that the particular article of manufacture claimed to be invented is made in the following way. The patentee says:

“I take a blank piece of sheet metal of the required size and thickness, and at intervals I slash or cut it as shown in Fig. 1 [Fig. 1 of the patent shows that the sheet is slashed throughout its entire dimensions]; the slashes or cuts in each line of cuts being opposite to the spaces between the slashes or cuts of the adjoining line. These slashes or cuts are made of the required length to form proper-sized meshes. After the metallic sheet is cut or slashed as above described [that is, after the metal is cut or slashed throughout its dimensions as shown by Fig. 1, and not until then], it is stretched in a line transversely to the length of the slashes or cuts, thus forming the meshes as shown in Fig. 2.”

From this it is clear that the method of producing the screening consists of two successive acts or steps: (1) The cutting or slashing of the sheet throughout; and, (2) after it is so cut, stretching the same out in a direction opposite to the lines of the cuts, and thus by that act producing the article invented. This process of producing the article is, in my opinion, the sole description of the article found in the patent; and, if the defendants’ manufacture is not made by that process (that is, first slashing a sheet throughout, and afterwards, as a separate and distinct act, stretching it out to create the desired article of manufacture), it cannot be held to be an infringement of the complainants’ manufacture. This is a peculiar patent,—in name, for a manufactured article; in fact, for an article manufactured by a certain process, which is described. It is, therefore, in my opinion, brought within the doctrine of the case of *Smith v. Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952. In that case the claim was as follows:

"The plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described."

The court, in treating of this claim, says:

"The invention, then, is a product of manufacture made in a defined manner. It is not a product alone, separated from the process by which it is created. The claim refers in terms to the antecedent description, without which it cannot be understood. The process detailed is thereby made as much a part of the invention as are the materials of which the product is composed."

The court then, referring to the description of the patent, says:

"If, then, the claim be read, as it should be, in connection with the preceding part of the specification, and construed in the light of the explanation which that gives, the invention claimed and patented is a set of artificial teeth, as an article of new manufacture, consisting of * * *, secured in the manner described in the specification. * * *"

It appears from the opinion that the court, in determining the question of invention, refers to the antecedent description, found in the specification, of the process by which the product is obtained, and holds that such process is made as much a part of the invention as the materials of which the product is composed. Applying the principles of that case to the case in hand, it must be ruled that the process by which the screening is formed is a constituent element of the invention. The complainant introduces no substantial evidence showing that the defendants' fabric was made by the process of the patent. On the contrary, the defendants established by satisfactory proof that the process employed by them is entirely different from that suggested by the patent. For the foregoing reasons, there is no infringement shown. This conclusion obviates the necessity of considering the question of anticipation, as involved in Long's British provisional specification of 1862, or other evidence of want of patentable novelty. The proof of extensive use does not aid complainants. The proof shows that the fabric used is not made by the process of the patent as hereinbefore stated, but by a different process,—practically, that employed by the defendants. In other words, the process of the patent seems to have been abandoned by the complainants for another and different one; and, inasmuch as the process is an essential element of the claim, it cannot be held that the manufactured product of the patent has ever gone into such use as to be any evidence of utility of the invention. The bill must be dismissed.

BRILL v. THIRD AVE. R. CO.

(Circuit Court, S. D. New York. July 9, 1900.)

1. PATENTS—ANTICIPATION—PRIOR PATENT.

A patent for a mechanical combination is not anticipated by a drawing in a prior patent which incidentally shows a similar arrangement of parts, where such arrangement is not essential to the first invention, and was not designed, adapted, or used to perform the function which it performs in the second invention, and where the first patent contains no suggestion of the way in which the result sought is accomplished by the second inventor.

2. SAME—VALIDITY AND INFRINGEMENT—SUPPORTS FOR STREET-CAR BODIES.

The Brill patent, No. 478,218, for an improvement in car trucks, designed to prevent the oscillation or "galloping" movement of a street-car body incident to its being supported on a comparatively short wheel base, was not anticipated, and shows patentable invention, as to the combinations covered by claims 1, 2, 9, 10, 11, 12, 14, and 27, but not as to that shown in claim 17. Also *held* infringed as to such valid claims.

In Equity. Suit for infringement of a patent. On final hearing.

This bill in equity is based upon the infringement of claims 1, 2, 9, 10, 11, 12, 14, 17, and 27 of letters patent No. 478,218, applied for June 26, 1891, and issued on July 5, 1892, to George Martin Brill, for an improvement in car trucks. Although the patentee conceived the idea of the invention of claims 1 and 2 in May, 1889, and made rough sketches of it, he laid it aside, and did not take it up again until November, 1890. He made drawings in December, and completed the trucks containing the whole invention in January, 1891. The date of the invention may be considered to have been December 8, 1889. These claims are as follows: "(1) In a motor truck, the combination, with a stationary frame supported upon the running gear, said frame having sections extending outwardly from the axle, of a movable frame supported upon said truck, spiral springs located between the movable and stationary frames, and elliptical springs located between the extended sections of the said rigid frame and the movable frame, substantially as described. (2) In a truck, a spring-supporting frame supported upon the running gear by saddles, and having sections extending outwardly from the axles, a movable frame having like extensions, spiral springs located between the saddles and movable frame, and elliptical springs located between the spring-supporting frame and the movable frame, substantially as described." "(9) In a truck, the combination of two frames, one stationary and supported upon the running gear, the other movable, and a plurality of springs located between the stationary and movable frames, some of said series being adapted to be compressed by the downward movement of said movable frame subsequent to the compression of other of the series, substantially as described. (10) In a truck, the combination of two frames, one stationary and supported upon the running gear of the truck, the other adapted to be moved towards said stationary frame, springs located between the ends of both frames, and springs otherwise disposed between the two frames, the end springs being adapted to be compressed subsequent to the compression of the other springs, substantially as described. (11) In a truck, a stationary spring-supporting frame having at its ends elliptical springs rigidly secured thereto, in combination with a movable frame supported by springs other than said elliptical springs, said movable frame being provided with devices for engaging said elliptical springs, the elliptical springs being adapted to be brought into action subsequent to the springs supporting the movable frame, substantially as described. (12) In a truck, a spring-supporting stationary frame mounted on the running gear of said truck, said frame being composed of a plurality of bars contiguously disposed, a saddle secured to the outer sections of said bars, an elliptical spring, the lower section of which rests upon said saddle, and a second saddle disposed over the first and the spring and secured to the first saddle, a movable frame, spring supported upon the stationary frame, and having devices for guiding the upper section of the elliptical spring, substantially as described." "(14) A truck having running gear and a frame, and spiral springs for supporting the car body, supplemented by elliptical springs adapted to co-act therewith, the spirals being adapted to be compressed prior to the ellipticals, substantially as described." "(17) The upper chord having the depending cap, 45, with downwardly extending legs, 46, and elliptical springs held on the side beams, adapted to move in said cap substantially as described." "(27) In a truck, a stationary spring-supporting frame mounted on the running gear of said truck, having outwardly extending sections and elliptical springs secured to the stationary frame, and a movable frame, spring supported upon the said stationary frame, having a device for guiding the upper portion of the elliptical springs, substantially as described." One hundred and eighty-one infringing

trucks were purchased by the defendant from the Bemis Car-Box Company of Springfield, Mass., which it is admitted "is defending the present suit for the Third Avenue Railroad Company."

Francis Rawle, Frederick P. Fish, and Joseph L. Levy, for complainant.

Arthur v. Briesen, for defendant.

SHIPMAN, Circuit Judge (after stating the facts). After electricity was substituted upon city railroads as a motive power to move cars formerly drawn by horses, the railroad corporations were subjected to great expense, and the passengers to severe inconvenience, in consequence of the oscillation of the cars from end to end, or "galloping" motion as it was called. The horse cars were 16 feet long, and had a wheel base or distance between the two pairs of wheels of 6 to 7½ feet. The new electric cars were from 18 to 22 feet long, but, in consequence of the short radii of curves in city streets where cars turn from street to street, it was necessary to keep the wheel base about as short as before to enable the car to pass around the curves, and therefore the car body was longer than the truck, and overhung it. The result was that these overhanging and unsupported ends oscillated, pounded the rails, strained the trucks, and caused discomfort, and, on heavily laden open cars, danger to the passengers. The patentee says in his specification:

"The main object of my invention is to enable a truck of comparatively short wheel base to be used, and to support a car body upon it, the ends of which overhang the truck for some distance. My invention is also intended to overcome in a measure the end vibration or oscillation of the car body and movable portion of the truck to which the car is secured."

In the patented structure a pair of rigid longitudinal side beams, which derive their support from the axle boxes, extend lengthwise of the truck beyond the wheels at each end, and are called the "independent frame." At each side of each beam a spiral spring is interposed between the beam and the spring plates upon which the car body rests, and to which it is rigidly secured. These spring plates are secured to a rectangular frame called the "movable portion" of the truck. At each side of the car there are two spring plates and four spiral springs, two between each plate, and corresponding longitudinal beam or saddle, thus making a set of eight springs, called "axle-box springs." These springs, supported as they are upon a space equal to the length of the wheel base, cannot firmly support a car body of the length of the ordinary trolley car, and a multiplication of spiral springs between the wheels and the end of the car was also inadequate. The gist of the invention consisted in combining with the frames of the truck and the spiral springs another class of springs, viz. elliptical springs, between the car body and the extensions of the independent frame. The elliptical springs are slower in their action than the spiral springs, and neutralize the longitudinal oscillation of the car body. Mr. Akarman, a practical trolley railroad superintendent, stated the result and the reason of it as follows:

"From a practical observation my opinion is that the combination of an elliptic and spiral spring as applied in trucks of this type breaks the rhythm of motion, or interrupts it. In trucks with all spiral springs, or I should think,

if it were possible to construct, a truck having all elliptic springs, the rhythm of motion is perfect; the springs acting in unison. In the truck, as previously described, having the combination of elliptic and spiral springs, the rhythm is broken, and the result is that the galloping or rocking motion was done away with."

This leading feature of the invention is described in claims 1 and 2, which do not contain the limitations of the invention described in the next paragraph. A second and minor feature of the invention, described in claims 9, 10, 11, and 14, is such an arrangement of the elliptical springs with the car body that they "will not come into play until after the axle-box springs have begun to compress, and the action of the spiral springs in lifting the car body is continued after the elliptical springs have ceased to act." The elliptical springs are not depressed until the car body, or one end of it, has become depressed by the weight of the passengers, or some other cause, when this slower motion interposes, and checks the continuation or increase of oscillation. A third and more subordinate feature of the invention is described in claims 12, 17, and 27, and consists in the construction by which the elliptical springs are engaged with the independent frame of the truck and car body. One feature of this construction is that, as described by the complainant's expert, the "upper member of the spring is not positively connected with the movable portion of the truck, but the latter is provided with a 'cap' or bearing piece secured to the under side of the upper chord of the movable portion, said cap having downward extending projections or legs at each side of the upper member of the elliptical spring, which confine the spring in proper position under the cap, while permitting of independent vertical movement of the bearing plate and spring, so that the former may, if necessary, rise clear of the spring." The invention, as a whole, attracted the immediate attention of railway superintendents, was found to accomplish its object, and to be almost a complete remedy; and trucks having spiral springs next to the axle boxes and elliptical springs on the extensions of the truck frame have been universally adopted.

Upon the question of the novelty of the invention described in claims 1, 2, 11, 12, and 14 the defendant's expert puts great stress upon letters patent No. 409,993, dated August 27, 1889, to Benjamin F. Manier. One object of Manier was to prevent oscillation, and to accomplish it he employed an extended spring base, and mounted the body springs forward of the axles. He said that oscillation was noticeable in cars mounted on trucks wherein the body springs are on both sides of the axles, and near the center of the truck, and that the mounting of the body springs forward of the axles he considered a special feature of his invention. The springs, or the kind of springs, which he was to use, are no part of his invention. He says:

"Preferably I employ spiral springs, G, as shown in Fig. 1, for supporting caps, I; but, if desired, the elliptic springs, H, could be employed, as shown in Fig. 3, or other forms of springs may be used, as found convenient and desirable; the particular form of spring not forming part of present invention."

Manier's invention was entirely apart from that of Brill, and had no conception of its character. The only ground upon which the expert can place his theory is that in Fig. 3 the two different forms of springs,

spiral and elliptical, are shown, and upon this drawing the entire superstructure of anticipation is built. Manier's invention was not designed, nor adapted, nor used for the performance of the function performed by Brill's device, nor was the way to accomplish Brill's result suggested by Manier's invention. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658.

In regard to claims 9, 10, 11, and 14, the defendant's expert did not find in the prior art a combination which included the feature of the compression of the spiral springs prior to the action of the elliptical springs, or a provision for bringing those springs into action subsequent to the springs supporting the movable frames; but, as claim 9 refers to a plurality of springs, he finds that claim to have been anticipated by the patent to Horace G. Bird (No. 436,031) of September 9, 1890, and also that the terms of claim 10 were anticipated by the patent to John Diehl (No. 396,272) of January 15, 1889. The Bird structure had one set of springs between the axle boxes and the intermediate frame, and another set between this frame and the car body, all of these springs being spiral; and, as the different sets were of different strength, the patentee thought that by the inequality of their vibrations the oscillation of the car body would tend to neutralize that of the truck, and, as a result, excessive lengthwise rocking motion would be obviated. No substantial difference in the time of compression was intended, but there would be a difference in the amount of compression, which would be greater in the lighter springs. The Diehl patent is for springs for a vehicle, and consists of a bar, a single semielliptical lengthwise spring secured to the central portion of the bar, and two spiral springs of different lengths, arranged to depend from each end of the bar, whereby one of the spiral springs is always in contact with the semielliptical spring. Supplemental spiral springs are adapted to be brought into action after the main spiral springs have been excessively compressed. Neither of these patents relates to the invention of Brill, which was described in his specification. The Diehl patent has no relation to the invention as described in claim 10, and neither does the Bird patent touch the invention as stated in claim 9, although each of those claims, if read literally, and not in accordance with the invention as described in the specification, is liable to the charge of being too broad. They should be construed in accordance with the invention as described in the specification, for the combination with the other named elements of spiral springs and elliptical springs located between the frames as described. The defendant's expert referred also to the Brill patent, No. 357,811, and the Richard Vose patents for rubber center spiral springs or metallic spiral springs, Nos. 199,945, 347,281, and 350,174. The Brill patent is unimportant in this connection, and the Vose patents relate simply to spiral springs which act successively under compression.

In regard to claims 17 and 27 the defendant's expert was unable to point to anything in the prior art which contained the particular construction or the elements of those claims. The expert referred in his direct examination only to the Manier, Bird, Diehl, Brill, and Vose patents "as showing most clearly constructions which I [he] considered as the best anticipations of the alleged invention of the patent in suit,

and particularly to the subject-matter of claims 1, 2, 9, 10, 11, 12, 14, 17, and 27." His attention was afterwards called by the defendant to 19 other patents, and in regard to which he testified. Four of them were issued after the date of the Brill application. The remaining 15 have no bearing upon the question of anticipation, and were commented upon probably to have an effect upon the question of invention. I do not think that any of them calls for remark except the Edgar Peckham patent, No. 419,876, dated January 21, 1890. In this car truck, between the end portions of the lower beams and the car sill, suitable springs were interposed, either spiral springs or a semielliptical spring, which was disposed transverse to the car body and rests with each end secured to the top of the lower beam. The upper beams are supported on spiral springs on the axle boxes. This construction, although it contains the name "semielliptical spring," has not the conjoint action of the patented combination, nor does it perform the function of the Brill device.

The contest in regard to infringement related to claims 9, 10, 11, and 14, the controversy being whether the elliptical springs in the defendant's trucks were so arranged with reference to the car body that the weight came upon them as soon as it came upon the spiral, so that there was no compression of the spirals before the weight began to come upon the ellipticals. The defendant offers testimony in support of this theory, but, in view of the strength of the affirmative testimony offered by the complainant upon the issue of infringement, it was inadequate. A very intelligent carpenter, who helped to ship the trucks in question from Springfield to New York, testified that both classes of springs began to be compressed at the same time, and was undoubtedly honest in his opinion; but the strength of the testimony is that when the trucks first came to New York, and the car bodies were put in place, the spiral springs carried the weight of the body, and the ellipticals were a re-enforcement to carry the passenger weight. It is noticeable that the managers of the Bemis Company, and those officials who made the plans and constructed the trucks, and could have described and shown the plan of construction upon which their trucks were made, did not testify on this point.

The only remaining question is that of patentable novelty. It has already appeared that the gist of the invention is described in claims 1 and 2. The necessity for a remedy against the pounding of the car, the importance of the result, the adoption of the invention by experienced railway superintendents, the number of previous attempts at a remedy, and the barrenness of their results, go far to show that the work of an inventive mind was required and was active in the invention. The testimony of the defendant's expert himself, as he goes through the history of the art, and thereby points out what the patentee's combination did, as compared with previous efforts to do something, shows that the patented improvement was patentable. The result of the minor invention of claims 9, 10, 11, and 14 was important, though upon first inspection its marked importance does not appear, but it perfected the general invention of the first two claims. The combination shown in claims 12 and 27 was patentable. The simple combination in claim 17 of the upper chord with its depending cap

and downwardly extended legs and elliptical springs does not appear to me to have been patentable.

Let there be a decree, with costs, for an injunction against the infringement of claims 1, 2, 9, 10, 11, 12, 14, and 27, and for an accounting if it is asked for.

FALK MFG. CO. v. MISSOURI R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. July 2, 1900.)

No. 1,293.

1. PATENTS—INVENTION—IMPROVEMENTS IN RAIL JOINTS.

The Hoffman & Falk patent, No. 545,040, for an improvement in rail joints and methods of forming the same, is for a process, rather than a product, the essential steps of which as described and claimed consist in "cleaning or brightening the rail ends to be joined; forming or adjusting a mold upon said rail ends and over the joint, so as to surround the webs and base flanges thereof; heating said mold and rail ends, and pouring molten metal into said mold around and beneath the base flanges of both rails, and uniting said rail ends by fusion." *Held*, that such patent discloses nothing not previously well known in the art of cast-welding, and is void for want of patentable invention. It was also anticipated in the application of the process to the same and analogous purposes by numerous prior patents, the oldest of which were the English patent to Stephenson in 1831, the American patents of 1847 and 1849 to Martin and Fisher, and the English patent of 1851 to Norris; the latter covering a substantially identical method of joining the rails of railways.

2. SAME—APPLICATION OF OLD PROCESS TO NEW USE.

The fact that the modern invention of electric street railroads has rendered the process of greater utility as applied to the tracks of such roads, and brought it into general use, cannot give validity to the patent, since the process described and claimed is essentially old, and is applied without varying the operation to any appreciable extent.

8. SAME—UTILITY OF PATENTED PROCESS.

The great utility of a patented article, process, or improvement can only be considered, and allowed to turn the scale upon the question whether the inventive faculty has been exercised, when that question is balanced with doubt.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

For former opinion, see 91 Fed. 155.

Frederic H. Betts (Samuel R. Betts, on the brief), for appellant.

L. L. Bond and F. W. Lehmann (A. H. Adams, C. E. Pickard, and J. L. Jackson, on the brief), for appellees.

Before CALDWELL and THAYER, Circuit Judges, and ROGERS, District Judge.

THAYER, Circuit Judge. This action was brought by the Falk Manufacturing Company, the appellant, to restrain the infringement of United States letters patent No. 545,040, dated August 20, 1895, and issued to Albert Hoffman and Herman W. Falk under an application which was filed on March 18, 1895. The defenses principally relied upon by the defendants below, who are the appellees here, are want

of patentable novelty, and anticipation by the prior art. In the specification the patentees recite that they "have invented a certain new and useful improvement in rail joints and methods of forming the same"; that the "invention relates to new and useful improvements in rail joints and methods of forming the same"; and that the object of the invention "is to provide a suitable rail joint by means of which the rail ends may be securely united together so as to effectually prevent any vertical, lateral, or longitudinal movement of the rail ends after they have been joined, and at the same time to unite the body of metal which surrounds the rail ends securely to the surfaces of said rail ends by the fusion of the metal." Then follows a description of the method or process of forming the improved rail joint, which, according to the directions given in the specification, is substantially as follows: The ends of the two rails to be joined are first cleaned or brightened so as to remove any oxide or foreign matter which adheres thereto. A mold made in two sections or halves so as to embrace the webs and bottoms of the rail ends and form a chamber around the same for some distance on both sides of the point of junction is then clamped to the rails. Before being clamped to the rails, the mold is heated to a comparatively high degree, so as to communicate a part of its heat to the rail ends around which it is clamped. Through an aperture in the mold on one side thereof molten metal is poured into the chamber surrounding the webs and bottoms of the rail ends until it is filled. The molten metal is then allowed to set or harden, in the course of which process it fuses with the surface of the webs and bottoms of the rail ends, thereby uniting the rails firmly. The patentees suggest that when sufficient heat is not communicated to the rail ends by the heated mold, the required degree of heat may be obtained by continuing to pour the molten metal into the mold after the chamber surrounding the rail ends is filled, and allowing the molten metal to overflow through another aperture or hole in the opposite side of the mold until the requisite temperature is obtained. They further recommend the application of any suitable flux to the rail ends to obtain the desired fusion of the molten metal to the surface of the rail ends without the necessity of heating the same too highly and to that end they suggest that a thin sheet of fusible metal may be placed against the rail ends, which will melt when the chamber is filled with molten metal, and form a flux. They further direct the coating of the interior surface of the mold with a mixture of graphite and oil to prevent the molten metal from attaching itself to the mold. They further declare that "by our improved form of joint the rail ends are held together so as to be effectually prevented from springing or moving laterally or vertically, while by the fusion of the cast-metal body to the abutting rail ends said ends are held together, and all tendency of the rails to pull apart when contraction of the rails takes place will be effectually counteracted. Furthermore, by the fusion of the cast-metal body to the surfaces of the rail ends, the rails are electrically 'bonded,' thereby dispensing with the necessity of separately bonding the rails when our improvement is applied to the tracks of electric railways." They also say, in substance, that by the improvement in question the rails are held in unyielding

contact with each other, so that longitudinal movement of the rails is impossible, and the track is rendered smooth and even, and the liability of the rails to wear away at the joint in the track is effectually obviated.

The claims of the patent are five in number, and the first of these is as follows:

"We claim as new: * * * (1) An improved method of forming rail joints, consisting in cleaning the rail ends to be joined, forming or adjusting a mold upon said rail ends and over the joint, so as to surround the webs and base flanges thereof, heating said mold and rail ends, and pouring molten metal into said mold around and beneath the base flanges of both rails, and uniting said metal directly to the surface of said rail ends by fusion."

The remaining four claims of the patent are a substantial repetition of the first, the object of all the claims being to cover beyond peradventure, by means of some slight changes in the phraseology of the respective claims, the process of making a rail joint, which is above described. It is apparent, therefore, from an inspection of the specification and claims, that the patent in suit is for a special method of joining rail ends by casting metal around the abutting ends or joints. In other words, the patent covers a process, rather than a product, and the essential steps of that process, as described and claimed, consist—First, in cleaning or brightening the rail ends to be joined; second, in forming or adjusting a mold to the rail ends so as to embrace and form a chamber around the webs and base flanges of the same; third, in pouring molten metal into said chamber until it is full, and allowing the mold to remain in position until the molten metal sets or hardens. Three of the claims, namely, the first, third, and fifth, also mention the heating of said mold and rail ends as one of the steps in the process. The defendants insist that this method of making a joint or splicing the rails is not new; that the various steps of the process as detailed in the patent are each old in the foundrymen's art; and that the method of fusing cast iron to steel or wrought iron, thereby firmly uniting the two metals, which the patentees describe, had been described in earlier patents, and was well known to foundrymen. How far these claims are justified will be best disclosed by referring to several patents which are chiefly relied upon to show the state of the art and to sustain the defendants' contention.

In the year 1831 an English patent (No. 6,111) was granted to George Stephenson, the inventor of railroads, for an improved mode of making wheels for railway carriages. The process of making wheels which Stephenson describes in his patent is substantially as follows: The form of a wheel of the required size is first molded in sand in the usual manner. Hollow tubes of thin wrought iron to form the spokes of the wheel are then laid in the mold, radiating from the central cavity or hub, the ends thereof having first been treated with a solution of borax to serve as a flux. The outer ends of the spokes are made flaring or trumpet shaped. Melted cast iron is then poured into the central cavity of the mold to form the hub of the wheel and into the outer or circular cavity to form the felly, and the molten metal is allowed to set or harden. The felly is afterwards

surrounded with a strong wrought-iron tire, which is applied while hot, so that it may shrink while cooling. The patentee says, in substance, that when the molten iron is thus turned into the mold to form the hub and felly it flows around the ends of the thin wrought-iron spokes, and into the outer ends of the spokes for a short distance, and, in consequence of the previous application of borax to the ends of the spokes, the borax, acting as a flux, "causes the same to unite and adhere very firmly to the wrought iron," and hence makes a very strong wheel. In another part of his specification Stephenson says that the wrought-iron tubes forming the spokes are prepared for the molten cast iron which forms the hub and felly "by carefully cleaning the ends inside and outside from all dirt and loose scales, and then applying a thin glazing of borax to those ends." In another part of his specification he says that the melted cast iron will heat the thin wrought iron of which the spokes are formed to such a degree "as by the fluxing action of the borax will cause a very firm union to take place between the ends of the wrought-iron tubes which form the arms of the wheel and the cast-iron which forms the central nave and the circular rim thereof." After a careful examination of the specification of this patent it is obvious, we think, that Stephenson contemplated that a firm union by fusion would take place between the wrought iron and cast iron at the point where the several ends of the wrought-iron spokes came in contact with the molten cast iron which was intended to form the hub and felly of the wheel.

In the year 1851 an English patent (No. 13,500) was granted to R. S. Norris, which clearly foreshadowed the process now employed by the appellant for splicing steel rails, even if it is not the identical process. This patent, in the language of the inventor, "relates, firstly, to a method of joining together, fastening, or supporting the bars of railways, various parts of iron bridges, locks, and other erections, and consists in effecting such object by casting molten iron, or other suitable metal, upon or about the said rails or other parts intended to be joined, fastened, or supported." The drawings attached to the patent disclose a chill mold of metal made in two halves, and so constructed as to embrace and form a chamber around the webs and base flanges of the rail ends that are to be united. Through an orifice into this chamber molten iron is poured and allowed to set, thereby forming a chair upon the rails "fitting thereon [as the specification declares] exactly at every point." In one part of the specification the patentee says, "I pour molten iron or other suitable metal into the surrounding space [to wit, the chamber formed by the mold], and thus effect a perfect union of the two." He furthermore says, in substance, that in cases where it is deemed necessary to provide for expansion and contraction of the parts to which the molten metal is applied, he interposes a piece of canvas, coated with loam and lime, between the molten metal and those parts to be united with which it would otherwise come in contact. In view of this statement it is necessary to infer that, but for the interposition of the strip of canvas coated with loam and lime, the molten metal would form a chemical union with the parts to be united, and that in most cases where the process was employed such a union was in fact contemplated by the

patentee. Norris claims, among other things, as his invention, the "joining, fixing, or supporting the bars or other metallic portions of railways, bridges, locks, and other metallic erections by pouring molten iron or other suitable metal onto or about such parts."

As early as October 16, 1847, United States letters patent No. 5,331 were issued to William Martin, Jr., and Mark Fisher for what was claimed by them to be an "improvement in the manner of uniting or welding cast steel and steel of other kinds or wrought iron with cast iron." In their specification these inventors say, in substance, that attempts had been made to unite steel and wrought iron with cast iron by casting the latter while in a molten state upon the steel or wrought-iron surface with which it was to unite; that the process then in use was to brighten the face of the steel or wrought iron, and coat it with borax or some other analogous flux, and then lay it in the mold, and pour the molten metal thereon; that the result of such process had not been satisfactory, but, without changing the old process in any other respect, they proposed to overcome such difficulties as had been encountered by simply allowing the molten metal to flow laterally along the brightened steel or wrought-iron surface instead of falling thereon vertically. The alleged invention of Martin and Fisher appears to have consisted in a new method of pouring the molten metal into the mold, and it is noticeable that they claimed at that early date to be able to produce a perfect union between steel and wrought iron and molten cast iron by simply changing the direction in which the latter flowed into the mold. These same inventors—Martin and Fisher—took out another patent in the year 1849, being letters patent No. 6,054, in which they pointed out the advantages of heating the steel or wrought iron to which cast iron is to be welded or united before allowing the molten cast metal to flow laterally along the surface to which the cast iron is to be attached. For the purpose of raising the steel or wrought-iron plate to the requisite temperature, they filled a cavity in the sand mold with molten iron, placing the plate over the cavity, and when it was sufficiently heated allowed molten cast iron to flow across the upper surface of the plate that had first been brightened and coated with a flux.

In an English patent granted to Robert Richardson in the year 1854 a method of uniting the ends of gas and water pipe is fully described, which consisted in encircling the ends of the pipe to be joined with a mold and pouring molten cast iron into the chamber formed by the mold, thereby firmly uniting the two pieces of pipe. The patentee, while describing his process of forming a joint by means of molten metal poured around the ends of the pipe, says: "To effect or facilitate an effectual union of the melted metal with the iron of the pipes, the iron may have borax, tin, or zinc applied to it, or it may be cleaned with a file or an acid at those parts at which the union may be desired." In view of this statement it is evident that Richardson contemplated that the molten cast metal would become fused to the iron of the pipes if the latter was either treated with borax or other suitable flux, or if the pipes were thoroughly cleaned or brightened where they came in contact with the molten metal.

As further illustrating the state of the art prior to the alleged invention of Hoffman and Falk we only deem it necessary to refer specially to two other patents, namely, United States letters patent No. 27,227, issued to James Lippincott on February 21, 1860, and United States letters patent No. 160,816, issued to John Donovan on March 16, 1875. The first of these patents relates to the manufacture of axes, and describes a method of manufacture by which a piece of cast steel that is to form the cutting edge of the ax is placed at the bottom of a sand mold made in the shape of an ax, and a head is cast onto the same by filling the mold with molten "hot blast soft iron." The other patent relates to the manufacture of anvils, and describes a process whereby a steel plate that is to become the face of the anvil is placed in the bottom of a sand mold made in the shape of an anvil, and molten cast-iron is then poured into the same, which attaches itself firmly to the steel plate, and forms the mass or body of the anvil. These patentees showed that molten cast iron could be united to steel by fusion, and that the union of the two metals would be facilitated by first cleaning and heating the steel, and, like most of the other inventors, they recommended the use of borax "to assist the welding process."

Several other patents were offered in evidence by the defendants to show the state of the art and sustain their contention, but from the foregoing review of prior inventions and publications it is evident, we think, that when the patent in suit was issued it was well known to those who were skilled in the art to which the patent appertains that molten cast iron could be made to fuse or unite more or less perfectly with solid steel or wrought iron by bringing the molten and the solid metals in contact; that, in order to produce such a fusion or union, the surface of the solid metal where fusion was desired must be made clean or bright, so as to lay bare its "sensitive skin"; and that the union of the metals would be facilitated and rendered more perfect by heating the solid metal to a considerable degree, and applying thereto a suitable flux before the molten metal was allowed to come in contact with it. The prior art not only disclosed these facts, but it showed that railroad rails had been united by pouring molten iron around the webs and base flanges thereof by the use of a mold made in two sections more than 40 years before the patent in suit was issued. We are unable, therefore, to discover in what respect Hoffman and Falk, by their alleged invention, gave any additional information concerning the means by which molten cast iron could be made to fuse and unite with steel, or in what respect they made a distinct advance in the art of cast welding, to which their patent clearly relates. The process that they describe of uniting the ends of rails by pouring molten iron around the same cannot be differentiated from the process that had been described previously by Norris, unless it be assumed that Norris did not intend that the molten metal should become fused to the ends of the rails under any circumstances; and that assumption, as we have already remarked, is not warranted by the Norris specification, because he points out means by which such a fusion may be avoided when a union by fusion is not desired. The process described by Norris, like that described by Hoffman and

Falk, was designed to be performed in the open air, with the aid of a portable furnace, after the rails had been laid in place, and by the use of a mold made in two sections so as to form a chamber around the abutting ends of the rails. Moreover, we are not able to attach any importance to the fact that Norris did not suggest the cleaning of the rail ends as one of the steps in his process, since the cleaning process had been suggested by Stephenson. It was doubtless well known at that time to all foundrymen that, in order to effect that "perfect union" of molten cast iron with steel or wrought iron which Norris mentions, it was necessary that the steel or wrought iron should first be thoroughly cleaned of oxide or other foreign substances which adhered to it. But, even if we were willing to concede that the patent in suit describes a process of welding rail ends together by means of molten metal which is different from that suggested by Norris, in that the latter neither advised the cleaning nor the heating of the rail ends before the molten metal was poured into the mold, still the fact remains that long prior to the alleged invention by Hoffman and Falk other patentees had explained the necessity of cleaning and the utility of heating the surface where the union by fusion was to take place. It cannot be said, therefore, that they suggested a new step in the art of cast welding, or that by a change in the old methods of manipulation they succeeded in producing a result that was substantially new. The Lippincott patent of February 21, 1860, to which reference has already been made, fairly describes, as we think, every step in the process of fusing molten iron to steel which the patent in suit describes, including the use of a metal mold and the cleaning and heating of the steel which is to form the blade of an ax, before it is brought in contact with the molten iron which forms the head. But, if this were not the case, and if it did appear that the patentees had in fact blended various known steps in the art of cast welding that had not before been combined in a single process, we should nevertheless feel constrained to hold that in so doing they had displayed nothing more than ordinary mechanical skill; for if it be assumed that when Hoffman and Falk addressed themselves to the task of splicing rails their main object was to unite the molten metal firmly to the webs and base flanges by fusion, then it would be natural to expect that in accomplishing that object they would resort to all of those expedients disclosed by the prior art, such as cleaning and heating the rails, and applying a suitable flux, which experience had shown were useful in producing a firm union of the metals by fusion.

Counsel for the appellant have urged at some length and with apparent confidence that the process of splicing rails described by the patent in suit has proven to be of such great utility, especially in its application to the rails of street railroads operated by electricity, that it should be upheld even if it does appear, when viewed in the light of the prior art, that it suggests nothing new in the process of cast welding. They further urge that, although the patent describes an old method of welding, yet as it is applied in a new relation, or, in other words, to a use that is not analogous to any former use to which it has been applied, it should be upheld within the doctrine announced in *Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed.

294; *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 18, 12 Sup. Ct. 601, 36 L. Ed. 327; and some other kindred cases. We are not able, however, to assent to either of these propositions. Without disparaging the utility of the process as applied to street railways, it may be said, we think, with entire accuracy, that it is better adapted to joining the rails of street railroads than to joining the rails which are used on steam railroads, because rails of the former kind are usually sunk deeply into the earth, and are held in position very firmly by the solid pavement of rock or cement in which they are embedded, which also protects the rail somewhat from the effects of heat and cold. Whether the process in question can be usefully applied to welding the rails of steam railroads has not, as it seems, been fully determined. But, be this as it may, since the method described and claimed is essentially old, a patent therefor ought not to be sustained merely because a new kind of rail is now in use on electric street railroads to which it can be successfully applied without varying the operation to any appreciable extent. The use of the process for the purpose of uniting the ends of two rails is analogous to the use made of it in the prior art for uniting the ends of two water pipes, the steel face and body of an anvil, and the steel blade and head of an ax. The use of the process for the latter purposes would, as we think, naturally suggest its use for uniting rail ends when it was deemed desirable to unite them. Moreover, the immediate result of the operation is in each instance the same, namely, the union of two metal bodies, one molten and one solid, by fusion at the point of contact. We discover no sufficient reasons, therefore, for holding that the use to which Hoffman and Falk applied the process in question was not analogous to the uses to which it had been applied in the prior art, and that the inventive faculty was exercised in suggesting the new use. Nor is the great utility of the process as applied to the construction of electrical street-railway tracks a sufficient reason for sustaining the validity of the patent. The utility of a machine, article of manufacture, process, or an improvement thereof, is only allowed to turn the scale in favor of its patentability in those instances where the question whether the inventive faculty has been exercised is balanced with doubt and uncertainty. *Duer v. Lock Co.*, 149 U. S. 216, 13 Sup. Ct. 850, 37 L. Ed. 707; *McClain v. Ortmyer*, 141 U. S. 419, 429, 12 Sup. Ct. 76, 35 L. Ed. 800; *Magowan v. Packing Co.*, 141 U. S. 332, 343, 12 Sup. Ct. 71, 35 L. Ed. 781; *Smith v. Vulcanite Co.*, 93 U. S. 486, 495, 496, 23 L. Ed. 952. In such cases the conceded utility of a patented machine or process, or an improvement thereof, may well be allowed to sustain the patent; but conceded utility cannot be permitted to have that effect in a case like the one in hand, where the process which is described and claimed as new is clearly old. It results from what has been said that this court approves the action of the circuit court in dismissing the bill of complaint, and the decree below is therefore affirmed.

GERMAN-AMERICAN FILTER CO. OF NEW YORK v. LOEW FILTER CO. et al.

(Circuit Court, N. D. Ohio, E. D. June 30, 1900.)

No. 6,029.

1. PATENTS—CONTRIBUTORY INFRINGEMENT.

One who makes and offers for sale to the public an article adapted for use in a patented process, with the intent and purpose that it shall be so used, and which is so used by purchasers, is liable as a contributory infringer.

2. SAME—ANTICIPATION—MEASURE OF PROOF.

One who alleges anticipation to defeat a patent must establish his claim by clear and cogent evidence.

3. SAME—PROCESS OF FILTERING BEER.

The Stockholm patent, No. 378,379, for a process of filtering beer, was not anticipated by the King apparatus for straining beer in racking off, for which an application for a patent was made which did not recognize or describe the principle of keeping the beer during filtration under both forward and back pressure to prevent the escape of the gas, which is an essential feature of the Stockholm process.

4. SAME—INFRINGEMENT.

The manufacture and sale of a filter differing in no essential particular from that described in the Stockholm patent, and adapted for use and used in the process of such patent, *held* contributory infringement, against which a preliminary injunction should be granted.

In Equity. Suit for infringement of a patent. On motion for preliminary injunction.

Wetmore & Jenner and Hoyt, Dustin & Kelley, for plaintiff.

Francis C. McMillin, for defendants.

DAY, Circuit Judge. This case is before the court upon a motion for a preliminary injunction. The action seeks an injunction and accounting for alleged infringement of letters patent of the United States No. 378,379, granted February 21, 1888, to Uhlmann and others, as the assignees of one Stockholm, and conveyed to the plaintiff corporation, which is now the owner of the patent in question. An answer has been filed denying validity of the patent and infringement by the respondent. Numerous affidavits have been filed, and the case thoroughly and ably argued by counsel. The patent in controversy has been the subject of much litigation, and was sustained by the circuit courts of the United States in *Uhlmann v. Brewing Co.* (C. C.) 53 Fed. 485; *Uhlmann v. Brewing Co.* (C. C.) 41 Fed. 132; and *Filter Co. v. Erdrich* (C. C.) 98 Fed. 300. Judge Gresham, who delivered the opinion in the earliest case, makes this statement, which meets with substantial approval in the subsequent cases:

"Lager beer, owing to fermentation, contains yeast germs, albuminoids or gluten, and other impurities, which need to be removed without depriving the beer of its carbonic acid gas, also the product of fermentation, before the beer is marketable. Prior to the use of the Stockholm process, the subject of this suit, when beer had reached its proper age it was conveyed from a storage cask to a cask at the bottom of which chips and shavings had been placed for the purpose of attracting and retaining the yeast particles and other extraneous substances. The finer impurities were not, however, thus attracted and precipitated, and, in order to force them to the bottom of the

cask, isinglass, made of fish sounds, a glutinous substance, which, injected at the top, dissolved, and, spreading over the top surface of the beer, gradually sank to the bottom, carrying with it smaller impurities not already attracted there by the chips and shavings. The state of the art, the invention, and its advantages are thus described in the specifications: "The object of this invention is the filtration of beer which contains mechanical impurities, and also carbonic acid gas under pressure. In the filtration of such liquids it is important that the liquid—beer, for example—should be filtered continuously in its passage from the store cask to the keg into which it is drawn for sale, without material loss of the gas contained in the beer, and without material foaming in the keg into which the filtered beer is delivered. The methods in use prior to my invention for clearing beer of the yeast which is produced in it as a product of fermentation have generally involved the use of isinglass, by which the yeasty particles are collected and precipitated to the bottom of the tun or cask containing the beer. Isinglass is, however, costly, and involves a very large annual expenditure where any considerable amount of beer is brewed, and much trouble in preparing for use as a "fining," and it is slow in its operation. Nor are the results entirely satisfactory, as all of the yeasty particles are not thereby removed, but some portion remains, and, yeast being a fungus growth, that which remains propagates more yeast, fermentation continues, and in consequence the beer is apt to become cloudy and spoiled. This result is especially noticeable in beer which is bottled, and intended to be kept for some time, either for export or domestic use. In mechanical filtration, variations in the supply of beer to the filter, and in the speed with which the filtered beer is discharged into the keg, permit the carbonic acid gas generated to escape in considerable quantities while the beer is passing through the filter, and, the beer having lost its carbonic acid gas, or a considerable quantity of it, comes out flat and insipid, and is discharged into the keg in a foamy condition, and soon becomes worthless; besides which, the escape of the gas in the filter causes foaming therein, the foam collects upon and clogs the pores of the filtering substance, or the gas permeates the filtering substance, thereby affecting its efficiency as a separator of mechanical impurities, or both results ensue, and thus the operation of the filter is materially retarded, the variations of supply and discharge are increased, and in consequence the filtering substance fails to collect much of the yeast. To modify these results would require frequent changing of the filtering substance, and this would involve, not only expense for filtering material, but considerable loss of beer, and delays in filtering operation. Continuous filtration, without material variation in the speed with which the beer is discharged from the cask, is also important, because, if the speed of the discharge is materially diminished, the accumulated air pressure will burst the cask, unless it is closely watched; and, the cask being usually in a cellar, where neither continuous sunlight nor gaslight is permitted, because either would elevate the temperature of the cellar, such watching is inconvenient. For these reasons, among others, mechanical filtration has not, I believe, been generally or successfully practiced by beer brewers before my invention. By my improved method of filtering I dispense entirely with the use of isinglass or other finings, and thus very great economy is secured. The beer is thoroughly clarified; all, or substantially all, of the yeast particles being removed. The operation of filtering is rapid and continuous, without material variation in speed, and without the necessity of changing or cleansing the filtering substances. The carbonic acid gas is substantially preserved in the beer, and the beer comes out of the filter retaining all of its brilliancy and liveliness, ready to be discharged into the keg at the racking-off bench without any danger of subsequent cloudiness or other deterioration due to the filtration, and without having had imparted to it any undesirable taste."

Having described the drawings accompanying the specifications, the patentee says:

"In case any air enters the filter, either through the connecting pipes or otherwise, or if any gas escapes from the beer from changes or variations of pressure either on the entrance or discharge side, or by reason of partial clogging of the filter media, or from other cause, the air or gas, as the case

may be, at once ascends to the top of one or other of the gas traps, where, being easily observed, it is, together with the foam thereby caused, allowed to escape through the vent cock, the filtration meanwhile proceeding without any interruption or disturbance. In the drawings Fig. 1, the racking bench is shown as situated on the floor, or on a level above that of the store cask; and this is the arrangement, I believe, in most breweries. The result is that the column of beer in the pipe, G, and hose, M, constitutes a back pressure, by which the filter and the traps at the top thereof may be kept completely filled with beer; but in some breweries the racking-off bench is on the same floor or level with the cask. In such a case a back pressure sufficient to keep the gas traps filled with beer should be formed by elevating the hose, M, at a point between the filter and the racking-off bench, a little above the top of the lantern, or by narrowing the capacity of the hose, M, relatively to the capacity of the hose, K, and the air pressure at the cask. As there is always more or less circulation of beer in the lantern, and the lantern being of glass, the beer therein may be conveniently observed, and the quality of the beer passing through the filter—that is, its freedom from impurities—may be known. Of course, if the gas trap is not of lantern construction, a sample of the filtered beer may from time to time be drawn off for observation by means of the vent cock, and the vent cock may from time to time be opened to allow the escape of any air, gas, or foam which may have accumulated in the gas trap; but this is less convenient than to make the trap of lantern construction. The interior of the chambers of the filter may also be so formed as to constitute traps for air, gas, or foam, the vent cocks being placed at their highest points; but such an arrangement is still less desirable."

Having thus described the process and the apparatus in and by which it is conducted, what he claims as new is:

"(1) The process of filtering beer, consisting in drawing the beer to be filtered from the cask under a pressure exceeding atmospheric pressure, conducting the same to and through a filtering apparatus in which that pressure is maintained during the filtering operation, keeping the filtering apparatus full of beer, collecting and carrying off any air entering the filter along with the beer, and gas separating from the beer during the filtering operation, and discharging the filtered beer from the filter under pressure, substantially as hereinbefore set forth. (2) The described process of filtering and keeping beer, which consists in forcing the beer under a pressure exceeding atmospheric pressure from the store cask through a filtering apparatus, and thence to the keg, keeping said apparatus full of beer during the operation, and collecting and carrying off from the beer during its passage from the store cask to the keg air that may be mingled with the beer, and gas that may separate from the beer, substantially as and for the purpose hereinbefore set forth. (3) The process of filtering beer, consisting in drawing the beer from the cask under a pressure exceeding atmospheric pressure, forcing the beer under said pressure through a filter, maintaining that pressure in the filter during the filtering operation, and creating and maintaining a back pressure in the filter, so as to keep the filter full of beer, substantially as described. (4) The process of filtering beer, consisting in drawing the beer from the cask under a pressure exceeding atmospheric pressure, forcing the beer under said pressure through a filter, maintaining that pressure in the filter during the filtering operation, creating and maintaining a back pressure in the filter so as to keep the filter full of beer, and collecting and carrying off from the beer any gas separating from the beer on its way from the store cask to or through the filtering apparatus, substantially as described."

The improvement made by Stockheim was an important one in the brewing art, as is shown not only by the adjudications in the courts, but in the general adoption and use of the Stockheim process for brewing beer in this country. Before Stockheim's process it was customary to clear beer by placing chips and shavings in casks, which tended to precipitate the yeast and other grosser material. A solution

of isinglass was also used for this purpose, intended to carry germs and other impurities to the bottom. The object of Stockheim's process was to avoid to a large extent the use of expensive material for clarifying beer, to shorten the time necessary in the process, and to accomplish this by filtration without the loss of the carbonic acid gas. It is not claimed that the means used by Stockheim in the various stages of this process were new. All the appliances for carrying out the process were old. What Stockheim invented was an improved process of treating beer containing deleterious substances, notably yeast germs, by maintaining pressure on the beer throughout the operations, so as to contain the gas therein while filtering, thereby preserving the gas in the beer, and delivering it into vessels for shipping continuously and in large columns. In this process the air and gas were removed, maintaining the beer in the condition desired by a forward and back pressure, carrying off air and gas collected during the filtering process. This patent having been so frequently examined by the courts, and uniformly sustained, for the purpose of this motion may be regarded as a valid patent, and having the scope and meaning which has been put upon it by the adjudications referred to. While such adjudications may not be binding upon this court, such frequent decisions after protracted litigation are entitled to great weight, and especially when re-enforced by clear and convincing reasoning. It is not claimed that the defendants use the process in a brewery of their own or otherwise, except as they may be regarded as contributory infringers furnishing to brewers filters of their manufacture, to be used by them in combinations which do infringe the process of the patent. If the defendants are selling a filter intended to be used in combinations which, if unlicensed by complainant, would be an infringement of the patent, then they would be infringers, as I understand the rule. This principle is recognized and enforced in the opinion of Judge Taft in the case of Thomson-Houston Electric Co. v. Ohio Brass Co., decided in the circuit court of appeals of this circuit in May, 1897 (26 C. C. A. 107, 80 Fed. 712). The first and second propositions of the syllabus of that case are:

"One who makes and sells one element of a patented combination with the intention and for the purpose of bringing about its use in such a combination, is guilty of contributory infringement, and is equally liable with him who in fact organizes the complete combination."

"One who makes articles which are only adapted to be used in a patented combination, and offers them for sale to the general public, will be presumed to intend the natural consequences of his acts, and will, therefore, be held to intend that they shall be used in the combination of the patent, and an injunction will be granted."

It is unnecessary to notice the numerous cases cited by counsel upon this subject, in view of this decision in this circuit. Applying the principle laid down in the above case, the defendants are infringers if they are making an article adapted to be used with the combination of complainant's patent, offered for sale to the public with the intent and purpose that the mechanism shall be so used. That the defendant company is making filters to be sold and used in breweries where the process is covered by the patent we think is clear. The circulars of defendants show that they claim the right to make and

sell filters to brewers using the process patented. I am of opinion that the filter of defendants, when thus sold, for the purpose above stated, would make defendants contributory infringers. It is true defendants' filter has no apparatus exactly corresponding to the vent cock in Stockheim's patent to allow the escape of air, gas, and foam which accumulate in the gas traps. The filter as made by defendants has what seems to me to answer the same purpose, in valves so located that they can be used as the lantern gas traps in Stockheim's filter are used. Nor do I think the method of operating the defendants' filter as claimed by them would avoid infringement. Defendants claim that in the practical operation of their filter the valve, E, is only opened to let the water with which the filter is first filled wash out such particles of the filtering medium as may be loose in the filter, for the purpose of cleaning out the filter completely from such detached particles of the filtering medium and other foreign substances as may have in any way come into the filter before the filtering of the beer is to take place or begins; and when the column of water coming out of valve, E, shows perfectly clear and free from foreign matter, the valve, E, is closed, and never again opened until after all filtering of beer ceases, and it is desired to again clean the filter. While this may be true, these valves are in place, and capable of use, and, it seems to the court, very convenient for use in the process of filtration. In the Erdrich Case, above cited, Judge Gray held, with reasoning that has great force, that special methods of allowing gas and air to escape are not absolutely essential to the Stockheim process. Be that as it may, I think the valves shown on defendants' filter practically answer the purpose of the same valves shown on the Stockheim filter. Without entering into a detailed comparison, I am of opinion that defendants' filter, as made and advertised and intended to be used in combination with the patented process in question, when sold to persons using the patented process of Stockheim constitutes an infringement of complainant's rights, making defendants contributory infringers.

The matter principally argued on this motion is the effect to be given to the apparatus made and used by one King, of the Continental Brewing Company, of Boston. In view of the weight and authority of prior decisions sustaining the patent, a preliminary injunction could hardly be denied, unless defendants have introduced some new element into the case requiring a different conclusion. This King apparatus is set up for the first time in this case, and because of that fact this court, in considering it, acts upon its own judgment; and the question is, was this prior use more than two years before the application of Stockheim for a patent such as will defeat it by establishing priority of use, thereby depriving Stockheim's invention of novelty? As to this proposition the arguments of counsel and the testimony in the case have been principally directed. Looking at this as a new question, starting with a presumption in favor of the patent, does the King invention show such prior use, and raise such a doubt as to the validity of the patent, that the court should withhold a preliminary injunction? One who asserts the invalidity of a patent for want of novelty must establish his claim by clear and convincing

proofs. It has frequently been said this proof must be beyond any reasonable doubt. *Philadelphia Trust, Safe-Deposit & Ins. Co. v. Edison Electric Light Co. of New York*, 13 C. C. A. 43, 65 Fed. 551. In *Coffin v. Ogden*, 18 Wall. 124, 21 L. Ed. 821, the supreme court said: "The burden of proof rests upon him [defendant], and every reasonable doubt should be resolved against him. * * * The law requires not conjecture, but certainty." See, also, *Nelson v. Type-Foundry Co.* (C. C.) 91 Fed. 418. Certainly the testimony ought to be of such cogent character as will lead the court to the conclusion that the Stockheim patent has been successfully anticipated in the alleged prior public use in the King apparatus. From the testimony it may be fairly said that King undoubtedly adopted in his business in the Continental Brewery at Boston a process of racking off beer in which he used a method of straining the beer after it left the receiving cask, and before it was drawn into the receiving kegs for shipment. In order to anticipate Stockheim's invention, it must be shown that this use was two years and more prior to October 7, 1887, when the application for the patent in suit was filed. It appears in the testimony that probably in May, 1885, King made a strainer into which the beer was forced by pressure from an air pump upon the beer in the cask, and that the beer thus strained was afterwards conducted by a hose to the racking bench, to be drawn into kegs for shipment. King used two metal plates held with flanges secured together, interposing the straining medium between these two plates. At first he used wire gauze about as fine as China silk, and cotton flannel of one or more thicknesses. Subsequently his filtering plates were made stronger and better, more filtering material being used; this change probably being made after Stockheim's application for a patent. Subsequently King substituted for his own invention a Klein filter, later held to be an infringement, after which he abandoned it, and returned to the use of his own filter in a modified form, which he is still using. In 1893 the owners of the Stockheim patent brought suit against King, who answered, and set up, among other things, his own prior use, alleging the discontinuance of the Klein filter. After this answer the complainant filed no replication, and the case was dismissed for want thereof. A long period of time has passed since King put in his apparatus, and the difficulty of witnesses remembering the details of construction after so long a time is inherent, and has frequently been commented upon by the courts. We have in this case testimony independent of the memory of witnesses in the application for a patent which was filed by King upon July 10, 1885. It seems only fair to say that what King therein claimed and described may be regarded as embodying what he had accomplished up to that time. He states that he has invented a new and useful improvement in the process of racking off beer, which he describes as follows:

"In the process of racking off beer at the brewery, as generally practiced, a part of the finings or settlings is liable to be carried from the large casks to the barrels or kegs, thus giving the beer a cloudy appearance, which renders it very objectionable for consumption, and leaves it in an unmarketable condition, and consequently interferes with its ready sale. It is the object of my invention to obviate these objections, and to that end it consists in the employment of a box or casing interposed between the large cask and the

barrel or keg, and connected to the same respectively by means of pipes or tubes. Within and across the center of said casing is secured a screen or strainer through which the beer is forced, and which arrests the finings or settlings, and prevents their passing into the barrels; thus leaving the beer in a clarified and merchantable condition."

Drawings are attached, which show casings with flanges secured together, and containing fine material answering the purpose of screens, with openings in the casings for the insertion of a pipe or tube leading to the cask to be racked off. "My invention," says King, "is more especially adapted for use in racking off lager beer, which is now manufactured and sold in large quantities. In filling the barrels and kegs directly from a large cask, a considerable quantity of foam is evolved, which, in my improvement, is in a great measure prevented." He claims:

"In an apparatus for racking off beer, the casing, A, A', provided with the openings, B, B', in combination with a screen, C, secured between the flanges, a, a', as and for the purpose set forth."

This application Mr. King suffered to remain in the patent office, without undertaking to press it to issue, until time had run against his application; and no letters patent were ever issued to him for this invention. It will be observed that what he claims to accomplish is by means of a screen or strainer through which the beer is forced in order to arrest the finings or settlings. If he had discovered the principle involved in the Stockheim patent, he makes no mention of it. It is not described so that at the expiration of his letters patent it could become public property. The important element of removing the yeast germs, keeping the filter constantly filled, and keeping the gas by back pressure, is not mentioned or claimed by King. Assuming the operation of this back pressure could be obtained by his process, this feature, which is so important a part of the Stockheim patent, is not disclosed. It is possible in the King process back pressure may be obtained, although the inventor makes no mention of the principle involved. We do not understand that one who discovers and applies an important principle is to be deprived of his invention because it might have been developed in a prior process invented or used by others. This question was before Judge Gray in *Filter Co. v. Erdrich*, supra, and he said:

"As we think has been shown, certain steps of the process (as, for instance, the discharge of gas and air after the filtering operation has been going on) may not be necessary to the successful operation of the process; but the condition just described, of keeping the filter full after the preliminary expulsion of gas, by forward and back pressure, is a condition absolutely essential to the process, however practiced, and is an end aimed at in the other steps of the process. This leading thought of the inventor, however obvious it may now seem, entered into no other filtering device, so far as the evidence discloses,—at least in such fashion that its importance as a governing condition of the filtering operation might be understood. That this condition should have existed by accident in any process other than Stockheim's, or have been produced without its importance being recognized and proclaimed, cannot affect Stockheim's claim. It may well have been that, before the Stockheim process was explained, some one may have filtered highly charged beer under pressure successfully; the filter having been kept full of beer the while. But, so far as the evidence discloses, no one recognized that as the essential condition of a successful operation, or explained its function as a step in the process. One who accomplishes a result by a process which is only partially

or not at all understood by him has invented nothing, and cannot deprive another, who afterwards discovers and proclaims the true principle of the operation, of the rights of an inventor."

In *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, the court said:

"It is not sufficient, in order to constitute an anticipation of a patented invention, that the device relied upon might, by modification, be made to accomplish the function performed by the invention, if it were not designed by its maker, nor adapted, nor actually used for the performance of such function."

It seems clear that, if King had accomplished the very important step which is involved in the Stockheim process, he would have described and claimed it, and certainly not have suffered his rights to lapse by not pressing his invention to a successful issue. The process covered by the Stockheim patent is not shown or suggested in King's application any further than above stated. Had King believed that his invention made this important progress, he certainly would have protected himself by a fuller description of his invention, and taken prompt action to realize the benefit thereof. King seems to have contemplated an apparatus which would arrest the finings or settlings liable to be carried from the large cask to the keg. He seems to have had no conception of a process which would arrest the yeast germs and other impurities, and maintain back pressure upon the beer in the process of filtration and delivering it at the racking bench in a solid stream. There is testimony in the case tending to show that at least in 1885 the King apparatus was regarded only as a straining process. In comparing the specification and claim of his application with the ample statements of the prior art, the objects to be obtained, and the process sought to be secured to the inventor in the Stockheim patent, it is evident that the two inventors had not the same thing in mind. Believing from the testimony that King had no more in 1885 than is shown in his application, and that he does not therein show any invention which would anticipate, if publicly used, the Stockheim patent, it seems to me there is nothing in this case to warrant a different conclusion from that which has been reached by other courts which have passed upon this patent. If the Stockheim patent was only for a filter, it may be that such changes as would be necessary to adapt the King apparatus to the one shown and described in the Stockheim patent would be mere changes of degree, not involving invention, being merely mechanical changes which persons skilled in the art could make. But it must be borne in mind Stockheim's invention is for a process. This process, I am of opinion, is not anticipated by that of King. This question has been fully developed in affidavits and argued by counsel. I think the complainant is entitled to a preliminary injunction.

LAMSON CONSOLIDATED STORE-SERVICE CO. v. CHAMBERLIN.

(Circuit Court, D. Vermont. March 30, 1900.)

PATENTS—ANTICIPATION—STORE-SERVICE APPARATUS.

The Goodfellow patent, No. 493,621, for a store-service apparatus, claims 1, 2, 3, 5, and 13, covering the method of propelling a carrier along a way or track by means of a flexible cord or device running along the track under the upper wheels of the carrier and over pulleys above, or over the under wheels of the carrier and under pulleys below at each end, which by being pulled over the pulleys separates itself from the way, causing the carrier to move from one end of the way to the other, were not anticipated, and are valid.

In Equity. Suit for infringement of a patent. On final hearing.

J. Steuart Rusk and M. B. Phillipp, for plaintiff.

W. S. Kerr, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 493,621, applied for June 4, 1885, dated March 14, 1893, and granted to John H. Goodfellow, assignor by mesne assignments to the plaintiff, for a store-service apparatus for conveying packages between the clerks' station and the cashier's desk on wheeled carriers, suspended on a track or way, and propelled by a flexible cord or device running along and from the track under the upper wheels of the carrier and over pulleys above, or over the under wheels of the carrier and over pulleys below, at each end, which, by being pulled over the pulleys pressing against and along the face of the wheels, separates itself from the way, and moves the wheels forward, carrying the body of the conveyor either way, from end to end. The specification describes a two-part elongated wedge at the ends of the way for stopping and retaining the carrier, and says:

"The way may be inclined, the propeller acting to force the carrier up the same until it is arrested by the wedge or stop; the carrier being returned partly by the action of the propeller at that end, and partly by gravity."

There are 14 claims. Those alleged to have been infringed by the defendant are:

"(1) The combination, in a store-service apparatus, with a way, and a wheeled carrier movable upon the way, of a flexible line extending along the way, and adapted to engage with the carrier and propel it along the way by the progressive separation of the flexible line from the way, substantially as set forth. (2) The combination, in a store-service apparatus, with a way and a wheeled carrier movable upon the way, of a bendable propeller adapted to engage with the carrier and propel it along the way by the progressive separation of the propeller and the way, which carrier resists such separation during such action, substantially as set forth. (3) The combination, in a store-service apparatus, of a wheeled carrier, a way, and a propeller leading between the wheels of the carrier, said propeller adapted to engage with carrier and propel it along the way by the progressive separation of the propeller and way, substantially as set forth." "(5) The combination, in a store-service apparatus, of a way, a wheeled carrier adapted to travel from end to end on said way, a stop for holding the carrier in the position at which it is arrested, and a propeller extending along the way, and adapted to engage with the carrier and propel it along the way by the progressive separation of the propeller from the way, substantially as set forth." "(13) The combination of the

way, a propelling cord or line secured at one end of the way, and movable at the opposite end from the way, and a carrier provided with two sets of wheels, one above and the other below the way, substantially as and for the purpose set forth."

English patent No. 737 was granted to Frederick Octavius Palmer, March 10, 1869, for an apparatus for carrying goods or passengers from one place to another, and especially across rivers and glens, consisting of a car hung to the axis of a pulley or pulleys running on a line or lines of wire, chain, rope, or other material, "caused to travel to and fro from end to end of such line by bringing the line into an inclined position, so that the car may descend along it by gravitation"; and, "in order to stop the car when it has descended along the inclined line or lines, the car might be caused to run upwards for a short distance on another line or lines rising up from the line or lines along which the car has descended." A drawing shows a line rising up from the one carrying the car, running over pulleys and suspending a weight at the outer end. This is relied upon now as an anticipation of this invention. The rising line there is not, however, a propeller, but a retarder, and is not described as, nor is it capable of use, as constructed, without more, as, a propeller. It could be used as such by substituting a handle for the weight, or perhaps by adding a handle, and is a step towards Goodfellow's invention; but others were necessary to accomplish it, which neither Palmer nor any one else appears to have taken before Goodfellow. George C. Blickensdorfer filed an application October 26, 1885, for a patent on an apparatus for this purpose; and an interference appears to have been declared November 16th between claims of his and of Goodfellow and to have been suspended for their rejection on references to Palmer's patent. Samuel Barr filed an application October 11, 1886, for mechanism for distending the wires, and for a spring catch, for which patent No. 357,449 was granted February 8, 1887. Goodfellow, as assignor to plaintiff, filed an application January 25, 1888, between which and Barr's patent an interference was declared; and January 27, 1888, an application for two separate propeller wires on opposite sides of the track, and a double-wheeled carriage, on which patent No. 381,545 was granted April 24, 1888; and another for a track with a wedge-shaped arm extension at each end, on which patent No. 410,239 was granted September 3, 1889. The interference came on before Commissioner Simonds, who, in deciding it, May 20, 1892, compared the claims, quoting from Barr's specification, and said:

"These remarks lead to the conclusion that the interference issue expresses a construction which is not claimed in said claims of the Barr patent. Nevertheless it seems best to determine the question of priority of invention upon the issue presented, regardless of the fact that such issue and Barr's claims are not identical. Goodfellow's application of June 4, 1885, had a certain Fig. 4 of drawing, and the following are extracts from the specification: 'With these ends in view, I provide * * * the combination of a flexible line or propelling device with the way, extending the length thereof. * * * Fig. 4 shows a side elevation of the application of my propeller to a horizontal way and a carrier thereupon, provided with antifriction wheels to engage the propeller from beneath the way. * * * The same references indicate the same parts in all the figures. In the drawing, F represents the bendable propeller, which may be a flexible cord or strap, or any equivalent device of any desirable bendable material, and extending along the way for a

part or the whole of its length, and attached to or near the way as at j.' The construction thus described embodies everything called for in the interference issue, with the exception that only one wire is moved in order to effect a separation of the two wires and propel the carrier from the station. As to that construction, Goodfellow is the first inventor, because it is disclosed in his application of June 4, 1885, which antedates the making of the invention on the part of Barr. The distinction between moving one wire and moving two may or may not be material, in a mechanical and patentable sense. No opinion is expressed upon that point. Its presence in the issue cannot be ignored without doing unwarrantable violence to the plain meaning of a common word. It must be accepted as a feature of the issue. With it accepted as a part of the issue, priority of invention must be and is awarded to Barr."

This finding may not be conclusive, outside the patent office, of the priority of Goodfellow as to propelling the carrier by the means shown in his first application; but it is the end of the interference proceedings, and does show that nothing in them adjudged away that priority. The delay in that office is said, however, to have been caused by his abandonment of this first application, and the taking out of the patents on the subsequent ones before taking out this is said to have so superseded this as to make it void. Of course, there cannot be two patents at different times for the same thing, to the same or different persons, and both be valid. The prior patent to the same person would of itself avoid the subsequent one, although the latter should be granted upon a prior application. But these patents do not appear to be for the same invention. The intermediate ones are for differences from and improvements upon that of Goodfellow's first application and last patent. Necessarily the later application somewhat described the apparatus of the first, but they do not claim it, nor so describe it as to of themselves show it to be abandoned. These claims for this mode of propelling the carrier seem, upon this consideration of them, to be valid. The defendant uses this method of propelling a carrier up an inclined way, to run back by gravity. He does not use the elongated two-part wedge of the specification and other claims for retaining the carrier at either end. It is said that without something to retain the carrier at the ends the apparatus would be inoperative, and that the wedge must be read into the claims for that purpose, or the claims must be held void, as for an inoperative thing. The invention covered by these claims is, however, this mode of propulsion, of which Goodfellow seems clearly to have been the first inventor, and by his persistence in the patent office not to have abandoned. Palmer came near it, as for a retarder, but not near enough to see its use as a propeller, and took the clumsy mode of raising and lowering alternately each end of the way to have gravity move the carrier instead. No one else seems to have come so near to it as Palmer before Goodfellow. There were prior carriers, but none of them had anything resembling this as a mode of propulsion. The claims of a patent distribute the parts of the invention described in the specification intended to be covered by each, and these claims seem to well distinguish this part of this patented invention from the other parts without drawing them into it. The right to it does not appear to have been lost, and the defendant appears to have taken it. Decree for plaintiff.

PERRY et al. v. REVERE RUBBER CO.

(Circuit Court of Appeals, First Circuit. June 21, 1900.)

No. 248.

PATENTS—INVENTION—STEAM PACKING.

The Perry patent, No. 462,278, for a steam-joint packing, consisting of a ring made of a piece of hollow tubing, having an outer covering of rubber, and the ends united by a dowel-pin, is void for lack of invention.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Edwin H. Brown and Edward P. Payson, for appellants.

Henry M. Rogers and Alexander P. Browne, for appellee.

Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges.

COLT, Circuit Judge. This appeal relates to letters patent No. 462,278, granted November 3, 1891, to Edward L. Perry, for improvements in steam-joint packing. The packing consists of a piece of hollow tubing, composed of an outer rubber covering and an inner core of fibrous material, and a hollow or solid coupling-pin, made preferably of metal, which enters and unites the two ends of the tubing, thus forming a ring. This packing can readily be made into a ring of any required size, and possesses this advantage over packings which are molded into rings of various fixed sizes. The claim of the patent is as follows:

"A steam-joint packing consisting of a hollow core of cotton duck or other woven fabric, a covering of elastic material, and a coupling, the ends of which enter the ends of the packing, substantially as and for the purpose specified."

There is nothing new or novel in a tubing made of rubber and fabric as described in the patent. This is abundantly shown by the record. The coupling which forms the other element of the combination is simply a dowel-pin. Webster's Dictionary defines a dowel-pin as "a pin of wood or metal used for joining two pieces, as of wood, stones, etc., by inserting part of its length in one piece, the rest of it entering a corresponding hole in the other." In Knight, Mech. Dict. (1876) p. 735, we find this definition:

"Dowel. A pin used to connect adjacent pieces, penetrating a part of its length into each piece at right angles to the plane of junction. * * * The slabs of calcareous gypsum or Mosul marble which line the adobe palaces of Nimrod were united by wooden and bronze dowel-pins."

Turning to the rubber art, we find it was common to unite the abutting ends of two pieces of rubber tubing, such as hose, by a coupling inserted in the ends. As was said by complainants' expert:

"It has been a common practice almost ever since rubber tubing began to be used, and so far back as I can remember, to couple together the ends of two rubber-tube sections by means of a coupling inserted in the ends."

Such being the common practice respecting two pieces of tubing, there was manifestly no invention in so uniting the ends of a single piece of tubing to form a gasket or packing.

But it is said the old forms of coupling were rigid, and that in the Perry device the coupling must be compressible, and that this

feature establishes patentable novelty. Whether a coupling-pin is made compressible or incompressible would seem to depend upon whether the tubing or packing was designed to be solid or compressible. To make a coupling-pin solid and incompressible for use in an incompressible tubing or packing, or hollow and compressible for use in a compressible tubing or packing, does not involve inventive thought. As the Perry packing is made hollow and compressible, it would occur to any ordinary mechanic that it would be better to make the coupling-pin hollow or compressible. On this point, however, we are met with the further difficulty that the Perry patent is not limited to a compressible coupling. The claim of the patent is for a packing consisting of a hollow core of woven fabric covered with an elastic material, and a coupling composed of any material, the ends of which enter the ends of the packing. The descriptive language of the specification is consistent with and supports the claim. The packing in the specification is restricted to a hollow core "to more readily secure compression," and this limitation is carried into the claim. The coupling in the specification is not limited to a hollow tube "in order to enable it to be compressed," but includes a "solid tube," and the claim is for any coupling the ends of which enter the ends of the packing. If the patentee had placed the same limitation upon the coupling in the specification and claim which he has placed upon the packing, it could be said that the invention was for a hollow or compressible packing, combined with a hollow or compressible coupling. But the invention described and claimed is broader in scope, in that it was intended to cover a solid or incompressible coupling as well as a hollow or compressible one. It would be doing violence to an intelligent construction of language to hold that "coupling," in the claim, should be construed as if the word "compressible" were inserted before it. Assume for a moment that Perry had been the first to invent a coupling in the form of a dowel-pin, could it be said that the use of a solid, incompressible pin was not an infringement of the patent? Undoubtedly the hollow, compressible coupling, as shown in the drawings and described in the specification, was the preferred form of the Perry structure, but the patent by express language covers other forms as well. The specification, in our opinion, uses the word "hollow" as synonymous with "compressible," and "solid" as synonymous with "incompressible"; and, when it speaks of a "solid coupling," it is used in contradistinction to a coupling "made hollow to enable it to be compressed." We cannot accept the contention of the complainants that the coupling described in the patent must be compressible, whether it is made solid or hollow. In our opinion, the Perry patent is for a packing made by uniting the ends of a piece of well-known tubing by means of a dowel-pin, and as such it must be held void for want of invention. The decree of the circuit court is affirmed, with costs for the appellee.

NEW YORK ASBESTOS MFG. CO. v. AMBLER ASBESTOS AIR-CELL
COVERING CO.

(Circuit Court, E. D. Pennsylvania. July 18, 1900.)

1. PATENTS—CONSTRUCTION OF CLAIMS.

Definitions and admissions made by an applicant for a patent in the course of the proceedings in the patent office, in order to avoid the state of the art as adduced by the office, by differentiating his invention from those disclosed by the references, are always binding upon him in the subsequent construction of his patent.

2. SAME—INFRINGEMENT—FIREPROOF MATERIAL.

The Lantzke patent, No. 624,828, for improvements in fireproofing material, is limited by the prior art to material produced in the precise manner described, which, as shown by the claims of the patent and by the statements made by the patentee during the progress of the application in the patent office, has for its characteristic feature the use of a middle layer or core of permeable fabric, saturated with an incombustible hardening solution, to either side of which sheets of asbestos are fastened by being pressed on before the solution hardens. As so construed, *held* not infringed by material formed by pressing together two sheets of asbestos, one of which is coated with the solution, which was well known and used in the art prior to the patent.

In Equity. Suit for infringement of a patent. On final hearing.

Schreiter & Mathews, for complainant.

H. La Barre Jayne and Fraley & Paul, for respondents.

GRAY, Circuit Judge. This is a patent case, brought for an alleged infringement of letters patent No. 624,828, dated May 9, 1899, and granted to Albert Lantzke, of New York, for improvements in fireproofing material. The parties to this litigation are both engaged in the manufacture of what is known in the trade as "air-cell covering." This is insulating, or non heat conducting, covering to be applied to steam pipes, or other hot surfaces, to prevent the loss of heat by radiation from the pipe. Air-cell covering is only one of a great variety of these largely used non heat conducting coverings. The principle of its construction consists in forming a series of layers of flat and corrugated asbestos paper, alternating with each other, into a hollow cylinder, which is applied around the pipe. The corrugated layers form air cells, or spaces filled with confined air, which is the best nonconductor. There is an incidental advantage also derived from making the covering of asbestos paper, because the material itself is not only non heat conducting, but practically fireproof. The patent in suit does not claim air-cell covering as such, but purports to be for a particular sort of composite or compound asbestos sheet, made out of three layers, which is capable of being used in an air-cell covering, or in any other structure where asbestos paper is used. The patent explains two applications or uses for this composite asbestos sheet, namely, as a jacket or outer covering for a pipe covering, the body of which, however, is not shown as made according to the Shearer construction, but according to a prior invention and patent of Lantzke. The second application is to corrugate these compound sheets, and pile them in layers, with the cor-

rugations "crosswise interposed," so as to make a flat asbestos sheet. The defenses are the usual ones, formulated in defendants' brief into four propositions, as follows:

"(1) Defendants' manufacture does not infringe the claims of the patent in suit construed in the light of the specification. (2) A fortiori, defendants' manufacture does not infringe the claims of the patent in suit construed in the light of the definitions, limitations, and admissions which were forced upon and accepted by the applicant in his effort to obtain the patent in suit. (3) Again, a fortiori, defendants' manufacture does not infringe the claims of the patent in suit construed in the light of the prior art; for defendants' manufacture includes nothing but what was old in the art. (4) The patent in suit was improvidently granted for that which was old in the art, and must be held to be void."

The claims of the patent in suit are seven in number, the first five of which refer to the making of the composite fireproofing sheet, and are only different modes of stating the composition described in claim 2, which alone it is necessary, for our present purpose, to quote:

"(2) A fireproofing sheet composed of one layer of fibrous fabric, saturated with an incombustible hardening solution, and of two layers of asbestos material cemented, one on each side, to the layer of fibrous fabric, and firmly compressed together with the inner layer."

Claims 6 and 7 refer to a fireproofing material made out of the sheets composed as described in the preceding claims, by corrugating them, and placing two or more sheets together crosswise, so as to make a corrugated composite sheet, used in one form for pipe covering, and in another as building block for fireproofing partitions and other plane surfaces. The fireproofing qualities of asbestos have long been known, and its use in this respect has been various,—sometimes in the form of loose asbestos fiber or flock, spread over and fastened to the surfaces to be protected, and later in the form of an asbestos paper, of varying thickness, to be applied in the same way. In the record there are set forth numerous instances of this use, and 10 or 12 patents, running through 20 years, are in evidence, in which asbestos paper is used for fireproofing purposes by being cemented to other materials, or to asbestos fiber, or to sheets or layers of asbestos. The corrugation of these sheets so as to make air cells or spaces for the purpose of increasing the nonconductivity of the fabric or sheathing was an old device at the date of the patent in suit. The use of silicate of soda as an adhesive cement for asbestos paper and material was also well known in the art at the date of the patent in suit, as was also the fact that the use of this adhesive served, when dry, to stiffen and thereby strengthen the material to which it was applied. The corrugations referred to were made by passing the material, when moist, through rolls like fluting irons. This was, of course, a well-known device long before the date of the patent in suit. The method of making the composite fireproofing sheet, as described in the patent, is, in effect, to saturate a single sheet of asbestos paper, of the required weight and thickness, or of some other incombustible fabric, with a solution of silicate of soda, and, when so saturated, to place on either side of the saturated sheet an outer sheet of asbestos, and then run the three sheets thus placed through the corrugating rollers. The pressure of the

rollers serves to closely unite the three sheets, and the viscous mucilaginous solution cements the outer layers of asbestos to the inner sheet. This incombustible solution, hardening when dry, also serves to stiffen and make rigid the composite sheet, so that it readily holds the shape into which it has been pressed. This composite corrugated sheet can be rolled, when in its plastic condition, into a cylindrical form, for steam pipe covering, and can be made of any required thickness, by superimposing one sheet upon the other. The same composite corrugated sheets, placed crosswise, may be built into blocks of any required thickness, and, with a flat layer of the composite asbestos sheet applied to the surface of the block, may be used for fireproof partitions, or protecting other plane surfaces from the effect of exposure to great heat. This composite material is the subject of the sixth and seventh claims of the patent.

It is claimed by complainant that this composite block or fire board so produced, as well as the composite sheets of which it is composed, is a new material in the fireproofing structural art. The claims 6 and 7, however, which wholly concern it, tie it to the previously described and claimed composite sheets of the first five claims; that is to say, the block or fire board of the sixth and seventh claims is required to be made of superimposed layers of the composite material described in the preceding claims. A careful reading of the specifications and claims of the patent clearly discloses the following essential elements: (1) A central core, sheet, or layer, variously described in the claims as "a rigid core of permeable fabric"; "one layer of fibrous fabric"; "a sheet of permeable material"; "an inner layer of incombustible fabric"; and "an inner layer of permeable fabric,"—which constitutes the foundation of the composite fireproof sheet claimed to be new in the art. (2) The saturation of this central sheet or core with an incombustible solution, which also has the adhesive quality necessary to cement the outer sheets of asbestos thereto. This solution is preferably "silicate of soda." (3) The cementing, by means of the saturating solution on the surface of the inner core, of sheets of asbestos paper or fabric thereto. In short, three things are necessary and essential to the patent in suit: (1) A central and integral permeable sheet or core of incombustible material; (2) a saturating solution applicable thereto; (3) outer sheets or layers of asbestos fabric (preferably), or other incombustible material, cemented to either side of the central core. The pressing of the outer sheets on the central core by the corrugating rolls, and the hardening of the saturating solution in the central core, make a composite fireproof material sufficiently rigid and hard to maintain any shape impressed upon it. The separateness of this central "core," "layer," or "sheet," and the requirement that it should be saturated through and through with the hardening and cementing solution before the outer sheets of asbestos are applied to either side, are the plainly characteristic and differentiating features of the patent in suit. The material or fabric produced by the defendants, and which is claimed to infringe, by its structure, upon the rights secured by this patent, lacks these essential features of complainant's fabric. The fireproofing sheet manufactured by defendants, according to the proofs in the case,

consists of two sheets of asbestos paper, cemented together by a solution of silicate of soda. The method of defendants is to pass one of the sheets of asbestos paper over a roller, to the surface of which silicate of soda has been applied, and, in order that the film of the solution adhering to the asbestos paper may not be in excess of what is required for adhesive purposes, the sheet, after leaving the roll, passes under a scraper, or a knife blade, which removes such excess. To the sheet thus treated another sheet of asbestos paper is applied, and the two are pressed together by being passed through a corrugating roll. All the elements of this product are old in the art, and are not claimed under the patent in suit, to wit, the process of corrugation, the asbestos sheets, the use of the silicate of soda for the purposes referred to, and the uniting of one sheet to the other by the adhesive properties of the solution. There is here no saturation of a central core or sheet, no strengthening filling substance between two sheets of asbestos, or of other fireproof material, and therefore no appropriation of the peculiar and essential features of complainant's product. Complainant claims, however, and its expert witness, with much ingenuity of argument, supports the claim, that defendants' composite sheet, made as just described, does contain a central core or layer, saturated with the hardening solution of silicate of soda. The argument is this: That when the two sheets of asbestos paper are cemented together in the manner described the adhesive solution on the surface of one sheet permeates or saturates both sheets to an appreciable extent; that the fibers on the surface of each sheet, by capillary attraction, absorb sufficient of this solution to constitute, when pressed together and hardened, a central core or layer of incombustible material. It is not claimed that either sheet is saturated, much less that there is any central independent sheet so saturated; but the contention is that the silicate of soda is so taken up by the fibrous surface of each sheet, when the two are pressed together, that they harden into a distinct incombustible central layer. Upon this argument the whole contention of complainant as to defendants' infringement is founded. The fallacy of the argument, however, is apparent. The operation of the adhesive solution upon the fibrous surface of the two sheets, when pressed together, to produce in the middle of defendants' structure an incombustible and measurably rigid film, is the thing complained of. But it is perfectly evident that this inner layer is not and cannot be said to be cemented or united to the outer layers by the silicate. The condition produced is manifestly different, both in the method of production and structure, from complainant's independent thoroughly saturated core or layer of asbestos or other incombustible material. Uniting an asbestos sheet to another surface by silicate of soda is admittedly old in the art; so, also, the uniting of two or more sheets together by the same adhesive solution. That defendants effectuate in some degree the result aimed at by the patent in suit, to wit, the production of a fireproof material sufficiently rigid to maintain the shape impressed upon it, does not necessarily invade complainant's monopoly, the elements of asbestos paper and silicate of soda so used in both complainant's and defendants' product

being old in the art. The state of the art requires that complainant should be held to the precise structure described in the patent. It is only a fair, and not a severe, application of this principle that distinguishes, in the sense of the patent law, the separable and independent layer, sheet, or central core from the condition produced by the partial saturation of the surfaces of the two sheets, when pressed together, by the adhesive film of silicate of soda.

We have so far discussed the question of the alleged identity of the two structures without reference to the disclosure of the file wrapper of the patent in suit. The application for the patent by the assignor of the complainants was the subject of a protracted litigation in the patent office. It appears that the application for the patent was refused by the principal examiner, before whom the original case came for action. The rejection was grounded by the examiner, among other things, upon references to prior patents, notably to the Johns patent, No. 230,945, and to the Merrill patent, No. 367,424; also upon patents to Halpine, No. 200,192, to Johns, No. 433,470, and to Line, No. 333,138; and also, in relation to claims 6 and 7, to the British patent to Lake, No. 18,646. At the close of his opinion, the examiner uses this language:

"In view of the disclosure of the references, the examiner is unable to see that the claims set forth any patentable invention. The materials, arrangement, and treatment are all old and well known, and nothing has been added to the knowledge of the public, nor any substantial advance made in the art."

From this decision an appeal was taken to the board of examiners in chief, and the case was submitted upon elaborate briefs of appellant's counsel. The board of examiners in chief, by a majority of two to one, affirmed the decision of the primary examiner. From this judgment of the board of examiners in chief an appeal was taken to the commissioner of patents, and the case elaborately argued before him by the appellant. The commissioner reversed the decision of the board of examiners in chief, and allowed the issuance of the patent. In according to the patent so issued the presumption to which it is entitled, from the action of the patent officials, we are bound to notice such statements and admissions as were made by the applicant in the course of the proceedings in order to obtain his patent as have any bearing upon the scope of the invention, and on the question of what are the essential features of the patent asked for and granted. Definitions and admissions made by an applicant in order to avoid the state of the art as adduced by the office are always binding on him. *Sargent v. Lock Co.*, 114 U. S. 63, 5 Sup. Ct. 1021, 29 L. Ed. 67. The doctrine of this case, in the respect just quoted, is affirmed in many decisions of the supreme and circuit courts of the United States, and is in accord with sound reason, and the philosophy of the rules in regard to dis-serving statements made by a party to a suit. The applicant, in his statements in the appeals to the board of examiners in chief and to the commissioner of patents, felt himself compelled, in order to avoid the objections urged to the granting of his patent, and the effect of the references of the principal examiner, to emphasize the necessity of an independent inner sheet, saturated with the incombustible solution, and of outer sheets

united to the inner by the saturating medium. Accordingly, the applicant, in his argument before the examiners in chief, as to this distinction, used this language (page 73, record, defendants' exhibits):

"If the stated specific and distinguishing features of applicant's invention are disregarded, and only the cementing together of three layers of the same or of different material is considered, as the primary examiner has done, the references would apply, *but the product described in applicant's specification IS NOT THE RESULT OF MERELY CEMENTING TOGETHER OF TWO OR THREE LAYERS of various materials or of a core or foundation sheet and a sheet or sheets of incombustible material applied and secured to one or both sides of the core or foundation sheet.* (The capitals and italics are those of appellant's brief.)

Again, in defining his invention, the applicant says, in his appeal to the board of examiners in chief, that it is—

"A composite sheet consisting of three elements: First, a permeable fibrous sheet, which may or may not be fireproof, must, however, be of sufficient consistency or tensile strength, and capable of being permeated by the second element; second, an incombustible hardening solution; and, third, two sheets of flexible asbestos material, which are united to the first element, forming the core, or, as applicant terms it, 'structural filling,' of the product by means of the same second element, noncombustible and hardening solution, permeating the fibrous sheet."

This statement, literally or in substance, is repeatedly made throughout his argument. At page 73 of the record, defendants' exhibits, we find the following:

"The examiner, in thus stating the distinctive features of the product pointed out in the claims, disregards entirely the nature of the core or foundation sheet, which is distinctively pointed out in the claims, and is set forth in applicant's specification, as one of the main features of his invention."

We also find in the same written argument of the appellant (defendants' exhibit book, pages 17, 18), in distinguishing his invention from that claimed in other patents referred to, the following:

"In the cases of Thomas and of others the cementing material must not be permitted to permeate the fibrous material, whereas in applicant's case this is an essential feature of his invention. This patentee (Thomas) states repeatedly 'that he coats or covers [the layer of hair felt] with silicate of soda' to affix the asbestos sheet to its surface."

Also the same at page 24:

"In the United States patents to Thomas or Merrill it is essential that the solution uniting the layers does not permeate the inner sheet or layer, whereas in applicant's case it is essential that the inner sheet be permeated or filled with that solution to attain the purpose of the invention."

Also the same at page 32:

"Applicant begs to respond that he purposely uses in performing his invention 'fibrous and permeable' material for the core sheet, with the end in view to store a quantity of the hardening solution therein. This is one of the characteristic features of his product, distinguishing it from those cited in the references of record. It is apparent that it would not be possible to embody in the product such a quantity of the hardening solution as is required to render the composite sheet capable of retaining its shape under pressure if the core sheet be only coated with it."

Also appeal to the examiner in chief, at pages 77, 78 (discussion of the Merrill patent).

Also appeal to the commissioner at pages 112 and 113:

"The cloth or paper used by applicant for the filling or core of his composite fireproofing sheet is not 'coated,' but permeated or saturated with the liquid silicate of soda, as explained in the specification and pointed out in the claims. This feature was, as shown by the record, repeatedly urged by the appellant in the proceedings before the principal examiner as one of the distinguishing characteristics of appellant's composite sheet."

Also the same at page 114:

"As it appears from this statement, the understanding of the examiner in chief as to what these claims specify is erroneous in every important particular. The examiner in chief states that the silicate of soda is 'coated on the paper.' Appellant sets forth in his specification, and points out in every one of his claims, that the inner layer or core is saturated or permeated with the incombustible hardening solution."

After these definitions of his invention and admissions made by the applicant in arguing his appeal, the commissioner, in reversing the decision of the board of chief examiners, dwells upon the essential and differentiating character of this separable and saturated core or layer. Alluding to the references upon which the application had been formerly rejected, the commissioner says:

"None of them, however, shows incombustible sheets united by a permeable fabric saturated with an incombustible hardening solution."

If the specifications and claims did not of themselves make clear this essential character of an independent core or foundation layer of permeable fabric, saturated through and through by an incombustible hardening solution, the statements and admissions of the patentee, just quoted, would establish it beyond cavil. The alleged infringement is, as we have seen, a composite sheet, made by cementing together two, and only two, sheets of asbestos paper, with a viscous solution of silicate of soda. The entire absence from this composite sheet of any separable, independent, fully-saturated layer or core, to either side of which asbestos sheets are fastened, distinguishes the defendants' structure from that of the patent in suit, as defined and narrowed, not only by the claims and specifications, but also by the statements and admissions made in the progress of the case through the patent office.

The view thus taken of the question of infringement makes it unnecessary to discuss the other questions raised by defendants as to the novelty of the invention described in the patent in suit. Admitting the patentability of this invention within the lines herein considered, we are nevertheless of opinion that no infringement by defendants has been shown of any of the rights secured by said patent. The bill therefore must be dismissed, with costs.

THE SOLVEIG.

(Circuit Court of Appeals, Fourth Circuit. July 9, 1900.)

No. 350.

MARITIME LIENS—ADVANCES AND CHARGES PAID BY SUBCHARTERER.

No maritime lien exists on a vessel, in the absence of express contract therefor, for advances made to the crew without the knowledge of the master, or for port charges paid, in favor of a charterer for a voyage, whose charter was not with the owners, but with a time charterer, who was

bound by his charter to pay all such charges, and of which fact his subcharterer was charged with notice.

Appeal from the District Court of the United States for the Eastern District of Virginia.

Frederick M. Brown (Butler, Notman, Joline & Mynderse, on the brief), for appellant.

Robert M. Hughes, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. The Danish steamship Solveig was chartered for six months by her owners to Henry T. Knowlton, under a charter party which contained, among other conditions, the following:

"(1) That the owners shall provide and pay for all the provisions and wages and consular, shipping, and discharging fees of the captain, officers, engineers, firemen, and crew; shall pay for the insurance of the vessel; also, for all the cabin, deck, engine-room, and other necessary stores,—and maintain her in a thoroughly efficient state, in hull and machinery, for the service. (2) That the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, commissions, consular charges, and all other expenses whatsoever, except those before stated, and shall accept and pay for all the coal in the steamer's bunkers on delivery; and the owners shall, on expiration of this charter party, pay for all coal left in bunkers, each at the current market price at the respective ports when she is delivered to them."

The charter party was to be canceled if the steamer was not ready to receive cargo by January 20, 1897, and the charterers were to pay for the use and hire of the vessel at the rate of eight shillings per gross registered ton per calendar month; captain to be under orders and directions of the charterers, and to be removable upon complaint of the charterers, who had the right of subletting the steamship. On April 21, 1897, Miller, Bull & Knowlton, as agents of the time charterer, chartered this steamship to William Johnston & Co. for a voyage from Newport News to Hamburg, to be loaded with a cargo of grain; and while so chartered she was burned at her wharf in Newport News on April 27, 1897, the fire originating on the wharf. The vessel was so much injured as to be incapable of proceeding with her voyage, and was afterwards sold under proceedings instituted by the salvors; and the proceeds of the sale, less the amount decreed to the salvors, is in the registry of the court. This appeal is from a decree of the district court of the Eastern district of Virginia ordering the payment of certain items out of the remnants and surplus arising from the judicial sale of the steamship upon the petition of William Johnston & Co., the items allowed being as follows:

Reporting news of Solveig to persons interested in cargo.....	\$ 26 87
Loans to crew of Solveig.....	10 02
Cost of wharfage.....	87 72
Port dues.....	10 00

\$187 75

The master of the ship testified that he did not know William Johnston & Co., and that no advances were made by them, either be-

fore or after the fire, at his request or with his knowledge; and the question to be decided is whether William Johnston & Co. have a maritime lien upon the ship for such advances. If they had not such a lien upon the ship, it would be repugnant to every sound principle to allow the claim against the proceeds. *The Lottawanna*, 20 Wall. 224, 22 L. Ed. 259. Maritime liens are allowed upon the ship herself, to the amount of the debts contracted in keeping up her existence and usefulness. The necessities of commerce require her to visit places where her owners are not known or are inaccessible, and, the master not being usually of sufficient pecuniary ability to respond to the demands of the voyage, he is the fully authorized agent of the owners; and any debt created by him for the benefit of the ship, to enable her to complete the voyage upon which she is engaged, is secured by a lien upon the ship itself. "The vessel must get on," says the court in *The Aurora*, 1 Wheat. 96, 101, 4 L. Ed. 46, and "the necessities of commerce require that, when remote from the owners, he (the master) shall be able to subject his owners' property to that liability without which it is reasonable to suppose he would not be able to pursue his owners' interests." And liens thus created by implication or operation of law do not arise when from the circumstances of the case it is clear that no such necessity has existed, and that the supplies or advances were not made upon the credit of the ship or by the authority of the master. In this case there is no privity of contract between the owners of the *Solveig* and the petitioners. Their contract was with Miller, Bull & Knowlton, who represented themselves as "time-charter agents" of the steamship. By the voyage charter the petitioners were put upon notice of the existence of the time charter, and of all the rights of the owner of the vessel thereunder. An inspection of this time charter would have shown that the owner was not liable for any charges for wharfage or port dues; that the owner was to receive a certain sum per registered ton per month for the hire of the vessel and the port charges, "and all other charges whatsoever" were to be paid by the time charterers. As they had agreed to pay all such charges, they, of course, had no authority to bind the vessel for the same. Such diligence as good faith requires would have enabled these petitioners to ascertain that there was no authority anywhere from the owners to obtain any supplies upon the credit of the vessel. No necessity can be suggested and no reason urged in support of such a maritime lien. The testimony of the master shows that the cargo was taken on board under the supervision of Ellis, the supercargo appointed by Knowlton, the time charterer, and that he had nothing to do with it, except so far as the safety of the vessel and the character of the stowage were concerned. By the terms of the charter party the general owner was to receive so much per month for the hire of his ship, and it was nothing to him whether she carried this cargo or not. The charterer became the quasi owner, and the contract of the petitioners was solely with him. The owner of a chartered vessel is not liable for wharfage. 1 Pars. Shipp. & Adm. 300. In *The Aeronaut* (D. C.) 36 Fed. 497, Judge Brown says:

"But upon personal dealings with the general owners, or with the charterers, who are the owners pro hac vice, for supplies to be furnished within the same

port or state where the contract is made, the legal presumption is that the dealings are not with the ship or upon her credit, but upon the ordinary personal responsibility of the owners, with whom the dealings are had; and no lien is in such a case sustained, unless a credit of the ship is proved to be within the intention of both parties. There is no legal presumption that aids the libellant in making out a maritime lien. They must stand upon the facts as they existed, and, upon these facts, not only had the charterers, under the circumstances of this case, no authority to charge the ship for these supplies, but there is no evidence that they had the slightest intention of doing so. Nothing in the negotiations or in the ordering of the supplies points to the ship as an intended source of credit, within the common intention, and the charterers could not have contracted on that basis in this case without fraud on the general owners."

The captain of the ship, by the terms of the time charter, was under the orders of the charterers, who were to indemnify the owners from all consequences or liabilities arising from compliance with the same.

The *Kate*, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512, was a libel against the vessel for coal furnished. There was a time charter party similar in terms to that now under consideration, wherein the charterers were to furnish coals, etc.; and a lien was claimed in virtue of a statute of New York which gave a lien upon the vessel for such supplies "as may be fit and proper for the use of such vessel at the time when the same were furnished," upon debts contracted by the "master, owner, charterer, builder, or consignee." The cases on the subject are reviewed, and the court says:

"When, therefore, supplies are furnished to a vessel in a foreign port, upon the order of the master, nothing else appearing, the presumption is that they were furnished on the credit of the vessel and of the owners, and an implied lien is given. But no such necessity can be suggested, and no such reasons urged, in support of an implied lien for supplies furnished to a charterer, when the libellant at the time knew, or by such diligence as good faith required could have ascertained, that the party upon whose order they were furnished was without authority from the owner to obtain supplies on the credit of the vessel, but had undertaken, as between itself and the owner, to provide and pay for all supplies required by the vessel."

Again:

"If no lien exists under the maritime law when supplies are furnished to a vessel, upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the vessel for such supplies, much less is one recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer, who did not represent the owner in the business of the vessel, but who, as the claimant knew, or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them."

The *Valencia*, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, is to the same effect.

The record in this case shows that there was no express agreement for a lien, and there is nothing in the testimony that warrants the inference that either the master or the charterers agreed to pledge the credit of the vessel. The petitioners were dealing with the time charterers, who, by their agreement, were bound to pay all port charges and "all other charges whatsoever." They could not, without actual fraud, pledge the vessel for the payment of these debts, and

there is no ground to suspect that they did so. The master of the ship certainly did not, for his uncontradicted testimony shows that he had no relations whatsoever with petitioners. There being no actual lien by agreement, and no circumstances from which one can be implied, our opinion is that none exists.

Objection has been made to the right of the petitioners to sue, being the agents of a named principal. Our conclusion renders it unnecessary to consider or determine this point. The decree of the district court is reversed.

THE CARRIE L. TYLER.

(District Court, E. D. North Carolina. July 3, 1900.)

PILOTS—TENDER OF SERVICES—RIGHT TO COMPENSATION.

Code N. C. §§ 3502, 3505, which provide that if any master of a vessel, not having a pilot on board, coming over the bar and into the Cape Fear river, or up and down such river, shall refuse a pilot across the bar, such pilot shall be entitled to the same pilotage as if he had been actually employed, are not applicable to a barge without motive power, and in tow of a coastwise tug having on board a regular pilot.

In Admiralty. Libel to recover pilotage.

Thos. Evans, for libellant.

George Rountree, for respondent.

PURNELL, District Judge. The libellant, being a pilot on Cape Fear river, files his libel in rem against the barge for pilotage, under sections 3502 and 3505 of the Code of North Carolina, being a part of the act of the legislature of the state in 1784. The sections provide that when any master of a vessel, not having a pilot on board, coming over the bar and into the Cape Fear river, or up or down said river, shall refuse a pilot across the bar, then such pilot so refused shall be entitled to the same pilotage as if he had been actually employed. Libellant's proctor cites, and relies, also, on section 3522 of the Code; but this section has, by act of 1889 (chapter 285), been amended to apply to Hatteras Inlet only, and hence has no application. Libel claims several refusals on the part of the master of the barge. The Carrie Tyler is a barge owned and enrolled at Charleston, S. C., of (net measurement) 503 tons; and it is alleged that her usual cargo is from seven to eight hundred tons, dead weight. On six occasions the master refused pilotage when libellant made application before the vessel had crossed the bar, and libellant claims \$240, or \$40 for each occasion. The Carrie L. Tyler is a barge having two stump masts, and carrying just enough sail to steady her in a sea, but not sufficient for sailing, or to furnish motive power. She is engaged in transporting phosphate rock from Charleston, S. C., to Wilmington, N. C., and on each occasion when spoken by libellant was in tow of a regular coastwise tug, having a licensed pilot on board. The indebtedness was denied. There was no dispute of the facts.

Several interesting questions were discussed in the argument, which it is not necessary to pass upon in determining the question

at issue. Is the Carrie L. Tyler such a vessel as was contemplated in the statute? Or does the statute apply to a barge in tow of a coastwise tug having a regular pilot? If not, then the libel should be dismissed. The tug and the barge were, in contemplation of law, one ship, having a regular pilot, and during the tow the tug would have been liable for a collision. *The Civita and The Restless*, 103 U. S. 699, 26 L. Ed. 599; *The Minnie*, 40 C. C. A. 312, 100 Fed. 128; *The Plover* (D. C.) 100 Fed. 883. This being well-settled admiralty law, it was not contemplated in the statute to require barges without motive power, in tow of a tug having a pilot aboard, to employ a pilot. The libel is therefore dismissed at libelant's cost. It is so ordered.

THE CARRIE L. TYLER.

(District Court, E. D. North Carolina. July 3, 1900.)

PILOTS—OBLIGATION TO TAKE PILOT—BARGE IN TOW.

A barge without motive power, in tow of a tug having a regular pilot on board, is not within the provisions of Code N. C. §§ 3480, 3481, 3519, requiring vessels to employ a pilot in crossing the bar at the mouth of Cape Fear river, and passing up and down the river, and providing for a forfeiture where any one not being licensed acts as pilot in such case. In contemplation of law, the tug and tow are one vessel, and the pilot of the tug is the pilot of the voyage.

In Admiralty.

Thos. Evans, for libelant.

Geo. Rountree, for respondent.

PURNELL, District Judge. This is a libel in rem, under sections 3480, 3481, and 3519 of the Code of North Carolina. The facts are the same as in the cause in admiralty entitled "*Walker L. Newton v. The Barge Carrie L. Tyler*," argued and decided at this term (103 Fed. 326). This libel by the board was entered by virtue of sections 3480 and 3481, above cited; and the claim is for \$240, because it is alleged that the barge has on three occasions refused pilotage over the bar, and up and down the Cape Fear river. Hence libelant claims it is entitled to demand, and has demanded, the forfeiture provided for in the section cited. Respondent demurred to the libel. The demurrer is sustained. The libel does not state facts which, if true, are sufficient to constitute a cause in admiralty. The section cited (3519) provides for a forfeiture for any one who, not being licensed, acts as pilot; and there is no allegation to sustain the forfeiture. And, as before decided, the barge, being a vessel without motive power, which depended upon and was propelled in its voyages by steam tugs having regularly licensed pilots, was not of the class of vessels contemplated in the statute as being required to employ a pilot. The tug and tow being, in contemplation of law, one vessel, the pilot of the tug is the pilot of the voyage. Nor is there anything in the statute which gives to libelant a forfeiture under the facts as stated. The demurrer is sustained, and the libel dismissed, at the cost of libelant. It is so ordered.

In re LAKE LAND TRANSP. CO.

THE GEORGE W. ROBY.

(District Court, E. D. Michigan, S. D. July 16, 1900.)

1. COLLISION—DISTRIBUTION OF DAMAGES BETWEEN VESSEL AND CARGO—HARTER ACT.

The whole object of the Harter act is to modify the relations previously existing between the vessel and her cargo, and it does not affect the relative rights of vessel and cargo owners as claimants against a second vessel for damages arising from collision.

2. SAME—RIGHT TO PRIORITY.

Where both vessels were in fault for a collision in which one was sunk, with her cargo, the cargo owner has the superior lien upon the fund available for reparation, in the absence of contract affecting such right.

3. SAME—LOSS OF CARGO—SUBROGATION OF VESSEL OWNER TO INSURANCE.

Where, in a suit for limitation of liability arising out of a collision which resulted in the loss of the second vessel and her cargo, such vessel, although adjudged equally in fault, claimed and was awarded exemption from liability to her cargo owners under the provision of the Harter act, her owners have no right to be subrogated to the claims of the cargo owners against the insurer of the cargo, under the "benefit of insurance" clause of the bills of lading, because the court awards the entire fund for distribution to the cargo owners in preference to the vessel owners on account of the vessel's contributing fault, on the theory that such action necessarily imposed on the vessel the liability for the loss of cargo. In such case the payment of claims entitled to legal preference, as permitted by admiralty rule 55, cannot be said to take anything from the holders of inferior claims, who have no interest in the fund until preferred creditors have been satisfied.

4. SAME—TOTAL LOSS OF VESSEL—MEASURE OF DAMAGES.

Where a vessel is sunk and totally lost in a collision, and her full value is awarded her owners as damages, they are not entitled, in addition, to recover the amount she would have earned under an unexpired charter.

5. SAME—PRIORITY IN DISTRIBUTION OF DAMAGES—CLAIMS OF CREW FOR LOSS OF EFFECTS.

The negligence of a ship is so far imputable to her officers and crew that they are entitled to recover from another vessel but half the damages sustained in the loss of their effects as the result of a collision for which their own vessel was equally in fault, and their claims therefor are subordinate to those of the cargo owners.

6. SAME—CLAIM OF CHARTERER FOR LOSS OF FREIGHT.

The claim of a charterer having full control and management of a vessel, and supplying her master and crew, for loss of freight resulting from a collision, for which such vessel was adjudged equally in fault, against the fund arising from the sale or bonding of the other offending vessel in proceedings instituted by her owners for limitation of liability, stands on the same footing as that of the owners of the chartered vessel, and is subordinate to that of the owners of her cargo.

In Admiralty. On motion for decree and exceptions to commissioner's report.

John C. Shaw and William B. Cady, for Peter P. Miller and others, owners of the steamer Florida.

F. H. & G. L. Canfield, for British & Foreign Marine Ins. Co.

SWAN, District Judge. On the 20th day of May, 1897, a collision occurred on Lake Huron between the steamers George W. Roby and

Florida, whereby the latter, with her cargo, was sunk and became a total loss. The Florida at the time of her loss was running under a season charter to the Lackawanna Transportation Company, which engaged during said season to "man, use, and navigate the said vessel at its own expense, and for its sole use and benefit." A libel was filed by the owner of the Florida to recover damages for loss of the vessel and her cargo; also, for loss of seamen's effects, etc.; and a cross libel was filed by the owners of the George W. Roby, who subsequently filed their petition for limitation of liability. On the hearing both vessels were held in fault, and damages ordered to be divided, and a reference was made to the commissioner to ascertain and report the same. In the proceedings for limitation of the liability the Roby was appraised and bonded in the sum of \$59,300. The claims proved against her in those proceedings were as follows: (1) The claim of the British & Foreign Marine Insurance Company as underwriters upon the cargo of the Florida, amounting to the sum of \$65,293.33, including interest to the date of the commissioner's report, which was filed August 28, 1899. (2) The claim of Peter P. Miller et al. as trustees of that part of the cargo of the Florida not insured by the British & Foreign Marine Insurance Company, amounting to the sum of \$6,026.71, including interest as aforesaid. (3) The claim of Peter P. Miller et al. as trustees of the effects of the officers and the crew of the Florida, amounting to the sum of \$1,462.79, including interest as aforesaid. (4) The claim of Peter P. Miller et al. as owners of the propeller Florida, amounting to the sum of \$45,596.56, including interest to the date of the report as aforesaid; said sum being one-half of the value of said steamer with interest as aforesaid. (5) The claim of Peter P. Miller et al., owners of the Florida, for the loss of the unexpired term of the charter for the steamer for the season of 1897, viz. the sum of \$13,889.52.

The aggregate of the claims proved and allowed by said commissioner's report is the sum of \$118,379.39,—about twice the appraised value of the Roby. The main question presented by the commissioner's report and exceptions thereto, and the motion of the owners of the Florida and that of the insurance company for decrees in their favor, respectively, arises upon the division of the funds represented by the stipulation given for the appraised value of the Roby,—whether that fund shall be apportioned ratably between the injured parties, or whether the claim of the cargo owners shall be preferred to that of the owners of the Florida, or vice versa. It is contended on behalf of the Florida that the claim of her owners ranks that of the cargo owners, by reason of the operation of the Harter act, so-called, and must be paid in full before that paid for the cargo. Both vessels being held in fault for the collision, the cargo owners, being blameless, contend for priority of their claim. The exact question here presented has not been expressly decided in any reported case. In the case of *The Chattahoochee*, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801, which resembles the case at bar in some particulars, and is claimed to be decisive here, the facts were substantially as follows: The *Chattahoochee* collided with the schooner *Golden Rule*, which, with her cargo, was sunk and became a total loss. The dis-

strict court found both vessels in fault, and entered a decree against the steamer for \$17,215.17,—the full value of the sunken cargo and the effects of a passenger. The damages by reason of the loss of the schooner and the effects of her crew were \$18,410.90, for one-half of which, viz. \$9,205.45, the steamer was held liable; but her owners were allowed to recoup from that sum \$8,607.58, which was one-half of the value of the cargo. Holding that the schooner was entitled to the benefit of the Harter act, the supreme court said, in an opinion by Mr. Justice Brown:

"It was held by this court in the case of *The Atlas*, 93 U. S. 302, 23 L. Ed. 863, that an innocent owner of a cargo is not bound to pursue both colliding vessels, though both may be in fault, but is entitled to a decree against one alone for the entire damages. It was held by the courts below that, while the action of the owner of the cargo would lie against the steamer for her full amount of damage done, the owners of such steamer were entitled to recoup one-half of this amount against one-half of the amount awarded to the owners of the schooner for the loss of their vessel, upon the theory that under the limited liability act they were liable for one-half of this amount, not exceeding the value of the schooner. * * * We are of opinion that the court of appeals did not err in deducting one-half of the value of the cargo from one-half the value of the sunken schooner, and in limiting a recovery to the difference between those values."

This was the point of the decision. The recoupment was obviously allowed, not as a liability of the schooner to the cargo owners, but in satisfaction of the claim of the owners of the steamer against the schooner for one-half the total damages, "because when both vessels are in fault there arises a liability of one party to pay the other such sum as is necessary to equalize the burden." *The North Star*, 106 U. S. 22, 1 Sup. Ct. 41, 27 L. Ed. 91. No question of priority, as between the owners of the schooner and the owners of the cargo, was contested or passed upon by the court. *The Chattahoochee*, as one of the two wrongdoers, was liable to the cargo owners for all the damages suffered by the cargo, which, of course, was innocent of fault. Under the Harter act the schooner was exempt from liability for the loss or injury of her cargo, although her relations to the *Chattahoochee* were unaffected by that act. The remedy, therefore, of the cargo owner, whether the suit was brought in his own name, or by the owners of the vessel as trustee for him, was against the steamer solely; and his right to recover his entire damages was unquestionable, under *The Atlas*, 93 U. S. 302, 23 L. Ed. 863, *The Beaconsfield*, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993, and *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, Adv. S. U. S. 67, 44 L. Ed. —. In whatever name such suit was brought, the remedy against the wrongdoer proceeded against could not be affected, or the amount of recovery impaired, by any defense arising out of the contract of carriage with the schooner. It is equally clear that in a suit for collision the rule of mutual liability when both vessels are in fault cannot be defeated by the contract of affreightment of their respective cargoes. Neither may be liable to her own cargo, yet each is answerable for one-half the damages resulting from the collision, notwithstanding. *The Albert Dumois* (Oct. term, 1899) 20 Sup. Ct. 295, Adv. S. U. S. 295, 44 L. Ed. —.

In the case at bar the mutual liability is conceded, but, as the appraised value of the *Roby* is not enough to meet even the claim of the cargo owners alone, the question is squarely presented, which constitutes a preferred lien upon the stipulation given for the appraised value of the *Roby*,—the claim for loss of cargo, or that for the loss of the *Florida*? Further questions arise upon the subrogation clause in the bill of lading: The status of the claim for the freight pending upon the cargo of the *Florida* at the time of her loss; that of the claim of the owners of the *Florida* for the loss of the unexpired term of the charter for the season; and the rank which should be accorded the claim for the loss of the seamen's effects. In *Norwich Co. v. Wright*, 13 Wall. 122, 20 L. Ed. 585, in proceedings had for limitation of liability by the owners of the steamer *City of Norwich*, which had been held solely at fault for a collision with a vessel, and decreed to respond therefor and for the cargo, and was also sued for damages and loss to her cargo, which was also greatly injured, it being alleged that the total damage claimed against the steamer would exceed her value, the court said:

"But the claim of the libelants alone is not alleged to be greater than the value of the steamer and her freight. The libelants, therefore, would be entitled to receive the whole amount of this damage, if they were the only persons who sustained damage, or if, by reason of the nature of their claim, their lien was superior to that of the owners of the cargo lost on the steamer. Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc., but they stand on an equality with regard to each other if they arise from the same cause. We think, therefore, that the lien of the libelants for the loss of the schooner and her cargo arising from the collision is on an equality with the lien for the loss of the cargo of the steamer from the same cause. *MacL. Shipp.* 598."

It is to be noted that this refers to a case where the steamer alone was in fault. If this rule should govern all cases, without regard to circumstances, the main question would be easy of solution, and the decree should be that the contestants for this fund should share it *pro rata*. It is recognized equity, however, that the claim of an injured party wholly innocent of fault or dereliction resulting in a loss should be more favorably regarded than that of a creditor against the same fund whose negligence aided to cause the loss. Such a case would present an exception to the general rule of *pro rata* division among sufferers by a common disaster, and that rule should be limited to cases where all the parties seeking reparation are equally innocent of fault, unless statutory or judicial authority has otherwise determined. The argument for the *Florida* that the postponement of her owners' claim against the *Roby* to that of her cargo owners is in contravention of the Harter act is untenable. The decisions upon that act clearly confine its operation to the relations between a carrying vessel and her cargo. It evinces no purpose to classify claims against a wrongdoer, or to depart from the well-settled equitable principles of distribution between competitors for the same fund which had always been followed in courts of admiralty. In *The Delaware*, 161 U. S. 471, 16 Sup. Ct. 516, 40 L. Ed. 771, Mr. Justice Brown, construing the act, says:

"It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her cargo. This is

apparent, not only from the title of the act, but from its general tenor and provisions, which were evidently designed to fix the relations between the cargo and the vessel, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair, and outfit of the vessel, and the care and delivery of the cargo." Page 474, 161 U. S., page 522, 18 Sup. Ct., and page 776, 40 L. Ed.

In *The Chattahoochee*, supra, Mr. Justice Brown says:

"It would seem to follow [from *The North Star*, 106 U. S. 17, 1 Sup. Ct. 41, 27 L. Ed. 91] that the sunken vessel is not entitled to the benefit of any statute tending to lessen its liability to the other vessel, or to an increase of the burden of such vessel until the amount of such liability has been fixed upon the principle of an equal division of damages. This is, in effect, extending the doctrine of *The Delaware* case, wherein the question of liability for the loss of the cargo was not in issue, to one where the vessel suffering the greater injury is also the carrier of a cargo. In other words, if the Harter act was not intended to increase the liability of one vessel towards the other in a collision case, the relations of the two colliding vessels to each other remain unaffected by this act, notwithstanding one or both of such vessels be laden with a cargo."

In *The Irrawaddy*, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130, the court rejected the claim of the owners of the steamer *Irrawaddy* for general average contribution from the cargo to the expenses necessitated by the negligent stranding of the vessel, holding that the provisions of the Harter act did not sanction its allowance; and after reviewing the law as it stood before that act, by which the vessel was liable for all the damages and expenses caused by negligence, the opinion sums up the construction of the act as follows:

"Upon the whole, we think that, in determining the effect of this statute in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing, and to limit the relief from their operation, afforded by the statute, to that called for by the language itself of the statute."

There is nothing, therefore, in the Harter act to sustain the claim of the Florida owners for priority over that of the cargo owners. The claim is equally opposed to the spirit and usage of the admiralty and maritime law of the United States. That law assumes that the cargo owner is free from fault in collision cases, and allows him to recover the entire damages,—a moiety from each of the offending vessels, if each is able to respond for its quota thereof, with a right to resort to the other vessel for any deficiency arising from the inability of the other to pay her due share. " * * * It would seem to be just that the owner of the cargo, who is supposed to be free from fault, should recover the damage done thereto from those who caused it; and, if he cannot recover from either of them such party's due share, he ought to be able to recover it from the other. * * * He [the cargo owner] ought not to suffer loss by the desire of the court to do justice between the wrongdoers. In short, the moiety rule has been adopted for a better distribution of justice between mutual wrongdoers, and it is not to be extended so as to inflict positive loss on innocent parties." *The Alabama* and *The Gamecock*, 92 U. S. 696, 697, 23 L. Ed. 763. In the application of the moiety rule to cases of mutual fault, it is said in *The Atlas*, 93 U. S. 318-320, 23 L. Ed. 863:

"* * * The court never intended to adopt a theory which would fail to give innocent parties full compensation suffered by the collision, * * * and never meant to extend the moiety rule so as to do injustice to an innocent tow or the owner of the cargo. * * * Innocence entitles the owner to full compensation from the wrongdoer, and it is a good defense against all claims from those who have lost."

In the case at bar, because of the insufficiency of the fund, and doubtless in very many cases for a like reason, preferring the claim of the vessel owner to that of the cargo would deprive the latter of all compensation. The carrying vessel being absolved by the statute from liability to her cargo, if the latter's claim against the Roby is postponed to that of the Florida the cargo owner is left remediless, notwithstanding his carrier's agency in causing the loss. This result is plainly inequitable and contrary to the spirit and usage of the maritime law, and, as has been pointed out, the Harter act contains nothing to sanction a discrimination so unjust. The statutory exemption to the carrier is purely negative. It shields him against the cargo's claim, but does not advance his rank as a claimant for reparation against his co-wrongdoer, or even give him equality with the cargo owner. This is the rationale of the decision of *The Irrawaddy*, supra. The equity of contribution in general average for expenses incurred for the common benefit of vessel and cargo, occasioned by a peril for which the carrier is not answerable, is stronger than that of a joint wrongdoer to absorb, or even share pro rata with an innocent party in, the only fund to which recourse can be had for compensation. It results that the cargo owner, where both vessels are at fault, is the superior lienor against the fund available for reparation, unless by the contract of carriage and the supervening disaster, or by contract with insurers, another has been substituted to his right.

Are the owners of the Florida entitled to be subrogated to the claims of the cargo owners against their insurers by the provisions of the bills of lading? Shipments Nos. 2, 4, 6, 8, and 9, allowed to the intervener the British Marine Insurance Company by the commissioner's report at \$11,665.69 and interest, were made under bills of lading containing the following agreement:

"Any carrier by water, liable on account of loss or of damage to any of said property, shall have full benefit of any insurance that may have been effected upon, or on account of, said property."

Shipment No. 3, allowed intervener at \$137.25, was covered by a bill of lading containing the following clause:

"In case of loss or damage of any of the property named in this bill of lading for which this company may be liable, it is agreed and understood that this company may have the benefit of any insurance effected by or on account of the owner of said property."

The total of the above shipments is \$11,802.84. The right is asserted on behalf of the Florida to have this sum, at least, deducted from intervener's claim of \$57,697.50, under the clauses above given from the bills of lading. This claim is made on two grounds: (1) That, to the extent that the claim of the owners of the Florida against the Roby is diminished by preferring the claim of the shippers, the Florida is pro tanto necessarily held responsible for damage or loss

resulting from faults or errors in navigation or in the management of the said vessel, and is "held liable for losses arising from the dangers of the sea or other navigable waters"; (2) under the "benefit of insurance" clause in the bills of lading. The second of these propositions is asserted as a corollary from the first.

1. The first of these propositions is fallacious. The argument erroneously assumes that the fund secured by the Roby's stipulation for value was constituted primarily for the satisfaction of damages suffered by the libelants, and the interests other than the cargo which they represent, and that any payment made therefrom for cargo damage is in effect taken from libelants. By general admiralty rule 55, relating to proceedings for limitation of liability, "the moneys paid or secured to be paid into court * * * or the proceeds of said ship or vessel and freight (after payment of costs and expenses) shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims duly proved and confirmed as aforesaid: saving, however, to all parties any priority to which they may be legally entitled." The stipulation given for the Roby is impressed with the same rights, and is to be distributed in the same manner among claimants against that steamer as the proceeds of her sale in the registry of the court would be in an ordinary suit in admiralty under an order of confirmation, viz. according to the rank of the claims decreed to be paid. In such proceedings payment of the claims of preferred creditors cannot be said to defeat or diminish those of inferior rank, although the preferred claims may exhaust the fund. The holder of an inferior lien has no interest in the fund until prior liens thereon have been satisfied. When that is done, his interest begins. Until then, payments of preferred claims do not affect his security. The payment for cargo damage exacted from the surviving wrongdoer is based on the tort of that wrongdoer solely. The fact that the cargo owner's priority exhausts the fund, and prevents redress therefrom to other sufferers by the collision, is the misfortune of the inferior creditors, but is in no sense payment by them, or either of them, of the cargo loss.

2. The validity of stipulations in the bill of lading giving the carrier, when liable for the loss of the goods, the benefit of any insurance upon them, is well settled. *Liverpool & G. W. S. S. Co. v. Phoenix Ins. Co.*, 129 U. S. 464, 9 Sup. Ct. 469, 32 L. Ed. 788. But says Mr. Justice Gray in that case:

"It behooves a carrier setting up such a defense to show clearly that the insurance on the goods is one which by the terms of his contract he is entitled to the benefit of. *Inman v. Railway Co.*, 129 U. S. 128, 9 Sup. Ct. 249, 32 L. Ed. 612."

As the Florida is not held liable on account of loss or damage to any of the property covered by the bill of lading, the "benefit of insurance clause" does not subrogate her owners to the right of the cargo owners against their insurers. This proceeding is not prosecuted against the Florida or her owners, but against the owners of the Roby, in the limited liability proceedings instituted by the latter, to recover damages done to the cargo of the Florida. It is also evident that the owners of the Florida cannot claim an exemption

from liability to the cargo under the Harter act, and at the same time claim to have the benefit of the insurance upon the cargo. The carrier cannot claim the benefit of the insurance upon the cargo unless he has paid or incurred a legal liability for its loss, or the damage thereto. *Inman v. Railway Co.*, supra.

3. It is also insisted by the owners of the Florida that the commissioner erred in rejecting their claim for compensation for the loss of the unexpired term of the charter under which the Florida was running when lost, viz. the sum of \$13,889.52. The commissioner held that "this claim should not be considered or allowed in this suit as part of the damages recoverable by said owners, inasmuch as said propeller was totally lost by reason of said collision, and her full value, with interest thereon, has been awarded to said owners." In this ruling the commissioner followed the view he had expressed upon a like claim made in the case of *The North Star* (D. C.) 44 Fed. 492-494, which was approved by Judge Brown. The reasons given by the commissioner are those expressed by Judge Thomas in the case of *The Hamilton* (D. C.) 95 Fed. 844. The decree in *The North Star* was affirmed in 10 C. C. A. 262, 62 Fed. 71; this question being, however, passed sub silentio. In *The Umbria*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053, Mr. Justice Brown, who delivered the opinion of the court, thus reiterates and expands what he had said in *The North Star* (D. C.) 44 Fed. 496:

"In cases of a partial loss there is no injustice in allowing the probable profits of a charter for the short time during which the vessel is laid up for repairs, but in case of a total loss the recovery of such profits is limited to the voyage which the vessel is then performing, since, if the owners were entitled to recover the profits of a future voyage or charter, there would seem to be no limit to such right, so far as respects the time of its continuance; and, if the vessel was under a charter which had months and years to run, the allowance of the probable profits of such charter might work a great practical injustice to the owners of the vessel causing the injury."

It may be added that in cases of partial loss, requiring detention for repairs, the owner is deprived of the probable earnings of his vessel during such detention, while in case of a total loss, in general, the deprivation of the earning capacity of the vessel is compensated by the award of her market value, which will enable her owner to purchase a vessel equally profitable. A possible or even an actual decline in freight rates or in the charter value of a like vessel is rather a vicissitude of the business of marine transportation, than a calculable element of probable damages. An advance in such rates or in the charter value of the vessel would redound to the advantage of the ship owner, whose decree has given him the means of obtaining a vessel of equal value and capacity unfettered by a charter, and free to contract for the higher rates. Either contingency should not affect the compensation to be made for a lost vessel, because it is speculative and uncertain. Again, if the owner is allowed the market value of his vessel and the probable profits of his charter, he may purchase another equally profitable vessel, and thus double his gain for the unexpired term of his charter. The great weight of American authority is against the rule of damages adopted in the case of *The Freddie L. Porter* (C. C.) 8 Fed. 170,

where damages were allowed for the unexpired term of the charter. The exception to the commissioner's report based on the disallowance of this item of damages is overruled.

4. The claims of the officers and the crew of the Florida for lost effects are also subordinate to those of the cargo owners. The negligence of the Florida is so far imputed to her officers and crew that they can recover but half their damages against the other wrongdoer. Each member of a crew takes the risk of the others' negligence, as all are fellow servants. *The Queen* (D. C.) 40 Fed. 694; *Killien v. Hyde* (D. C.) 63 Fed. 172-176; *The Niagara* (D. C.) 77 Fed. 336; *Hedley v. Steamship Co.* [1892] Q. B. Div. 58, [1894] App. Cas. 222. If the Florida had been blameless, her owners, officers, and crew would have ranked with the owners of her cargo in the distribution of the proceeds of the Roby; but, they being tainted with the fault of their vessel, their claim must yield priority to that of the innocent cargo owners.

5. Libelants make claim for loss of freight on the Florida's cargo pending at the time of the collision, viz. the sum of \$1,283.05. The Florida was running under charter to the Lackawanna Transportation Company. The libel enumerates as one of the elements of libelants' damages arising out of the collision the loss of this freight. No objection was made before the commissioner as to libelants' right to recover this sum as trustees for the charterer, nor was any exception filed to the allowance of one-half the sum as part of libelants' damage. It is objected here that libelants bear no such relation to the charter as entitled them to sue for this sum, even as trustees, and that suit therefor should have been brought in the name of the charterer. The litigation has apparently proceeded on the theory that the libelants were entitled to prove this item in the capacity of trustees, and its exclusion at this time would deprive the charterer of redress if the appraised value of the Roby were sufficient to pay it after satisfaction of prior claims. The question, however, is not important, as the claim of the charterer is inferior to that of the cargo owner, which will absorb the fund. The charterer had possession and control of the vessel, and was owner *pro hac vice*; and its servant, the master of the Florida, was guilty of fault for which that steamer was condemned. *Thorp v. Hammond*, 12 Wall. 408-416, 20 L. Ed. 419. The charterer's claim is therefore of the same class as that of the general owners.

The exceptions of the owners of the Florida to the report of the commissioner are overruled, and a decree will be entered, in accordance with the opinion, awarding priority to the owners of the Florida's cargo in the fund represented by the stipulation given for the Roby, and directing that their claims be first paid therefrom.

PINE et al. v. MAYOR, ETC., OF CITY OF NEW YORK.

(Circuit Court, S. D. New York. June 27, 1900.)

1. CIRCUIT COURT—JURISDICTION—AMOUNT IN CONTROVERSY—ALLEGATION—DENIAL—ABSENCE OF EVIDENCE—EFFECT.

In the absence of a plea to the jurisdiction of the circuit court, an allegation in the bill that the amount of damage exceeds \$2,000, though denied by answer, is sufficient, in the absence of proof, to give the court jurisdiction, and hence a finding of the amount of damage is unnecessary to sustain the jurisdiction.

2. EMINENT DOMAIN—STATUTE—EXTRATERRITORIAL FORCE.

A statute of one state to confer the power of condemning lands situated in another state for public purposes would be ineffective.

3. RIPARIAN OWNER—ORDINARY FLOW OF WATER—NATURE OF RIGHT.

The right of a riparian proprietor on a nonnavigable stream to the use of its ordinary flow of water, undiminished by an unreasonable use by a proprietor above him, is not an easement or appurtenance, but is inseparably annexed to the soil, and is parcel of the land itself.

4. SAME—DIVERSION OF WATER—PUBLIC USE—ABSENCE OF COMPENSATION—CONTINUING WRONG.

The seizure and permanent diversion of the waters of a stream by a municipal corporation without compensation to the lower owner is a continuing wrong, which is not excused by the fact that the appropriation is for the public benefit.

5. SAME—INJUNCTION—PROPRIETY OF REMEDY.

Injunction to prevent a permanent and unauthorized seizure and diversion of the waters of a stream is the appropriate and effective remedy; the legal remedy of action for damages being inadequate, in providing for the recovery of only such damage as has already accrued, and hence necessitating a multiplicity of suits.

6. SAME—ABSENCE OF SERIOUS DAMAGE.

The right of a riparian owner to an injunction to restrain the unauthorized diversion of the waters of a stream exists independently of the fact that his damage from the diversion is not of large amount or serious character.

7. SAME—COMPENSATION TO OWNER—ALTERNATIVE DECREE.

Though, where the defendant has committed a permanent injury to property, without pretense of a right to take and retain it, a court of equity, in enjoining the trespass, will not render a decree in the alternative providing that unless compensation be made to the injured owner the injunction will issue, yet the issuance of the order may be properly delayed to allow the parties to agree between themselves as to compensation.

Charles C. Marshall, for complainants.

H. T. Dyckman, for defendant.

SHIPMAN, Circuit Judge. The main facts of this case, as presented in the bill in equity, are not controverted in the answer. The complainants, Pine and Muller, are citizens and residents of the state of Connecticut, and each of them owns in fee a separate tract of land in that state, through which, or upon and along which, the Byram river flows. This river, which is, at the lands of the complainants, a nonnavigable stream, is made up of two branches. The east branch is wholly in the state of Connecticut. The west and by far the most important branch rises in Westchester county, N. Y., flows southeasterly for about five miles in that state into Connecticut, and thereafter unites with the east branch at the farm of Muller, about four miles from the New York boundary line. About a mile

below his farm the united stream forms the eastern boundary of Pine's farm for about 3,725 feet, and thereafter empties into Long Island Sound. Upon his land there is a deposit of feldspar, which he manufactures, and he uses the water of the river for the needs of his farm house and steam mill. Muller's farm has a frontage on both sides of the river of 920 feet, and extends on the west side of the river 450 additional feet, making an entire frontage of 2,290 feet. He uses the water of the river for general farm use. The bill in equity alleged that the damage to each complainant by the act of the defendant would be above \$2,400. Shortly before the bill was brought, the defendant began to build a dam across the west branch of Byram river at a point in the state of New York about 700 feet from the Connecticut state line, in order to divert the water of that branch into the Kensico reservoir, which is a part of the defendant's extensive system of water supply for the residents of the city of New York; and the dam has been completed at an expense, without any of its appurtenances, of about \$45,000. By private arrangements the defendant settled with the Connecticut mill proprietors on the stream for the injury caused by this dam to their flowage rights, but has never compensated the complainants or other riparian owners for the injury to their riparian rights. The answer admits that the defendant intends to divert some or all the water of the west branch of the river from its natural channel, and avers that the diversion of the whole of it would be of little or no injury to the riparian owners. The diversion of water by the defendant is, as appears by the testimony of Mr. Birdsall, the chief engineer of the system for the water supply of New York, 7,600,000 gallons per day. The total average flow of the river at the junction of the two branches was 24,000,000 gallons per day. The decrease is, therefore, more than one-fourth. Testimony was offered by each party with respect to the value of the two properties, and the amount of pecuniary damage in consequence of the diversion of the water. That there will be an actual, continuing pecuniary damage more than nominal in amount is manifest; but whether more or less than \$2,000, or what will be the exact amount, I did not undertake to find, because it was unnecessary. In the absence of a plea to the jurisdiction, the allegation in the bills in equity that the amount of damage in each case exceeded \$2,000, "though denied by the answer, even if not sustained by the proof, was sufficient to give the circuit court jurisdiction." *Butchers' & Drovers' Stock-Yards Co. v. Louisville & N. R. Co.*, 67 Fed. 35; *De Sobry v. Nicholson*, 3 Wall. 420, 18 L. Ed. 263. A number of unknown factors enter into an estimate of damage from a diversion of water,—such as the probabilities of future years of excessive drought, the prospective uses to which the properties may be applied, and the prospective demands for other than agricultural uses,—which cause the estimate of actual pecuniary damage to be one of inaccuracy. The statutes of the state of New York do not undertake to give power to condemn land for public purposes which is situate in another state, and if they undertook to confer such power they would be ineffective. *Holyoke Water-Power Co. v. Connecticut River Co.*, 52 Conn. 570; *Farnum v. Canal Corp.*, 1 Sumn. 46, Fed. Cas. No. 4,675; *U. S. v. Ames*, 1

Woodb. & M. 76, Fed. Cas. No. 14,441; *Rutz v. City of St. Louis* (C. C.) 7 Fed. 438. Neither is there a Connecticut statute which authorizes the city of New York to exercise any rights of eminent domain over land in Connecticut.

The conclusions which must result from the foregoing facts have been often clearly stated by various courts, and by none more clearly than by the courts of Connecticut and New York. The principles which underlie the case, or which are applicable, are as follows:

1. The right of a riparian proprietor upon a nonnavigable stream to the use of the ordinary flow of the water of the stream, as it has been accustomed to flow, and not diminished by an unreasonable use by a proprietor above him, "is not an easement or appurtenance, but is inseparably annexed to the soil, and is parcel of the land itself." *Wadsworth v. Tillotson*, 15 Conn. 366; *Clinton v. Myers*, 46 N. Y. 511; *Smith v. City of Rochester*, 92 N. Y. 463.

2. The unauthorized and uncompensated permanent diversion by a municipal corporation of the water of a nonnavigable stream from a riparian owner is not excused by the fact that it was deemed to have been taken for a public benefit. The seizure and permanent diversion is a continuing wrong, unless compensation has been made, either by agreement, or under process of law, and by virtue of authority conferred by the constitution and the statutes of the state. *Seifert v. City of Brooklyn*, 101 N. Y. 136, 4 N. E. 321; *Nolan v. City of New Britain*, 69 Conn. 668, 38 Atl. 703; *Harding v. Water Co.*, 41 Conn. 87.

3. An injunction to prevent a permanent and unauthorized seizure and diversion of running water is a proper and is the effectual remedy, because the remedy by an action at law provides only for the damages which had accrued before suit, and compels a multiplicity of suits. It is the only efficient remedy for complete relief. *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536; *Corning v. Nail Factory*, 40 N. Y. 204; *Knitting Co. v. Dean*, 162 N. Y. 278, 56 N. E. 757.

4. The equitable remedy by injunction exists and is to be exercised in the absence of any legislative authority for the infliction of the permanent injury, although the pecuniary damage to the riparian proprietor is not of large amount. The fact of no serious pecuniary damage is not a hindrance to the right of the riparian proprietor to the restoration of the water to its natural course. This principle has been fully stated by the courts of the state of New York. *Corning v. Nail Factory*, 40 N. Y. 191; *Gilzinger v. Water Co.*, 66 Hun, 173, 21 N. Y. Supp. 121, affirmed in 142 N. Y. 633, 37 N. E. 566; *Knitting Co. v. Dean*, 162 N. Y. 278, 56 N. E. 757; *Legg v. Horn*, 45 Conn. 409.

5. If a court of equity has power in any case by decree to ascertain and order the payment of damages by decree of injunction in the alternative, a court of equity will not exercise such power where the defendant has committed a permanent injury without authority of law, and without pretense of right to take and retain the property. *Pappenheim v. Railway Co.*, 128 N. Y. 436, 28 N. E. 518; *Stowers v. Gilbert*, 156 N. Y. 600, 51 N. E. 282. But a court of equity can properly delay the issuance of an order of injunction to allow the defendants an opportunity to agree with the complainants in regard to adequacy of compensation. *Harding v. Water Co.*, supra.

Let there be a decree, with costs, that if on November 1, 1900, there shall have been no agreement between the parties as to the amount of compensation to the complainants for the injury they have separately sustained by this diversion of the water of Byram river, and no payment of such agreed compensation, an order of injunction shall issue to restrain the defendant, its officers, agents, and employes, from diverting the water of the west branch of Byram river, or any part thereof, or from preventing in any way said water, or any part thereof, at any time, from flowing through its natural channel before, at, and below the junction of the two branches of said river.

COLBURN et al. v. HILL et al.

(Circuit Court of Appeals, Sixth Circuit. August 7, 1900.)

No. 756.

1. REMOVAL OF CAUSES—JURISDICTION ERRONEOUSLY ENTERTAINED—REMANDING CAUSE AFTER SALE BY RECEIVER—CONFIRMATION.

Where a cause is erroneously removed from a state court to the circuit court of the United States on the ground that there is a separable controversy as to one of the defendants, a receiver is appointed, and the case there proceeds to judgment, and certain property in controversy is directed to be sold, but on appeal it is discovered that there is a defect of jurisdiction, in that the matter in controversy between complainant and the petitioner for removal is a cause of action jointly against the latter and other defendants, and the decree is reversed, with directions to the circuit court to remand the cause, the latter court is without jurisdiction to confirm a sale made by the receiver under the order of the court directing it.

2. SAME—COSTS—BOND—JUDGMENT.

Where a cause is remanded to the state court for want of jurisdiction in the federal court, judgment will not be entered against the surety on the removal bond for costs, in the absence of any stipulation therein that such judgment may be entered without the necessity of an action on the bond and in execution of such orders as the court may make in regard to the costs of the case.

Appeal from the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

On motion to amend mandate.

Geo. Gillham, Edgington & Edgington, and M. F. Dickinson, Jr., for appellants.

Wm. M. Randolph and George Randolph, for appellees.

Turley & Wright, for executors of D. T. Porter.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

PER CURIAM. This case is one in which the decree of the court below was reversed by this court upon the ground that the circuit court of the United States had never obtained jurisdiction. 101 Fed. 500. The case was removed from a state court in Tennessee on the ground that the petitioner, one of the defendants in the case, had a separable controversy therein, within the meaning of the act of congress; and on that ground the cause was transferred to the circuit

court of the United States, and proceeded therein to a decree. The error in assuming jurisdiction was not effectively questioned until late in the progress of the case, and it happened that many things were done while it was pending in the circuit court of the United States. A receiver was appointed, and ordered to sell property consisting largely of real estate, which was taken into the possession of the court for the purposes of the suit. On the case coming here, it was ascertained that there was a defect in jurisdiction, in that the matter in controversy existing between Mary T. Hill, the petitioner, and the complainants was a cause of action jointly against her and other defendants. As has been said, the decree was reversed, and the cause was remanded to the circuit court, with directions to that court to remand the cause to the state court. On the mandate coming down, it found a situation like this in the circuit court: Under the orders directing the sale of property, the receiver had made the sales. These sales had not been confirmed, but still remained incomplete and subject to the orders of the court. When the matter was brought up in the circuit court for the purpose of entering a decree in accordance with the mandate of this court, the defendants and the purchasers under these sales intervened, and claimed that they were entitled to have the sales confirmed. The circuit court was of the opinion that under the terms of the mandate that court was without authority to proceed further in the confirmation or execution of orders that had been theretofore made by that court. Thereupon the decree on the mandate was deferred so as to afford an opportunity to have the matter submitted to this court. It is the opinion of this court that, it having been held that the circuit court was without jurisdiction, it is necessary for that court to relinquish the further exercise of authority; and we think that all that should be done by this court is to reverse the decree, with direction to remand the cause, and that we should refrain from authorizing the further exercise of jurisdiction. That means that these incomplete sales must drop. The part of the money that has been paid in conditionally, of course, will have to be refunded to the purchasers. The case is not like those where the court, having erroneously assumed jurisdiction, has taken possession of property, and in the control and preservation of it has authorized the receiver to borrow money or incur obligations necessary to the management. There the lender has parted finally with his money, and the wrong would be irretrievable if the court had not the power to protect him. But here the purchasers lose nothing, unless it be the profits of their bargain, and the court does not exercise its special prerogative for the purpose of guarding against that consequence. This motion of defendants, therefore, for an amendment of the mandate so as to provide for the confirmation of these sales, is denied.

The complainants in the case make another motion to amend the mandate. It appears that a bond was given, as was necessary, for removal to the circuit court of the United States by defendant, and the surety was one of the counsel in the case. This court gave no direction in its mandate for any order to be passed in reference to the security thus furnished, but made the general order directing the court below to enter a decree charging the defendant, Mrs. Hill, who had

been the petitioner for removal, with the costs. Now the complainant moves that the mandate shall be so amended as to direct the entry of a decree against the surety on the bond, also. But we think that motion should be denied, for the reason that this bond was one in the ordinary form, and was not such as is sometimes found where a stipulation is made that judgment may be entered upon the bond without the necessity of a distinct suit and in execution of such orders as the court may make in regard to the costs of the case. It is not infrequent that orders of that kind are employed in judicial proceedings, but here the bond was simply in the ordinary form of bond. We are of opinion that the court would have no authority to enter judgment directly against the surety on said bond, and that the remedy must be by independent proceeding brought in a proper court having jurisdiction. This motion is also denied.

GRAND ISLAND & W. C. R. CO. et al. v. SWEENEY (four cases).

(Circuit Court of Appeals, Eighth Circuit. June 25, 1900.)

Nos. 1,212, 1,213, 1,214, 1,215.

1. APPEAL—NECESSARY PARTIES—JURISDICTION.

Under Sess. Laws S. D. 1893, c. 116, § 4, requiring plaintiff in an equity action for the foreclosure of a mechanic's lien to make all persons claiming liens against the same property parties, defendants to an action for the foreclosure of a mechanic's lien against certain sections of a railroad, who have filed claims for liens against the same property, which the complainant alleges are inferior to that of the plaintiff, and against whom it is decreed that they "be forever barred and foreclosed of all right, title, lien, and equity of redemption" in the property in question, have such an interest in the decree as requires their joinder in an appeal taken by the railroad company and contractors, or a showing of opportunity given to them to so join, although one of such defendants was served by publication only, and the other, though personally served, made default.

2. SAME—PARTIES—SEVERABLE CONTROVERSY.

Whenever several parties are made defendants to a suit, and the decree as to any one of them is severable, or so separate and distinct as not to affect the rights of the other parties to the suit, such party may prosecute his appeal without joining others whose rights are not so affected.

3. SAME—JURISDICTION—PRACTICE—CIRCUIT COURT OF APPEALS.

The practice of the circuit court of appeals is in accord with that of the supreme court in holding that in equity cases, unless all the parties whose interests are affected by the appeal join in the appeal, the appellate court acquires no jurisdiction, and the appeal must be dismissed.

Appeals from the Circuit Court of the United States for the District of South Dakota.

These four suits were instituted by the appellee, Sweeney, to foreclose four certain and different mechanics' liens for powder and explosives furnished by him to subcontractors for the construction of certain sections of the railroad of the appellant the Grand Island & Wyoming Central Railroad Company. The defendants in the first two cases, Nos. 1,212 and 1,213, are the railroad company whose property was alleged to be subject to the lien; John Fitzgerald and David Fitzgerald, co-partners under the firm name of John Fitzgerald & Bro., who were the original contractors for the construction of the road; John Chamberlain and Joseph W. Skinner, co-partners under the firm name of Chamberlain & Skinner, who were the subcontractors for the construction

of the particular part of the road for which appellee furnished supplies; and the Congdon & Henry Hardware Company, alleged in the bill of complaint to have, or to claim to have, an interest in or lien upon the property of the railroad company which complainant averred to be junior and inferior to his lien. The defendants in the next case, No. 1,214, and their relations to each other and to the complainant, are the same as those in the cases just mentioned, except that Nathan Wescott is the subcontractor, in lieu of Chamberlain & Skinner. The defendants in the last case, No. 1,215, and their relations to each other and to the complainant, are the same as those first mentioned, except that John Carroll and Samuel E. Donoghue, co-partners under the firm name of Carroll & Donoghue, are the subcontractors, instead of Chamberlain & Skinner. The railroad company and David and John Fitzgerald appeared and filed their joint answer to the bill of complaint in each case. The defendants Chamberlain & Skinner, being nonresidents, were duly served by publication in cases 1,212 and 1,213, entered no personal appearance to the suits, and suffered judgment by default. The defendant Wescott, being a nonresident, was duly served by publication in case No. 1,214, entered no personal appearance to that suit, and suffered judgment by default. The defendants Carroll & Donoghue were personally served with process in case No. 1,215, but suffered judgment by default. The defendant the Congdon & Henry Hardware Company was also personally served with process in each and all of the cases, but made no appearance to the suits, and suffered judgment by default. The final decrees in all the cases are similar. They first find the amount due from the subcontractors to the complainant in each case; then adjudge complainant's right to a lien upon the property of the railroad company; next order the subcontractors and the railroad company to pay the amount so found, together with all costs, to complainant, within 30 days, and, in case of default in making such payment, that the property of the railroad company should be sold in the usual manner, for the purpose of satisfying complainant's demand, and finally specifically order, adjudge, and decree that the defendants, including the subcontractors and the hardware company, "be forever barred and foreclosed of all right, title, lien, and equity of redemption in and to said premises and real property so sold, or any part thereof." The record shows that the subcontractors Chamberlain & Skinner had filed a lien upon the property involved in the cases in which they were defendants, namely, Nos. 1,212 and 1,213, amounting to \$58,557.53; that the subcontractors Carroll & Donoghue had filed a lien upon the property involved in the case in which they were made defendants, amounting to \$57,952.54; and that the defendant hardware company had filed a lien against the property involved in each and all of the cases. The appeals in these cases on the first hearing were dismissed by the court of its own motion, because it appeared that the subcontractors who were parties defendant had an interest in the decrees rendered by the trial court which might be affected by the action of this court on appeal, and because such subcontractors had neither joined, nor been given an opportunity to join, in the appeal. *Railroad Co. v. Sweeney*, 95 Fed. 396, 37 C. C. A. 127. Subsequently the court, in order to give counsel an opportunity to be fully heard, granted a rehearing, and afterwards motions were duly filed by the appellee to dismiss the appeals on two grounds: First, because the subcontractors were neither made parties to the appeal nor given notice to appear and join in the appeal; second, because the defendant hardware company was neither made a party to the appeal nor notified to appear and join in the same. These motions were argued by counsel in connection with their presentation of the case on the merits. If they are well taken, a consideration of the merits of the case is unnecessary.

N. K. Griggs (Frawley & Laffey and Charles F. Manderson, on the brief), for appellants.

Charles W. Brown (Eben W. Martin and Norman T. Mason, on the brief), for appellee.

Before CALDWELL and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

It was held in the former opinion that upon the face of the record the several subcontractors had such an interest in the decrees as required their joinder in the appeals, or a showing of opportunity given them to so join. The correctness of this holding is challenged by learned counsel for the appellants, and attention is called, among other things, to the fact that service was made on the subcontractors by publication only, and that, as a consequence, no personal liability was or could have been decreed against them. This fact was not disclosed by the transcript of the record as originally printed, and was, therefore, overlooked. Be this, however, as it may, the obligations of the subcontractors to the complainant were necessarily involved in fixing the liens upon the railroad. No lien could have been established or decreed against the railroad without having first litigated the question as to the indebtedness of the subcontractors to the complainant, and it may be that the adjudication as to the amount due was conclusive, though the service was by publication. For the purpose of fixing the liens, at least, the subcontractors were necessarily made parties defendant in each case, and service by publication against them was sufficient for that purpose. But, irrespective of any consideration of the subcontractors' relation to the cases, the present motions to dismiss can be disposed of on another ground. The hardware company was made a defendant in each case, and is charged in the bill of complaint to have a lien which was junior and inferior to that of the complainants. The hardware company was a necessary party to the suits. The statutes of South Dakota in force at the time the suits were originally instituted in the state court required the complainant to make all persons claiming liens against the same property parties. Sess. Laws S. D. 1893, c. 116, § 4. This last-named company was personally served with process in each case. It had, like the subcontractors, filed mechanics' liens against the sections of the railroad involved in each case. By the final decree in each case it was forever barred and foreclosed of all right under its lien as against the complainant. This company did not join in the appeal in either of the cases, and no severance or equivalent in the form of notice to appear and join was resorted to by the appellants. The question, therefore, whether the court has jurisdiction to hear these appeals taken by the railroad company and Fitzgeralds without joining the hardware company, or showing reason for not doing so, is now clearly raised upon its merits.

It is first contended by counsel for appellants that, because judgment went by default against the hardware company, and because it thereby admitted that complainant was entitled to the remedy prayed for, it had nothing to complain of, and was not a necessary party to the appeals taken by the other defendants. This is not the law. The hardware company, whether it suffered default or not, was interested in the decrees as rendered, and had a right to prosecute appeals from such decrees, and, notwithstanding such default, it should have been made a party appellant, or should have been given an opportunity to become such. *Mason v. U. S.*, 136 U. S. 581, 10 Sup. Ct. 1062, 34 L.

Ed. 545; *Davis v. Trust Co.*, 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563; *Trust Co. v. Clark*, 83 Fed. 230, 27 C. C. A. 522. It is clear, we think, by the settled doctrine of this court, that these appeals should be dismissed because of the nonjoinder of the hardware company. The earliest case on the subject is that of *Gray v. Havemeyer*, 53 Fed. 174, 3 C. C. A. 497. That case involved a similar question to the one now under consideration, namely, the relative priorities of the claims of mechanics' lien holders against a common fund or property. This court there aptly puts the question: "Upon what theory can it be held that this court ought to proceed to consider the correctness of the decree in the circuit court on the question of the relative priorities of the several lienholders when none of them save the appellant would be bound by any decree we might enter?" The general rule is there laid down that this court cannot proceed in a case unless all the parties whose interests will necessarily be affected by any decree that might be rendered are before the court. This rule is again clearly enunciated, and the doctrine of *Gray v. Havemeyer* is distinctly approved, in the following cases: *Trust Co. v. McClure*, 78 Fed. 211, 24 C. C. A. 66; *Dodson v. Fletcher*, 78 Fed. 214, 24 C. C. A. 69; *Trust Co. v. Clark*, 83 Fed. 230, 27 C. C. A. 522; and in *Boyd v. Railroad Co.*, 84 Fed. 9, 28 C. C. A. 262. In *Dodson v. Fletcher*, *supra*, the rule is stated thus:

"All the parties to a suit or proceeding who appear from the record to have an interest in the order, judgment, or decree challenged in the appellate court must be given an opportunity to be heard there before that court will proceed to a decision upon the merits of the case."

In fact, it is not seriously urged in argument by learned counsel for the appellants that, under the established practice of this court any other course is now open but to dismiss these appeals; but they challenge the correctness of our practice, and strenuously contend that it is not in harmony with the settled doctrine of the supreme court on the subject. This contention has received the careful consideration which its gravity demands, and now requires at our hands an analytical consideration of the decisions of the supreme court on the subject. The cases specially relied on by appellants' counsel are *Germain v. Mason*, 12 Wall. 259, 20 L. Ed. 392; *Brewster v. Wakefield*, 22 How. 118, 16 L. Ed. 301; *Bank v. Hunter*, 129 U. S. 559, 9 Sup. Ct. 346, 32 L. Ed. 752; *Gillfillan v. McKee*, 159 U. S. 303, 16 Sup. Ct. 6, 40 L. Ed. 161.

The case of *Germain v. Mason*, *supra*, was an action at law, and went to the supreme court on writ of error. Without stating the facts of that case, it is sufficient to say that it clearly appears in the opinion that the judgment rendered against *Germain* was a "separate, distinct, personal judgment against him for money," and a judgment in which the other defendants had no interest. It was for these reasons the court held that *Germain* could prosecute a writ of error in his own name without joining the other defendants.

The next case—*Brewster v. Wakefield*, *supra*—was a suit instituted by *Wakefield* to foreclose a mortgage made by *Brewster*. The real question in the case related to the amount of money due by *Brewster* to *Wakefield* on a mortgage obligation. After disposing of

this question, the court takes up a motion of the appellee to dismiss the appeal. It appears from the opinion that other parties had acquired certain liens upon the mortgaged premises subsequent to the mortgage in question. The case does not disclose the character of the liens. The court held that the holders of the liens, whatever they were, were not necessary parties to the original foreclosure suit, and that their joinder in the appeal of Brewster was unnecessary. It appears from the opinion that the only question in controversy in that case was the amount of the debt due from Brewster, and it was held that his interest was so separate from the others as to entitle him to appeal without joining them.

In the next case—*Bank v. Hunter*, *supra*—it was urged that the appeal should be dismissed because the administratrix of John O'Neal had not joined in it. The conclusion reached and stated by the court is sufficient to distinguish that case from the case in hand. The court says:

"She [referring to the administratrix] did not appeal, and the bank and Dawson petitioned the court to be allowed an appeal as between themselves and Hunter, Evans, and Buell, the complainants, which was ordered by the court as to said two defendants, who perfected their appeal accordingly. This was proper, as with the matters complained of by the bank and Dawson O'Neal's estate had no concern. The total balance of the indebtedness due from that estate after all payments and money realized were applied would be the same, irrespective of the proportion of such balance found due to each of the two creditors. The decree was severable in fact and in law, and the bank and Dawson were entitled to prosecute their appeal without joining their co-defendants who did not think proper to question the judgment."

It thus appears that the supreme court sustained its jurisdiction in that case on the sole ground that the decree was severable, and involved no rights of the particular defendant whose nonjoinder was complained of. On the same ground and for the same reason the supreme court sustained its jurisdiction in the case of *Gillfillan v. McKee*, *supra*. It says:

"The objection that an appeal was not taken by the other defendants, that they did not join in the appeal, and that there was nothing in the nature of a summons and severance, is equally untenable. The decree was several, both in form and substance, and the interest represented by each defendant was separate and distinct from that of the other."

From these cases a general rule may be formulated that whenever several parties are made defendants to a suit, and the decree as to any one of them is severable, or so separate and distinct as not to affect the rights of the other parties to the suit, such party may prosecute his appeal without joining others whose rights are not so affected.

Do the cases before us fall within this rule? Clearly not. The hardware company, by the statutes of South Dakota, was a necessary party to the suits. No separable controversy is presented, but, as said by Sanborn, circuit judge, in ruling on a motion to remand this case (61 Fed. 3): "The complaint is single and indivisible. The respective interests of the plaintiff and the hardware company range them on opposite sides of the controversy involved in it. That controversy cannot be fully determined without the presence of both of them." The hardware company claimed liens upon the same property

against which complainant claimed superior liens. Its liens, shown in evidence, appear to have been filed prior in time to those of complainant. The decrees forever barred the hardware company from any lien as against the complainant, giving to the complainant superior liens, and for certain fixed and definite amounts. In so far as such decrees declare the hardware company's lien inferior to complainant, or bar the hardware company from any right, title, or lien as against the complainant, they, of course, affect the hardware company's rights; and, in so far as the decrees establish the amounts to which complainant was entitled as a prior lien, they thereby affect the extent of the hardware company's ultimate recourse against the property of the railroad company. For these reasons it cannot, in our opinion, be successfully claimed that complainant's rights against the railroad were separate and distinct from his rights against the hardware company, or severable from them, or that the rights of the hardware company were not affected by the decrees below, or might not be affected by any decree this court might render. Such being the facts, the cases specially relied on by the appellants' counsel, in our opinion, afford no justification for their contention. This conclusion is the more obvious when other cases of the supreme court on this subject are considered. In *Masterson v. Herndon*, 10 Wall. 416, 19 L. Ed. 953, Mr Justice Miller, speaking for the court, says it is the established doctrine of this court that "in chancery cases all the parties against whom a joint decree is rendered must join in the appeal or they will be dismissed." No one can question that the decrees in the cases under consideration were joint decrees against the hardware company, the railroad, and all the other defendants. Their language admits of no other construction. The defendants, all of them, and those claiming under them, were "forever barred and foreclosed of all right, title, lien, and equity of redemption in and to the said premises and real estate so sold or any part thereof." The same general rule as that announced in *Masterson v. Herndon*, *supra*, with the reasons for it, is again stated in *Hardee v. Wilson*, 146 U. S. 179, 13 Sup. Ct. 39, 36 L. Ed. 933. In the next case, chronologically speaking,—*Inglehart v. Stansbury*, 151 U. S. 68, 14 Sup. Ct. 237, 38 L. Ed. 76,—the court descends from the statement of the general rule, which it had in the last two cases announced, to particulars; and in that case declares that parties whose rights "were affected by the decree appealed from" are necessary parties to the appeal. This is practically a specification of what is meant by "joint" decrees as used in the former cases, as they are cited in support of the conclusion reached. In the next case—*Davis v. Trust Co.*, 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563—there is a further particularizing of the general rule above stated. The court there says that among the ordinary rules respecting appeals is the following: "That all the parties to the record who appear to have any interest in the order or ruling challenged must be given an opportunity to be heard on such appeal," and the cases of *Masterson v. Herndon*, *Hardee v. Wilson*, and *Inglehart v. Stansbury*, *supra*, are cited as authority for the rule so announced. To the same effect are the subsequent cases of *Sipperley v. Smith*, 155 U. S. 86, 15 Sup. Ct. 15, 39 L. Ed. 79, and *Beards-*

ley v. Railway Co., 158 U. S. 123, 15 Sup. Ct. 786, 39 L. Ed. 919. The result is that there is perfect correspondence and harmony between the doctrines of the supreme court and this court on the subject in question. Both hold that in equity cases all the parties whose interests are affected by the appeal must join, or be given an opportunity to join, in the appeal, or the appellate court acquires no jurisdiction, and the appeal must be dismissed.

We have carefully considered all the propositions urged by counsel on these motions, and, if they are not now specifically referred to, it is because, in our opinion, they are necessarily involved in the conclusions as reached and stated. We have also considered with much care the questions relating to the merits as presented by the record, and, even if we were prepared to concede that any substantial error was committed at the trial below, we are of opinion that, for the reasons already stated, we are without jurisdiction to correct it. The motions to dismiss the appeals must be sustained.

UNITED STATES v. HIGGINS, County Treasurer.

(Circuit Court, D. Montana. July 2, 1900.)

No. 576.

TAXATION—LIABILITY OF HALF-BREDS TO STATE LAWS.

One born of a white father and an Indian mother, and who is a recognized member of the tribe of Indians to which his mother belongs, is an Indian, and not subject to taxation under the laws of the state in which he resides.

W. B. Rodgers, U. S. Dist. Atty.
Marshall, Stiff & Denny, for defendant.

KNOWLES, District Judge. This is a suit brought by the United States against George Higgins, the treasurer and tax collector of Missoula county, to enjoin him from collecting a tax from one Alexander Matt. It appears from the evidence in the case: That said Matt is the owner of a number of horses and cattle ranging upon the Flat-head Indian reservation, sometimes called "Jocko Indian Reservation," in the state of Montana. That in the year 1897 one W. R. Hamilton, the then assessor of Missoula county, listed said property as that of the said Matt for taxation, and that the amount of the taxes assessed upon the same for state and county purposes was the sum of \$10.50. The said assessment was duly returned upon the proper assessment roll for said year to the then tax collector of Missoula county. The said Matt refused to pay this tax, and after the same became delinquent said George Higgins, as treasurer and tax collector of said county, seized two head of cattle, the property of said Matt, and advertised the same for sale at public auction, with a view to securing money sufficient to pay said tax, penalty, and the cost of collection thereof. The government brought this suit for the purpose of enjoining this sale, alleging that said Matt is an Indian and its ward. No contention has been made that the United States cannot maintain

this suit, if such is the fact. The defendant contends that said Matt should be classed as a white man, and not as an Indian, and that, as that part of the Flathead reservation where Matt resides lies within the exterior boundaries of Missoula county, he should list his property and be taxed in that county. The question here presented is, should Alexander Matt be classed as an Indian or a white man? If an Indian, he is not subject to taxation in said county.

From the evidence it appears: That the father of Matt is a Canadian Frenchman. That his mother was a Piegan Indian, and that Alexander Matt was born somewhere in the northeastern part of what is now known as "Montana" in the year 1853, at which time it was all known and classed as Indian country. His father moved to Colville, then in the territory of Washington, and seems to have lived there several years, and then returned to Montana some time in 1864, and lived at various places within the limits of what is now the state of Montana, coming to Stevensville, in the county of Missoula, in 1866 or 1867. At that time the Flathead Indians were the principal inhabitants of the Bitter Root valley. Shortly after the arrival of the father and mother of Matt in the Bitter Root valley, his mother was adopted into the Flathead tribe. She made application to be so admitted or adopted to Victor, the head chief thereof, who called a council of the leading men of his tribe; and by them, and with the consent of the chiefs of the tribe, it was declared that she was a member thereof. From that time on she and her children were recognized as members of the Flathead tribe. The father of Matt was a blacksmith, and generally followed that trade, and instructed his son therein. Subsequently the whole family moved to the Flathead Indian reservation, sometimes called "Jocko Indian Reservation," and said Matt has lived there since that time,—some 26 years. By article 2 of the treaty between the United States and the Flathead, Kootenai, and Upper Pend D'Oreille Indians, concluded July 16, 1855 (12 Stat. 976), it was provided that other friendly tribes and bands of Indians in the territory of Washington might be consolidated under the common designation of the Flathead nation, with Victor as head chief, upon the said Flathead Indian Reservation. The evidence shows that the said Matt had and has been recognized as a member of the Flathead tribe of Indians ever since his residence therein. It is claimed that notwithstanding these facts, the father of Matt being a white man, Matt would follow the condition of his father, and must be treated as a white man. It is undoubtedly true that a white man, although adopted into an Indian tribe, and treated by them in all respects as and like an Indian, cannot escape his responsibilities as a white man, and must be subject to the laws and the taxing power of a government of white men, embracing the section of country where he lives. But is it true that under our laws a child will always be classed as of the same color and race as his or her father? It is well known and settled that, if a mother is a slave, her children follow her condition. A government under which persons of the half-blood may reside can determine the status of such half-bloods,—as to whether they shall be classed as white people or as Indians. In the case of *U. S. v. Holliday*, 3 Wall. 419, 18 L. Ed. 182, the court held that in

the treatment of the Indians it is the rule of this court to follow the action of the executive and other political departments of the government. In the Case of *The Kansas Indians*, 5 Wall. 756, 18 L. Ed. 673, the court said:

"But the acts of the political department of the government settles beyond controversy that the Shawnees are as yet a distinct people, with a perfect tribal organization. As long as the United States recognize their national character, they are under the protection of treaties and the laws of congress, and their property is withdrawn from the operation of state laws."

In the case of *U. S. v. Boyd* (C. C.) 68 Fed. 580, it was said:

"In determining the attitude of the government towards the Indians,—all Indians,—the courts follow the action of the executive and other political departments of the government, whose more especial duty it is to determine such affairs."

In determining as to what class half-breeds belong, we may refer, then, to the treatment and recognition the executive and political departments of the government have accorded them. On August 4, 1824, the government made a treaty with the Sac and Fox Indians (7 Stat. 229), in which it was provided that certain land therein described should be set apart as a reservation for the use of the half-breeds of the Sac and Fox confederated Indian tribes. It will be observed that these half-breeds were described as belonging to said tribes. On June 30, 1834 (4 Stat. 740), these half-breeds were given permission to sell these lands. These Indians were again described as half-breeds belonging to those tribes. On April 27, 1816 (6 Stat. 171), an act of congress was passed for the relief of Samuel Manac, and he is described therein as "a friendly Creek Indian of the half blood." On March 3, 1837 (Id. 692), congress passed an act for the relief of James Brown and John Brown, half-breeds of the Cherokee nation of Indians. On September 29, 1817 (7 Stat. 163), the United States made a treaty with the Wyandot and other Indian tribes, and therein provision was made for the children of one William McCollock, and these children are described as quarter-blood Wyandot Indians. At the same time, and in the same treaty, provision was made for the children of one Isaac Williams, who is described as a half-blood Wyandot Indian. At the same time, and in the same treaty, provision was made for one Anthony Shane, who is described as a half-blood Ottawa Indian. On October 6, 1818 (Id. 191), in a treaty with the Miami Indians, there was a reservation of lands made in favor of Ann Turner, Rebecca Hackley, William Wayne Wells, Mary Wells, and Jane Turner Wells; each of them being described as a half-blooded Miami Indian. On November 15, 1824 (Id. 233), in a treaty with the Quapaw Indians, a reservation of land is made in favor of one Saracen, who is described as a half-breed Quapaw Indian. On June 2, 1825 (Id. 240), the United States made a treaty with the Osage Indians, and therein is made a provision for half-breeds. The language and scope of the treaty show that these half-breeds were persons of that tribe. On June 3, 1825 (Id. 245), in a treaty with the Kansas Indians, a reservation of land is made for a large number of persons, named and described as half-breeds of the Kansas nation. On August 5, 1826 (Id. 291), in a treaty with the Chippewas a reservation of land is made for

the benefit of a large number of persons named therein, described as half-breeds and Chippewas by descent. On October 16, 1826 (Id. 298, 299), in a treaty with the Pottawatomie Indians, a reservation of land is made for certain persons therein, described as half-breeds and Indians by descent. On October 23, 1826 (Id. 302), in a treaty with the Miami Indians a reservation of land is made for certain persons therein, described as the children of a half-blood Miami Indian woman. Similar descriptions of half-breeds as being Indians of the tribe with whom they lived will be found in the following Indian treaties: August 1, 1829 (7 Stat. 324), treaty with Winnebago Indians; July 15, 1830 (7 Stat. 330), treaty with Sioux Indians; August 30, 1831 (7 Stat. 362), treaty with Ottawa Indians; September 15, 1832 (7 Stat. 372), treaty with Winnebago Indians; September 21, 1832 (7 Stat. 374), treaty with Sac and Fox Indians; October 27, 1832 (7 Stat. 400), treaty with Pottawatomie Indians; March 28, 1836 (7 Stat. 493), treaty with Ottawa, etc., Indians; July 29, 1837 (7 Stat. 537), treaty with Chippewa Indians; September 29, 1837 (7 Stat. 539), treaty with Sioux Indians; November 1, 1837 (7 Stat. 545), treaty with Winnebago Indians; October 4, 1842 (7 Stat. 592), treaty with Chippewa Indians; October 18, 1848 (9 Stat. 952), treaty with Menominee Indians; March 16, 1854 (10 Stat. 1045), treaty with Omaha Indians; February 22, 1855 (10 Stat. 1169), treaty with Chippewa Indians; February 27, 1855 (10 Stat. 1174), treaty with Winnebago Indians; September 29, 1865 (14 Stat. 689), treaty with Osage Indians; October 14, 1865 (14 Stat. 705), treaty with Cheyenne Indians; March 21, 1866 (14 Stat. 756), treaty with Seminole Indians. On September 24, 1857 (11 Stat. 731), in a treaty with the Pawnee Indians it is provided that the half-bloods of that tribe who remain with them shall have equal rights with the other members thereof; that those who do not reside with the tribe shall be entitled to scrip in lieu of lands. On March 12, 1858 (12 Stat. 999), in a treaty with the Ponca Indians it is provided that the half-breeds of that tribe residing with them shall have the same rights and privileges as the other members thereof, and that those residing among the whites in civilization shall be entitled to land scrip in lieu of lands.

In an act of congress approved June 5, 1872 (17 Stat. 226), the following provision is made in regard to the Flathead Indians:

"It shall be the duty of the president, as soon as practicable, to remove the Flathead Indians (whether of full or mixed blood) and all other Indians connected with said tribe and recognized as members thereof, from the Bitter Root valley in the territory of Montana to the general reservation, commonly known as the Jocko reservation, which by a treaty was set apart and reserved for the use and occupation of said confederated tribes."

The Jocko reservation, here referred to, is the Flathead reservation, named in the treaty with these Indians on the 16th day of July, 1855, above referred to. At the time this statute was passed the mother of Matt, according to the evidence, had been adopted into the Flathead tribe. Matt was undoubtedly a half-breed connected with that tribe, and was recognized as a member thereof. This statute recognized mixed bloods of the Flathead tribe as Indians. They are to be removed from the Bitter Root valley, which at the time was

being settled by whites. They were distinguished from the whites, as not being entitled to reside there. Considering the history of the Indian tribes throughout the United States, I am satisfied it will be found that the half-bloods of all tribes were the children of what was recognized as Indian marriages between white men and Indian women. But few instances can be found in which white women intermarried with Indian men. Considering, then, the treaties and statutes above referred to, I think it is evident that the executive and political departments of the government have recognized persons having at least one-half Indian blood in their veins, whose fathers were white men, which half-bloods lived and resided with the tribes to which their mothers belonged, as Indians. Considering the treaties and statutes in regard to half-breeds, I may say that they never have been treated as white people entitled to the rights of American citizenship. Special provision has been made for them,—special reservations of land, special appropriations of money. No such provision has been made for any other class. It is well known to those who have lived upon the frontier in America that, as a rule, half-breeds or mixed-blood Indians have resided with the tribes to which their mothers belonged; that they have, as a rule, never found a welcome home with their white relatives, but with their Indian kindred. It is but just, then, that they should be classed as Indians, and have all of the rights of the Indian. In 7 Op. Attys. Gen. 746, it is said, "Half-breed Indians are to be treated as Indians, in all respects, so long as they retain their tribal relations."

Entertaining these views, I hold that Alexander Matt should be treated as an Indian, and as such he is not subject to taxation under the laws of the state of Montana. The prayer of the bill will be granted. Let the injunction heretofore issued be made perpetual.

**EASTERN BUILDING & LOAN ASS'N OF SYRACUSE, N. Y., v. WELLING
et al.**

(Circuit Court, D. South Carolina. July 25, 1900.)

1. RES JUDICATA—PENDENCY OF PROCEEDINGS FOR REVIEW.

A judgment of the supreme court of a state cannot be pleaded as an adjudication in bar of a subsequent suit in a federal court, where it has been removed for review to the supreme court of the United States by a writ of error, and is there pending and undetermined.

2. SAME.

Quære, whether, under a system in which code pleading prevails, a defendant who has failed to interpose and avail himself of an equitable defense in an action at law can afterwards obtain relief in equity by original proceeding.

In Equity. On rule to show cause why a restraining order previously granted should not be continued.

This is a bill filed for the foreclosure of a mortgage given by Lawrence S. Welling and Marion Bonnoitt to the Eastern Building & Loan Association of Syracuse, N. Y. The bill, after the usual averments as to persons and citizenship, alleges: That complainant is a building, mutual loan, and accumulating fund association, organized under the laws of the state of New York for cor-

porations of that character, with certain by-laws, rules, and regulations binding upon the corporation, its stockholders and members, and all persons contracting with it, and which are incorporated in, and printed upon, and form a part of the several stock certificates in the corporation, and in those issued to the defendants in this suit. That on 28th January, 1891, defendants made application to complainant for 50 shares of installment capital stock of complainant, and so became subscribers thereto, and at the same time agreed to abide by all the terms, conditions, and by-laws contained or referred to in the certificate, and comply with all rules and regulations of the corporation. That the application was received and accepted and the certificates of stock issued to defendants in the state of New York. That on 8th April, 1891, defendants, as members and stockholders in said corporation, applied in writing for an advance of \$5,000 by way of loan for $6\frac{1}{2}$ years, to bear interest at the rate of 5 per cent. per annum, and a premium of 5 per cent. per annum, and as security for said loan or advance to them as stockholders to give a mortgage of the real estate described in the application. That this application was considered and granted by the board of directors of the corporation on 27th April, 1891, upon certain conditions precedent, in performance of which defendants made a further application in writing to the complainant, and thereby expressly bound themselves to comply with the charter and by-laws of the corporation and all requirements of its board of directors. That at the same time defendants delivered to the corporation a certain mortgage to indemnify and secure the corporation for the advance of the \$5,000, the same representing the par or maturity value of the shares of stock, the said mortgage having been executed in pursuance of the application for the advance, and in pursuance of and subject to the articles of incorporation and by-laws of the corporation and the laws of the state of New York. The bill then describes the lands mortgaged, which are situate in the county of Darlington and the state of South Carolina. That at the same time, and by way of collateral, defendants assigned to complainant their certificates of stock, upon which certificates their monthly dues or installments only had been paid, leaving the defendants bound to pay on said stock monthly dues of \$37.50 until said stock attained its par value. That at the time of the execution of this mortgage the officers of the corporation were of the opinion that the shares of stock held by defendants would attain their par value in 78 months, which estimate was not authorized or guaranteed by the articles of incorporation, nor by its by-laws, nor by the laws of the state of New York; and that these officers, without such authority, undertook to accept from defendants 78 notes, payable from month to month, extending over a period of 78 months from date of the mortgage, 75 of which notes were for the sum of \$79.20 each, and three of them for the sum of \$41.70 each, the first maturing on or before the last Saturday in May, 1891, and the last maturing on the last Saturday in October, 1897; these notes being for payment of dues and premium only, and in no sense applicable to the principal of the loan or advance. Any other construction of the transaction would not bind the corporation, but would be ultra vires under the articles of incorporation, the by-laws, and the laws of New York. That defendants, by their mortgage, bound themselves to pay the said 78 notes, and also bound themselves, or intended to bind themselves, to faithfully meet and discharge all the obligations as members and stockholders in the corporation, and particularly to pay to the corporation from month to month, by way of installments, dues, or calls, \$37.50 per month on their shares, until such stock should attain its full par value. That defendants paid all of the notes but one, and tendered payment of that one,—the last,—but only on condition that the complainant should then consider the mortgage satisfied and discharged. That this complainant refused to do, because, although the notes were paid, no part of the advance had been repaid. That the true contract between the parties was the repayment of the full sum of \$5,000 advanced; the premium at the rate of 5 per cent. per annum and interest at the same rate per annum to continue until the said advance was paid in full; the payment of the monthly calls of \$37.50 each until the stock was paid in full to its par value; the payment of all fines, penalties, and obligations provided in the by-laws. That by mistake of both complainant and defendants the mortgage did not express the full contract, but is defective in particulars stated, and the bill prays that

these mistakes be now corrected. That there has been a breach of the condition of the mortgage on the part of defendants. The bill then recites: That the defendants, upon the refusal of complainant to satisfy the mortgage, brought an action against complainant in the court of common pleas of the state of South Carolina sitting in the county of Darlington, under an act of the legislature of the said state giving a cause of action and damages to any mortgagor who has satisfied his mortgage against any mortgagee who, after such satisfaction, shall for three months neglect or refuse to enter such satisfaction on record. That complainant duly appeared and defended said action. That its defenses were overruled at nisi prius, and that on appeal to the supreme court the appeal was dismissed, and the judgment of the court below and the verdict therein were confirmed. That both of these courts based their conclusions upon the sole ground that the only matter before them was the construction of the mortgage, and the effect upon the mortgage of the payment of the 78 notes mentioned therein; but the meaning, construction, and effect of said notes and of the contract between the defendants and the complainant were not considered adjudicated, or determined by either of the said courts, nor were the debts and obligations of defendants as stockholders in and members of complainant corporation adjudicated or determined. That by reason of the judgments of the said courts the complainant has been denied the equal protection of the laws of the state of South Carolina, has been and is about to be deprived of its property without due process of law, the obligation of its contract has been impaired, and the complainant denied the rights, privileges, and immunities to which it is entitled under the constitution of the United States. That under these decisions complainant has been deprived of its right under this constitution to have full faith and credit given to the contract between it and defendants, and that said decisions do not give full faith, credit, and effect to the public acts, records, and judicial proceedings of the state of New York, to which complainant is entitled under the constitution of the United States and the Revised Statutes of the United States (section 905). That defendants claim that under said judgment their mortgage is fully paid and satisfied. That complainant, being advised that the said judgment is not conclusive or binding, has sued out a writ of error thereto to the supreme court of the United States, and has issued and served citation thereon, with an order of supersedeas, and, notwithstanding this, defendants claim that their mortgage is satisfied and released. The prayer of the bill is, among other things, that the rights claimed by complainant be established; that it be ordered, adjudged, and decreed that the judgment obtained in the state court was rendered and obtained through error, fraud, and mistake, and in violation of the constitutional rights of complainant; that the mortgage be reformed, and any entry of satisfaction thereon be vacated. There is also a prayer for a temporary restraining order until the final hearing of the cause. To this bill the defendants filed a demurrer, a plea, and an answer. The ground of demurrer is that by the bill of complaint it appears that the judgment of the court of common pleas for Darlington county, affirmed by the judgment of the supreme court of South Carolina, is a bar to the relief sought in the bill of complaint; and that complainant, evidently by reason of this, has not made or stated such a case as entitled it in a court of equity to the relief sought. The plea sets up in detail the petition for writ of error and assignments of error on the appeal to the supreme court of the United States. The answer replies to the allegation of the bill as to the contracts alleged to have been made by defendants, the execution of the mortgage, and the mistake alleged to exist therein. At the hearing complainant moved to strike out the demurrer and plea, or, at the least, to put defendants to their election, claiming that they went to the whole bill. *Hayes v. Dayton* (C. C.) 8 Fed. 702. The motion was overruled. It does not appear that either the demurrer or plea is to the whole bill. And if, perchance, the answer may extend to some part of the same matter as may be covered by the demurrer or the plea, neither of them can be held bad under rule 37 in equity. The question now before the court is, shall the restraining order heretofore issued be continued?

Russell & Winslow and Mordecai & Gadsden, for complainants.
Mitchell & Smith, for defendants.

SIMONTON, Circuit Judge (after stating the facts). In response to the rule to show cause, the defendants have interposed a demurrer, a plea, and an answer,—the demurrer because the controversy is *res judicata*; the plea in aid of the demurrer, setting out the assignments of error to the judgment of the supreme court of South Carolina, and so showing that the controversy in the state court is the same as is now set up in this court; and the answer putting in issue matters of fact alleged in the bill, specially that the mistake now relied upon was not mutual. The defendants insist that the controversy between them and the complainant has already been heard in the courts of South Carolina, that these courts have determined the controversy adversely to the complainant, and that so it is *res judicata*. Assuming, for the sake of argument, that the controversy set up in this bill of complaint is the same as that which was agitated in the proceedings in the state court between these same parties, it cannot be said that the question is *res judicata*. The pleadings disclose the fact that the final judgment of the state supreme court has been removed by writ of error into the supreme court of the United States, and that it awaits adjudication in that court. Were it now held that the issue is *res judicata*,—a question finally settled beyond controversy,—the decision of the supreme court may perhaps be anticipated, or its conclusion be antagonized. No controversy can be treated as *res judicata* until it has been finally discussed and decided in a court of last resort, or the result has been acquiesced in without resort to such a tribunal. But is the controversy which the complainant now seeks to make the same which was heard and decided in the suit in the state courts? The bill alleges that the contract by way of mortgage, which was the issue in the case in the state courts, was not the real contract between the parties; that it was entered into in mutual mistake, and by reason thereof did not express the full intent and purpose each of the contracting parties had in mind; that the whole transaction, with the printed and written documents attending it, shows that the real contract between the parties—that which each intended to make—was that the mortgage should not only secure the notes mentioned in it as given for the advance and the premiums and interest upon it, but that it should also secure the promises and obligations assumed by the present defendants, borrowing stockholders, as stockholders in the complainant association; that the mortgage as executed, in attempted compliance with the negotiations for the advance, failed to disclose this mutual purpose, and, on the contrary, was open to the construction that it was confined to the payment of the notes given at the time; that the taking of these notes, in itself, by the agent of the corporation, and the apparent conclusion drawn therefrom that the payment of the notes would satisfy the mortgage, were wholly unauthorized, and were in plain contravention of the charter of the lending corporation and its by-laws and of the written acknowledgments and contracts of the defendants, borrowing stockholders themselves. The action in the state court was an action at law. It was tried before the court with a jury. The verdict was reached wholly as in a case at law. No equitable defense was interposed, and no affirmative relief was asked,

by the defendant in that action. The equities set up in this bill were not introduced, and, it is alleged, could not have been, and in fact were not, considered under the issues made in the pleadings. It goes without saying that this court would not presume to sit in judgment upon the decision of the state court; that it would not and cannot listen to any prayer for relief based on alleged errors or irregularities in the state court; that it will not express any opinion whatever as to the result of the case in the state court. But a question is made in the present case whether this court, after the trial of the cause in the state court, will proceed to hear and adjust the equities between the parties which were not presented or decided in the state court, and, if it be determined that there is an equity in favor of the complainant, will set it up, and grant relief notwithstanding the judgment of the state court. The Code of Civil Procedure of South Carolina permits equitable defenses in an action at law. And it may be that a defendant who can interpose an equitable defense, and does not do so, will be precluded from resort to the equity side of the court for the relief which he could have had, and which he has omitted or neglected to ask in the law case. The defendants, in their return, urge this consideration. "A judgment is not only conclusive as to what was actually determined respecting the demand, but as to every matter which might have been brought forward and determined respecting it." *Davis v. Brown*, 94 U. S. 428, 24 L. Ed. 204. In order to make a full answer to the complaint in the state court, it was necessary that the defendant in that suit, the present complainant, should file a cross complaint seeking reformation of the mortgage upon the ground of the alleged mistake. It could not have been obtained in any other way. This was exclusively a matter for a court of equity, and wholly without the jurisdiction in a law case. Besides, it was not imperative upon the defendant to take this course. It could have litigated the issues at law, and could afterwards seek relief in equity. This appears to be the rule when the jurisdiction in law and in equity are distinct, and it would seem to be the rule where code practice prevails. *Botsford v. Wallace* (Conn.) 44 Atl. 10; *Bush v. Merriman*, 87 Mich. 260, 49 N. W. 567; *Hawkins v. Wills*, 1 C. C. A. 339, 49 Fed. 506; *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; *Witte v. Lockwood*, 39 Ohio St. 141. Certainly, under code pleading, a defendant having a counterclaim, and not using it as a defense, is not precluded from a separate action upon his counterclaim. *Roach v. Privett*, 90 Ala. 391, 7 South. 808, 24 Am. St. Rep. 819. And it would seem that the same rule applies to any defense which may be set up in the nature of a counterclaim. *Uppfalt v. Woermann*, 30 Neb. 189, 46 N. W. 419. This will be a matter proper for consideration if the supreme court of the United States confirms or declines to disturb the judgment of the state court. For the present the point is not decided in this court, and it is considered simply in reaching a conclusion as to the continuing or dissolving the existing restraining order. This is the sole question, and it is addressed to the discretion of the court. In view of all the circumstances, the restraining order will be continued until the cause can be heard on a full hearing.

PARKER v. CITY OF DETROIT et al.

(Circuit Court, E. D. Michigan, S. D. July 30, 1900.)

CONSTITUTIONAL LAW—STREET IMPROVEMENT—ASSESSMENT AGAINST ABUTTING PROPERTY—BENEFITS—CITY CHARTER.

The provisions of a city charter authorizing the common council of the city to contract for grading and paving its streets, and to assess the expense thereof, except that of cross walks and intersections of cross streets, against the abutting property, according to the extent of frontage on the street improved, without any reference to the question of benefits, and providing for notice only by publication in the newspapers of the completion of the assessment roll, and that it will remain in the office of the assessors for inspection, but providing no tribunal having authority to reduce the assessments or to review the amount thereof, except for the purpose of ascertaining if they are mathematically correct, are in conflict with the fourteenth amendment to the constitution of the United States, providing that no state shall **deprive any person of his property without due process of law**

In Equity.

Bacon & Yerkes, for complainant.

Charles D. Joslyn, Asst. Corp. Counsel, for defendants.

SWAN, District Judge. The bill in this cause was filed to set aside certain assessment and tax sales of complainant's land for the paving of Woodward and Blaine avenues, in the city of Detroit. It is conceded that the complainant is the owner of the property assessed, and is now and has been in actual possession of the same since August, 1893. The property consists of a house and lot on the corner of Woodward and Blaine avenues, with a frontage on Woodward avenue of 88.89 feet, and on Blaine avenue of 200 feet. The value of the premises is admitted to be \$10,000 and upward, and they have a rental value of \$800 per year. In December, 1892, proceedings were taken by the common council of Detroit for the paving of Woodward avenue; and in March, 1893, the contract was let for paving said avenue from Pallister avenue to the Joy road for the sum of \$55,634.78. An assessment roll, in four parts, for the expense of the work of grading and paving, was made by the assessors of the city of Detroit, and the property of complainant was assessed thereunder for the aggregate sum of \$491.44. The entire cost and expense of paving Woodward avenue from Pallister avenue to the Joy road, except the cost of the paving of intersections of streets and alleys, was assessed on the property abutting on Woodward avenue between said streets, pro rata, according to the frontage thereof on Woodward avenue. On the 25th day of March, 1897, complainant's property was sold for the taxes so assessed thereon, and was bid off to the city of Detroit for the term of 99 years. Redemption from this sale expired March 25, 1898. The city of Detroit now claims title to said lot under said sale for the said term of 99 years. In February, 1896, proceedings were taken to pave Blaine avenue from Woodward avenue to the Hamilton boulevard, and the paving was contracted for at the sum of \$11,462.32. Assessment roll No. 363, for defraying the expense of making improvements and paving Blaine avenue, was

made in four parts by the assessors of the city of Detroit. The amount assessed against the property of complainant on said lot for said paving was the sum of \$442.68. The entire cost and expense of paving Blaine avenue between Woodward avenue and Hamilton boulevard, except the cost of paving the intersection of streets and alleys, was assessed on the property abutting on Blaine avenue between the streets mentioned pro rata according to the frontage thereof on Blaine avenue. It appears from the proofs that complainant's lot has a frontage of 88.89 feet on Woodward avenue, and 200 feet on Blaine avenue, while the other lots on Blaine avenue assessed under said assessment roll for said paving are 127½ feet in depth, and have a frontage varying from 40 to 50 feet. On the 25th day of March, 1897, complainant's lot was sold for the taxes assessed on part 1 of the roll for paving Blaine avenue, and bid off to the city of Detroit for the term of 99 years. On March 28, 1898, the lot was sold for the taxes assessed on part 2 of the roll, and bid off to the city of Detroit for the term of 99 years. On the 19th day of April, 1899, the lot was sold for the taxes assessed on part 3 of said roll, and bid off to the city of Detroit for the term of 99 years. On the 16th day of April, 1900, the property was sold and bid off to the city of Detroit for the term of 99 years. On the first three sales of this lot for the paving of Blaine avenue the period of redemption has expired, and said sales have become absolute, and the city now claims title to said premises thereunder.

The provisions of the charter of the city of Detroit under which said paving was done, and assessment and sales had, are sections 33, 34, 35, and 43 of chapter 11 of the charter of the city of Detroit. Without quoting these at length, it is sufficient to say: That they authorize the common council to enter upon contracts for grading and paving and repaving its streets, and to cause to be assessed the expense of such work upon the lots and real estate made subject to such assessments, excepting the cost of repaving and cost of cross walks, and work at the intersection of cross streets. The lots and parcels of real estate situate on the streets, and fronting the portion ordered to be improved, are declared to constitute one local assessment district, unless subdivided into two or more by the action of the common council; and the cost and expense of such improvement, except for that part of the line for intersection of cross streets and alleys, and the cross walks at such intersections, and for repaving streets, alleys, and highways, shall be assessed ratably according to their extent of frontage on said lots, parts of lots, or parcels of real estate directly fronting on and within the local assessment district. Provision is made for a modification in exceptional cases of the assessment, but this provision has no concern with any feature of this case. The charter definition of the word "front" is as follows:

"Sec. 35. The word 'front' as used in this act shall be construed to mean that part of a lot or property or parcel of land which directly abuts on that part of the street to be improved. The board of assessors are required when necessary to make a list of all the lots or parcels of land constituting the local assessment district, with the name of owner or occupant of each, so far as can be ascertained, and the length of front of each lot or parcel fronting directly

on such improvement, which board shall then assess the cost and expense of the work chargeable as aforesaid upon the property of said lots ratably upon the separate lots and parcels of real estate, according to the length of front thereof. When the assessment roll is thus completed, said board shall give notice by at least five publications in the city papers that such roll is completed, and will remain in their office for twelve days from the first publication of said notice for the inspection of all concerned. At the expiration of said twelve days, said board shall after any needful revision and correction of said roll, sign the same and report it to the common council. Said council may then confirm the same, or may when it shall deem necessary refer the same back to said board for further revision or corrections; and when the same shall be correct to the satisfaction of said council, it shall confirm the same.

* * *

It will be seen from these sections of the charter that the common council is required to assess the entire cost of paving upon the property abutting on the street pro rata according to the foot front of such property, without any reference to the question of benefits. The only notice required to be given to the lot owner is that required to be given by publication in the city newspaper,—that the roll is completed, and will remain in the office of the assessors for the inspection of all concerned. The charter provides no tribunal having any authority to reduce the assessments or to review the amount thereof, except for the purpose of ascertaining that the apportionment of the total expense among the lot owners according to the foot front of their respective properties is mathematically correct, or, in other words, that the aliquot portion of the expense of the improvement has been correctly computed according to the frontage of the land upon the street improved. No provision is made for any hearing as to the extent of the benefit, if any, to the property by the improvement, or whether such benefit equals the assessment made upon the respective parcels of property. A restraining order was issued, and subsequently, upon notice, a hearing was had to the application for a perpetual injunction restraining the city from attempting to enforce the taxes and assessments on which the sales of complainant's premises were based, and from claiming title thereto under said sales. At the same time of the motion for injunction the case came on for hearing upon pleadings and proofs. It is the claim of complainant that the charter, in the provisions mentioned (that the entire cost of the street improvements, except for street and alley crossings, etc., shall be assessed against the abutting property by the fronting measurement, without any regard to the special benefits received by the property, or the relation to the cost of the improvement), is in conflict with the fourteenth amendment of the constitution of the United States, and is null and void; that such legislation constitutes taking of property without just compensation, and is a denial of equal protection of the law. The case of *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, is the foundation for this position, and seems fully to sanction it. Since the decision of that case the question presented has been fully considered in the following cases, among others, all holding that assessments like that here complained of are in conflict with the federal constitution: *Hutcheson v. Storrie*, 92 Tex. 685, 51 S. W. 848; *Loeb v. Trustees* (C. C.) 91 Fed. 37; *Fay v. City of Springfield* (C. C.) 94 Fed. 409;

Charles v. City of Marion (C. C.) 98 Fed. 166; Charles v. City of Marion (C. C.) 100 Fed. 538; Lyon v. Town of Tonawanda (C. C.) 98 Fed. 361; Cowley v. City of Spokane (C. C.) 99 Fed. 840,—and has been so well discussed by Judges Baker, Coxe, Thompson, Hanford, and Phillips as to leave little, if anything, to be said in support of their conclusions. The supreme court of Michigan has declined to depart from its decisions sustaining the constitutionality of like statutes providing for assessments per foot front, on the ground that the ruling in Baker v. Village of Norwood must be confined to the facts of that case, and has no application to an assessment for paving. With all respect for that learned tribunal, I am constrained, under the cases cited, to a different opinion of the decision, and to follow the supreme court of the United States upon the construction of the fourteenth amendment of the federal constitution. A decree, therefore, will be entered in accordance with the prayer of the bill, and a perpetual injunction will issue as prayed.

DAVISON et al. v. NATIONAL HARROW CO.

(Circuit Court, N. D. New York. July 24, 1900.)

No. 6,866.

INJUNCTION—THREATENING SUITS FOR INFRINGEMENT OF PATENT.

A court will not grant an injunction pendente lite restraining the defendant from sending circulars to agents and customers of complainant threatening suits for infringement of patents, so long as there remains a reasonable doubt as to the propriety of such course, and where the answer denies all allegations of fraud, malice, and bad faith, and asserts the truth of the matters contained in such circulars, and that they were issued in good faith.

In Equity. On motion for preliminary injunction.

R. R. Martin, for complainants.

E. H. Risley, for defendant.

COXE, District Judge. This is a motion for an injunction restraining the defendant from sending circulars threatening the customers of the complainants with infringement suits. The views of the court upon the point in issue have been so often stated, not only in writing but orally in the presence of counsel engaged in the prolific and apparently endless litigation between these parties, that it is unnecessary to reiterate them. There is no change so far as the law is concerned except the contribution recently made by the circuit court of appeals of the Third circuit in the Farquhar Case, 102 Fed. 714. This decision is authority for the proposition that a bill charging the issuing of false, fraudulent and malicious circulars solely for the purpose of destroying the business of the complainants cannot be held bad on demurrer. In the Adriance Platt Case (C. C.) 98 Fed. 118, this court took substantially the same view, but there is a manifest difference between overruling a demurrer and granting an injunction pendente lite. In the present case an answer has been interposed de-

nying the material allegations of the bill and alleging the truth of the circulars in question and the good faith of the defendant in sending them out. Indeed, it would seem that they were directly induced by a statement inserted by the complainants in a trade paper describing a litigation in Michigan which resulted in their favor and against the National Harrow Company. This statement in no way minimizes the character and scope of the complainants' victory. The decision is pronounced "very far-reaching" and as settling the question that the complainants' harrows do not infringe the defendant's patents. If it be true that in an action upon one patent the question of infringement was determined as to a hundred patents it is clear that the complainants were correct in describing the decision as "far-reaching." It is, however, safe to assume that the learned judge confined his decree to the patent in issue and that the carrying power of the decision has been somewhat overestimated by the complainants. The statement concludes with the following conciliatory advice:

"If the soothing powder which Judge Swan has administered to the National Harrow Company does not lull them into a Rip Van Winkle sleep and they issue more of their circulars to the trade, please consign them to the waste-paper basket and remember that 'barking dogs do not bite.'"

The judge's powder failed to produce the anticipated soporific condition. On the contrary, the decision, coupled with the liberal construction thus placed upon it by the complainants, produced an exactly opposite effect. The agents of the defendant, who manage its department of literature, have ever since been suffering from an attack of apparently incurable insomnia. On previous occasions they have shown some little familiarity with the art of advertising, but never before have they been so perniciously active as during the past few months. Not only have they kept up a well sustained system of "barking," but they have done some "biting" as well, in the form of suits against 9 or 10 alleged infringers of one of the defendant's patents. The circulars and letters, which, at the time this action was commenced, were descending upon the farmers from a seemingly inexhaustible supply are all, substantially, of the same purport. They contain an assertion that the Davison harrow infringes the defendant's patents and particularly the patent granted to Reed and Clark. Dealers who purchase the Davison harrow are threatened with prosecution. A list of those against whom suits have been commenced is given and also a list of defendant's licensees with a statement that harrows can be bought of them which are free from any charge of infringement. One of the complainants' customers has received 13 of these warnings, and that substantial duplicates of the same notice have been sent again and again to the same persons is not disputed. Although it would seem that the defendant is fast reaching the point, if indeed it has not already reached it, where its conduct may be deemed unnecessarily harsh and oppressive, the court should hesitate to interfere by injunction so long as there remains a reasonable doubt as to the propriety of such a course. In these causes the court is embarking, with only a crude chart, upon a newly-discovered sea filled with rocks and dangerous shoals, and should, therefore, proceed with the utmost caution. The court is not

convinced that at present a case for an injunction is presented. The long-continued controversy between these parties, which has for years occupied the attention of the court, both at law and in equity, has now reached a condition when it can be speedily and definitively settled. The defendant insists that the complainants infringe its valid patents. The complainants deny this. Among the suits recently commenced several are in this district and one is against parties residing in the county of Oneida. The complainants can select any one of these suits and press it to a final hearing. Then the vexed questions of patentability and infringement will be settled so that all parties will know their rights. Pending this determination both parties should hold their peace. The defendant is no longer under obligation to inform dealers of its position. If they do not understand the situation now the sending of additional circulars will not enlighten them. In the last notices sent out the defendant says:

"We have spent so much time and money in notifying dealers about these infringements that we feel that no dealer can now be handling them innocently, and we have determined henceforth to sue any dealer found handling these infringing harrows wherever they are found."

The court fully agrees with the defendant that the time for words has passed and the time for action has arrived. No legitimate purpose can now be accomplished by reiterating these statements and if they are continued the presumption will be strong that this is done with the intent to harass and annoy the complainants and their customers.

The peculiar circumstances attending this controversy make it proper to indicate what, in certain conditions, may be the action of the court in the future. Should the defendant continue to issue circulars, similar to those in proof, pending the trial of the infringement suit, it is not improbable that an injunction will be granted provided the complainants refrain from publishing provocative statements. If neither party places any obstacle in the way a decision of the infringement suit should be reached within six months from this date and during that period, at least, the parties should desist from appeals to the public. If the defendant violates this reasonable armistice the motion may be renewed upon proofs of the facts above suggested.

BIDWELL et al. v. HUFF et al.

(Circuit Court, S. D. Georgia, W. D. July 7, 1900.)

1. CREDITORS' SUIT—MULTIFARIOUSNESS OF BILL.

A creditors' bill, the general purpose of which is to subject assets of the principal defendants to the valid liens of their creditors, is not multifarious because, as incidental to such relief, it also seeks the cancellation of tax deeds on portions of the property, the equitable apportionment of the taxes for which such sales were made, as between the portions of the property covered by different liens, and to set aside special assessments made by a city for street improvements, alleged to be unconstitutional and void, and to that end joins as defendants the officers of the city and others interested in such tax deeds.

2. SAME—GROUNDS OF JURISDICTION.

A creditors' bill may be maintained by a judgment creditor where his remedy at law is ineffectual, or where it is obstructed by an incumbrance or by a fraudulent transfer, and for the purposes of such suit the return of an execution issued on his judgment *nulla bona* is conclusive that his remedy at law is ineffectual.

3. EQUITY JURISDICTION—FEDERAL COURTS—SUIT TO ENJOIN—ENFORCEMENT OF TAX.

Where it appears from a bill filed by a mortgage creditor that the city in which the property is situated has levied a special assessment thereon for street paving, equal to one-fourth the value of the property, under a statute and ordinance which take no account of the question of special benefits, and afford the property owner no opportunity to have the question of benefits or their extent judicially determined, and that the validity of such statute has been upheld by the supreme court of the state; that in fact the improvement did not increase the value of the property, and, if the assessment is enforced, it will deprive the complainant of his security,—the bill shows equities which a federal court will protect by injunction to restrain the enforcement of such assessment, and in such case it is not necessary that the complainant shall pay or tender any part of the assessment.

4. JURISDICTION OF FEDERAL COURTS—CREDITORS' SUIT—AMOUNT INVOLVED.

Where one complainant in a creditors' suit in a federal court has recovered a judgment against the defendant exceeding \$2,000 in amount, other creditors holding judgments for smaller amounts may unite with him as complainants, or may intervene.

5. CREDITORS' SUIT—JUDGMENT AS FOUNDATION.

A judgment in a state court is a good foundation for a creditors' bill in a federal court.

In Equity. On demurrer to bill.

William L. Bidwell, of Connecticut, who sues in his own right, and Franklin E. Woodford, of New York, as executor of Emerson A. Phelps, late of Connecticut, have brought this bill against W. A. Huff, individually and as trustee, against the mayor and council of the city of Macon, and against Edison Huff and A. P. Herrington, all of whom are citizens of this district. The plaintiffs are judgment creditors of W. A. Huff, and they sue for themselves and other creditors who may intervene. The bill alleges that W. A. Huff, for himself and as trustee for his minor children, Mattie J. C. Huff (now Jennings) and Edison Huff, on the 1st day of August, 1893, executed to Emerson A. Phelps a deed, in accordance with the provisions of section 1969 of the Code of Georgia, to secure a debt therein described, by which deed he conveyed certain lots in the city of Macon. These lots are fully described in the deed and in the bill. The deed, in so far as it related to the rights of the cestuis que trustent, was made by authority of the superior court of Bibb county, having jurisdiction to order the same. Emerson A. Phelps having died, the plaintiff Woodford, being appointed executor, brought suit as such against Huff individually, and against his several cestuis que trustent, in the city court of Macon, and on the 11th day of December, 1897, obtained a judgment thereon for \$2,400 principal, with interest and costs of suit, which judgment is a general lien on all the property owned at its date by W. A. Huff as an individual, and on all property to which he held title as trustee for his children. In addition to this general lien, the judgment, conforming to the law of the state, constituted a special lien, having the date and dignity of the deed above mentioned, which had been executed on the 1st of August, 1893, on all of the said lots which are therein described. An execution corresponding with said judgment, to enforce this general and this special lien, was issued on the 11th day of December, 1897. It was directed against all the property of W. A. Huff, and W. A. Huff as trustee, and especially against the parcels of land in the city of Macon which had been pledged to secure the debt. Thereafter this execution was placed in the hands of L. B. Herrington, deputy sheriff, with direction to execute the same. This officer, after due

search, made his return of nulla bona on the writ of fieri facias. It is alleged that this failure of the levying officer to enforce the execution is ascribable to certain illegal tax sales, and other illegal acts to be hereinafter mentioned. It is further alleged that on June 1, 1893, W. A. Huff executed and delivered to William Bidwell a mortgage upon a city lot on the corner of Cherry and Fourth streets in Macon, fronting 105 feet on Cherry and 210 feet on Fourth. This was to secure a debt for \$1,714.12. This, also, was foreclosed by the general and special judgment permitted by the Georgia procedure. On this, also, an execution was issued on the 16th day of November, 1897, to be levied on all the property of W. A. Huff, and especially on his undivided five-sevenths interest in the city lot upon which the mortgage had been given. This execution was placed in the hands of V. A. Menard, deputy sheriff, who likewise made the return of nulla bona thereon. It is further charged that for several years (particularly, from a period soon after the loans above mentioned were made) W. A. Huff, as an individual and as trustee, had failed to pay off the taxes on this property and on his other property; had permitted *fi. fas.* to be issued, and grossly excessive levies to be made thereon, and the property to go to sale under such levies. This was true, notwithstanding the fact that, in the obligations made to secure the debts of the complainants, Huff had covenanted that he would pay all taxes as they should fall due on this property. So far from keeping these covenants, he has, the bill alleges, cast the entire burden of all his taxes on the particular property conveyed or mortgaged to complainants. The bill further alleges that, after accumulating some \$1,600 of tax judgments against the lot on the corner of Fourth and Cherry streets, the mayor and council of the city of Macon have recently imposed a paving tax or assessment on that property for the sum of \$2,060.61, and a further special assessment of \$83 for sewer connection, and an additional sum for curbing, which complainants are not able to state. The burdens from city taxation and assessments on this property amount in the aggregate to about \$4,000, in addition to the state and county taxes, and, it is alleged, will consume the value of the property, and destroy the lien held by complainant Bidwell by virtue of his mortgage, and amounts to a confiscation of the property pledged to him, for the reasons following: It is alleged that the special assessment for street paving was not only in substantial excess of any special benefits accruing to the property, but was without any special benefit thereto, and was in effect a taking, under guise of taxation, of private property for public use, without compensation. This assessment was made by the city under a rule which excluded any inquiry as to specific benefits to the property, and was in fact not based on any inquiry into that question, or upon any judicial ascertainment that such benefit would or might accrue to said property; nor does the statute under which the assessment was made, or the ordinance of the city, furnish to the property holders any process of law by which the question of the extent of the benefit, if any, to said property could be raised or judicially investigated. The city has claimed to act by virtue of an act of the general assembly of the state of Georgia approved December 11, 1896, and especially under the seventh section thereof, which provides that the mayor and council of the city of Macon shall have power and authority to assess one-third the cost of grading, paving, constructing side drains, cross drains, crossings, and otherwise improving or repairing the street, on the real estate abutting on each side of the street improved. The real estate abutting on each side shall pay two-thirds of the entire cost, and any street-railway company or other railroad company having tracks running through or across the streets of said city shall be required to pave or otherwise improve said street as the mayor and council may prescribe, the width of its track, and for one foot on each side of every line of track now in use or that may hereafter be constructed by said company, and, in addition, that the entire cost of paving and otherwise improving sidewalks, including two-thirds of the necessary curbing for the same, may be assessed on the real estate abutting on the side of the street on which the sidewalk is so improved, and that the mayor and council shall have power to prorate the cost on the real estate according to its frontage on the street or portion of the street so improved, and that the assessment on each piece of real estate shall be a lien from the date of the passage of the ordinance providing for the work and

making assessment, and that said lien shall have rank and priority of payment next in point of dignity to the liens in favor of the city of Macon for taxes due said city. It is further alleged that the property owner is given no voice as to whether such improvement shall be made, or as to the kind of improvements or as to the cost thereof, or as to whether he deems the same beneficial to his property, nor do the ordinances of the city afford any such privilege, but, on the contrary, they impose on the property owner one-third of the entire cost of paving the street opposite his property, without any regard to benefit or supposed benefit that might result therefrom. The bill states that, since this property fronts 105 feet on Cherry street and 210 feet on Fourth street, it has a total frontage of 315 feet; that there is no building or other improvement thereon, except a dilapidated negro house, used as a negro boarding house, and which pays but a small rental; that the paving has not made it in any particular more desirable, or increased its rental value, or given it any value which it did not possess before, and yet notwithstanding these facts the assessment for the paving on Fourth street was \$1,252.51, and on Cherry street \$603.30,—the cost being taxed according to street frontage, and not otherwise. By reference to other vacant properties contiguous or opposite the lot in question, which are vacant and not rentable, or which have sold for less than their original cost, the complainants draw the conclusion that the pavement with Belgian blocks has not benefited the locality in any sense; and this is recognized, the bill states, by the mayor and council of the city of Macon, for before the paving assessment was made the sworn city appraisers, for many years, had assessed the property for \$15,000, and since that time the city assessors, acting for and on behalf of the city government, have assessed the property for \$10,000. Thus the complainants seek to make it appear that, although there has been no physical change in the property whatever, it has lost \$5,000, namely, one-third of its value, since the said paving assessment was made. It is alleged that this reduction by the city to the amount of one-third of the assessed value of this property is no part of any scheme to reduce assessments; for, since it is true that the city is indebted to the limit allowed by the constitution of the state of Georgia, and can only raise its necessary revenues by assessing property to its full value, and even beyond its value, so far from reducing valuations within the past few years, the city tax assessors have generally increased the valuations placed by them on property throughout the city. The bill alleges that the last special assessment of some \$2,000 for taxes against said property for said street paving, in addition to the burdens which it already had to bear, has destroyed such value as was left it, and has now rendered the same unmarketable, and amounts in effect to confiscation of the real estate pledged to secure his debt. It is further alleged that: The said W. A. Huff has practically abandoned this property to its burdens, and has made no effort to pay off the load of debt, taxes, and special assessments charged against it. He has taken no step to defend the property against the illegal assessment. He has failed and refused to pay off the taxes annually falling due thereon. He has permitted tax *fi. fas.* issued against him, not only on this property, but on his other property, both inside and outside the city of Macon, to be levied on this particular lot, and although such levies were grossly excessive, and sales thereunder illegal, he has taken no steps to prevent said sales. The mayor and council now claim a lien on said property for paving assessment, and, unless restrained, will proceed to cause the property to be sold, to the irreparable injury of complainants, and the destruction of the mortgage and lien thereon held by complainant Bidwell. In view of their rights as creditors holding liens, complainants allege that the paving assessments made in the manner described are in violation of their rights under the constitution of the United States, and will have the effect of depriving them of property and property rights without due process of law, contrary to the provisions of the fourteenth amendment thereto; that complainant Bidwell will be deprived of his special lien, and both complainants of the lien of their judgment thereon.

It is, moreover, alleged that on the 24th of May, 1894, the mayor and council caused a city tax *fi. fa.* against W. A. Huff amounting to \$225 to be levied on this particular lot, then assessed at \$15,000, which was sold, and they became the purchaser for \$230.75; that this levy was grossly excessive; that

the lot was easily capable of division into parcels, any one of which could have been offered for sale without injury to the rest of the property, and would have been safely worth more than the tax, interest thereon, and costs; for these reasons, that the sale was void and passed no title. And complainants pray that the mayor and council shall be compelled to produce their tax deed in court, to be surrendered and canceled. They proffer a willingness for the property to be sold, and out of the proceeds that said tax, and all other taxes which are legal and proper charges on said property, to the extent that the same ought in equity to be apportioned against the same, be paid, and that the overplus may be applied to the debts and liens. The bill, however, points out the fact that, although the city of Macon sold the property at the time and in the manner aforesaid, they have continued to assess it for taxes as the property of W. A. Huff, and have continued to issue *fi. fas.* against it, and caused assessments and charges to be made thereon, thus recognizing that their title is invalid. The bill further alleges that W. A. Huff is the owner of a large amount of valuable real estate outside of the city of Macon, and that for several years all the taxes assessed by the county of Bibb against him individually and against him as trustee have been levied on the lot in the city on the corner of Fourth and Cherry streets. This is true, notwithstanding the value of the property outside the city considerably exceeds in value the property owned by said defendant inside the corporate limits. The bill charges that this has been part of a scheme and purpose of Huff to cause his whole taxes to be charged against this property, so as to relieve his other property therefrom. This, it is said, is contrary to equity and good conscience, and directly in violation of the contract of Huff that he would pay all taxes, and protect the lien of Bidwell's mortgage against the lien of the taxes. These levies have likewise been grossly excessive, and under such levies the property has been sold and purchased at the sale by the county of Bibb, and thereafter, by the procurement of the said Huff, the said county of Bibb conveyed said land to other parties in complicity with Huff, and on his procurement, for the purpose of placing the same beyond the reach of complainant's lien. Such conveyances are now held by Walter Huff, son of W. A. Huff aforesaid, and A. P. Herrington. These parties are charged to be in complicity with W. A. Huff to hold said liens, as part of a scheme and purpose to hinder, delay, and defraud complainant, and are fraudulent and void against complainants and other creditors of said W. A. Huff. And complainants pray that the court may so declare, and that said sales and the tax title thereunder may be decreed to be surrendered and canceled. Complainants allege they are without remedy, save in a court of equity, by reason of the fact that they cannot redeem the property without paying off taxes which ought, in equity and good conscience, to be chargeable against and collected out of other property of Huff, and that they should not be called upon to assume burdens which in equity and good conscience are not their own. The bill charges: That the land mentioned and described in the deed to secure the debt made by W. A. Huff, individually and as trustee, to Emerson A. Phelps, in his lifetime, and on which complainant Woodford, as executor, holds a special lien, has from time to time been sold at tax sales under tax *fi. fas.* issued, some of them for city taxes, and some for state and county taxes, against said W. A. Huff, and W. A. Huff trustee, during several years past. That said tax sales were all of them void, by reason of the fact that the levies were grossly excessive, and that the property could have been readily subdivided, and a portion of it sold for a sufficient sum to pay said taxes, and that the sales were illegal and passed no title. The mayor and council of the city of Macon became purchaser at various city tax sales, and now claims to own said land so purchased. The bill prays that said deeds procured and held in this manner shall be likewise produced in court, to be surrendered and canceled. Nevertheless they aver their willingness to do equity, and pray that the court may decree a sale of all the said property by a receiver to be appointed, and that all valid taxes (both city tax and state and county taxes) remaining unpaid, together with lawful interest thereon, shall be paid out of the proceeds of such sale. The same averments are made with regard to different tax sales for state and county taxes where the property was bid in by the county commissioners of Bibb county, and tax deeds made to them, and thereafter that the county com-

missioners, acting for said county, have sold the lands, or most of them, to persons acting in complicity with the said W. A. Huff, with intent to hinder, delay, and defraud complainants, which persons so acting in complicity, when discovered, complainants pray leave to make parties hereto, and by fit and proper words to charge them as defendants to this bill.

The bill points out and describes a large body of lands contiguous to the city of Macon, aggregating 305 acres, which land belongs to W. A. Huff, individually and as trustee, and which has been conveyed to the Scottish-American Mortgage Company, Limited, of Edinburgh, Scotland, to secure a debt of \$15,000, besides interest. Complainants claim that, since this land was pledged to secure a debt, so long as the debt remains open and outstanding the legal title to the property is in the grantee of said conveyance, and the same cannot be levied on under executions at law. But complainants allege that they are entitled to reach the equity of redemption in said land, and can only do so by the aid and interposition of a court of equity. Further, it is stated that W. A. Huff individually is seised and possessed of other property; that by reason of deeds to secure debts on various of said properties, as well as tax deeds and other incumbrances, complainants cannot reach and subject the same to their debts, except through the aid of this court. The bill charges that Huff is insolvent; that the taxes levied under his direction against the property pledged to secure their debts were in large part properly chargeable against all of his other property, and ought, in equity and good conscience, to be apportioned thereon. For this purpose they pray that an accounting may be taken, and that the taxes may be apportioned against the different properties upon which the same are chargeable, and that the assets of the said W. A. Huff may be marshaled and distributed among his different creditors according to their rights and equities, liens and priorities; that, in view of their special liens and general liens, they are entitled to the aid of a court of equity. Since their remedies at law have proved unavailing, they are entitled to the aid of a court of equity to reach, all and severally, the assets of said W. A. Huff; and they pray that this bill may have the effect of a creditors' bill, not only for themselves, but for all the other creditors of said W. A. Huff who may intervene and be made parties thereto, and be chargeable with their portion of the cost of the proceeding. The bill alleges that Mrs. Mattie J. C. Jennings (formerly Mattie J. C. Huff) resides outside of the state of Georgia, but is represented by her trustee. It prays that she may be made a party, if necessary to an adjudication of the matters set up in the bill.

Waiving discovery and answer under oath, the bill prays further: That a writ of injunction may issue, restraining the mayor and council of the city of Macon from executing the levy or seeking to collect the pavement assessment aforesaid charged by them against the aforesaid lot No. 4 in square 24 in the city of Macon, and that said assessment be perpetually enjoined; that said decree may declare that said pavement assessment is void, illegal, and in violation of the rights secured by the constitution of the United States, and to be a taking, under the guise of taxation, of private property for public use without compensation, and is in violation of the fourteenth amendment to the constitution, providing that no state shall deprive any person of property without due process of law; that the several tax deeds executed by the city marshal in the case of city taxes, and by some of the deputy sheriffs of Bibb county in the case of state and county taxes, and the tax sales mentioned in the second and fourth paragraphs of the bill, of any portions of such property, and the sales and levies thereunder, may be decreed to be void, and that the deeds may be decreed to be produced in court and surrendered and canceled; that the liens and burdens of taxes chargeable against W. A. Huff, and W. A. Huff, trustee, or W. A. Huff jointly with other parties, may be apportioned and distributed, according to equity and good conscience, against the property chargeable therewith, and may be redistributed and enforced out of the property, and be collected out of such funds and proceeds of such sales as may be according to equity and good conscience; that the assets of said W. A. Huff individually, and W. A. Huff as trustee, may be marshaled, and that all the different liens, mortgages, and judgments, deeds to secure debts, tax liens, and other liens, equities, and priorities, may be enforced and collected according to equitable principles, so as to charge against each per-

son's property only such burdens as may be properly chargeable against the same; that the court appoint a receiver to take charge of and hold all of the above-described property, as well as any other and all other assets that may belong or be owned or possessed by the said W. A. Huff, and W. A. Huff as trustee; that he may convert said property into money, under the order of the court, and may distribute the proceeds according to the liens and priorities held and enjoyed by complainants and such other creditors as may become parties to the bill, as well as in payment of such taxes as may be chargeable against such property, and that the receiver shall have power to redeem property from tax sales, if according to equity and good conscience; and that the proceeds be distributed as may be ordered and decreed by this court. These are followed by a prayer for general relief, and the usual prayer for subpoenas.

The defendants have demurred,—all of them upon the ground that the bill is multifarious, and the mayor and council of the city of Macon upon the further ground that the plaintiffs have sufficient remedy at law, and because the complainants are not property owners in the city of Macon, and because there is no privity between the city and the complainants, and that complainants were not abutting property owners upon the streets of the city of Macon, and are not proper parties to complain of any defect in an ordinance of the city of Macon or in the manner of its enforcement, and because the bill fails to allege that the defendant is insolvent. By his demurrer, William A. Huff contends that the claims of the complainants should not be joined; that each had a special judgment, which they have not made a proper effort to enforce, and that this must be done before the creditors' bill can be maintained; that there is a complete and adequate remedy at law; and, further, that the assessment for paying made by the city postdates the mortgage of William L. Bidwell, and that the lien of said mortgage is superior to said lien for paving assessment; that the court has no jurisdiction to hear the complainant William L. Bidwell, for the reason that the principal of his claim does not exceed in amount the sum of \$2,000; because complainants' bill is without equity; because a creditors' bill is ancillary to a judgment at law, and, because these judgments were obtained in the state court, that they are foreign judgments, and a United States court has no jurisdiction of a creditors' bill founded thereon; that the complainants have no right to have the accumulation of taxes apportioned between parcels of property on which they were chargeable; that there is a misjoinder of parties and subjects-matter; and because the bill fails to show that the defendants are insolvent.

Hall & Wimberly, for complainants.

Alexander Proudfit and Anderson & Grace, for defendant W. A. Huff, individually and as trustee.

Minter Wimberly, City Atty., for mayor and council of city of Macon.

SPEER, District Judge (after stating the case as above). The important grounds of the demurrer are that the bill is multifarious, and that there is a total want of equity to sustain it.

With regard to the first ground, it is conceded by counsel for the defendants that a bill is not multifarious unless the matters involved are so dissimilar that the court will not be justified in permitting them to be litigated in one proceeding. "It is true that no rule can be laid down as to what constitutes multifariousness, as an abstract proposition. Each case must depend on its own circumstances, and the court must exercise a sound discretion." *Mitt. Ch. Pl.* par. 181, note. "A demurrer of this kind will hold only where the plaintiff claims several matters of different natures, but when one general right is claimed by the bill, though defendants have separate and distinct rights, a demurrer will not hold on this ground." *Id.* The proper

inquiry here is this: Is there any relief sought by this bill which is broad enough to comprehend the entire subject-matter of the averments, and are the defendants named necessary or proper parties thereto? This inquiry would seem necessarily to include the other question made by the demurrer, namely, is there equity in the bill?

The plaintiffs are judgment creditors. Their claims constitute liens recognized by a court of equity, which entitle them to relief therein, when a court of law does not afford a remedy in all respects as adequate and complete as that afforded by a court of equity. The controlling principle is stated by Mr. Justice Field in *Jones v. Green*, 1 Wall. 330, 17 L. Ed. 553, as follows:

"A court of equity exercises its jurisdiction in favor of a judgment creditor only when the remedy afforded him at law is ineffectual to reach the property of the debtor, or the enforcement of a legal remedy is obstructed by some incumbrance upon the debtor's property, or some fraudulent transfer of it."

It will be observed, in this authoritative statement of the law, that the jurisdiction in equity to enforce the rights of judgment creditors in such cases may rest upon all or either one of three grounds: Where the remedy at law is ineffectual, where it is obstructed by an incumbrance, or where it is obstructed by a fraudulent transfer. This case is an instance where all three of the grounds thus enumerated by the supreme court are discoverable. That the remedy at law is ineffectual to subject the property of the debtor to the payment of these debts is apparent from the failure or refusal of the levying officer to enforce the execution. This appears by his return of *nulla bona*. The execution is the concluding and supreme effort of the court at law. In the case of *Jones v. Green*, 1 Wall. 330, 17 L. Ed. 553, which was a bill filed by judgment creditors to subject property of their debtor held by a third party upon a secret trust for him, to the satisfaction of their judgment, the supreme court, speaking through Mr. Justice Field, used this language:

"The execution shows that the remedy afforded at law has been pursued, and is, of course, the highest evidence of the fact. The return shows whether the remedy has proved effectual or not, and, from the embarrassments which would attend any other rule, the return is held conclusive."

It is, however, said in support of the contention that the bill is without equity, that the complainants could have enforced their judgments; that the value of the property upon which they have special liens is ample to pay off the debts. And it is said that a court of equity will not take charge of the assets of the debtor unless the creditor has first utilized the property pledged for his debt, as far as it will go towards its satisfaction. A sufficient reply to this is also afforded by the return of *nulla bona*. In *Jones v. Green*, *supra*, the supreme court announces that "the court will not entertain inquiries as to the diligence of the officer in endeavoring to find property upon which to levy." It is clear, then, that the remedy which the law affords these creditors has proven ineffectual. It is also true that the bill recites a number of incumbrances, such as tax sales on levies alleged to be grossly excessive, and tax sales and deeds alleged to be fraudulent, which constitute incumbrances upon the debtor's property, and which obstruct the enforcement of legal remedies.

The demurrer admits these averments to be true. It follows that the case complies in every essential with the requirements of a creditors' bill, as these are defined by the supreme court of the United States.

A most important averment in the bill is that there has been a practical confiscation of the property to which plaintiffs' liens attach, under the guise of unconstitutional assessments for paving purposes imposed by the mayor and council of the city of Macon. The city is made a party to the bill, and an injunction prayed against it, not only to enjoin the collection of these paving assessments, but also to have a decree for the cancellation of deeds to the property of the debtor held by it, which deeds, it is alleged, as previously stated, were obtained in such fraudulent manner that a court of equity will declare them as of no effect, and which nevertheless obstruct the remedies at law. It appears from the averments of the bill that the city assessment against lot 4, on the corner of Cherry and Fourth streets, amounts to about one-fourth of the entire value of the property. It further appears that this paving burden was not only in substantial excess of any special benefits accruing therefrom to the property, but was so far without any special benefit thereto that immediately after the assessment, although there has been no change whatever in the physical conditions, the city assessors estimated its value as precisely one-third less than the sum at which it was assessed before the burdens for paving were imposed thereon. This is evident from the fact that the lot was estimated by the assessors as worth \$15,000 before the paving assessments were made, and only \$10,000 since then. The bill further alleges that neither the statute under which the assessment was made, nor the ordinances of the city, afford to the property holders any process of law by which the question of the extent of benefit, if any, to said property could be raised or judicially investigated. The property holders are simply assessed one-third the cost of grading, paving, constructing side drains, cross drains, crossings, and otherwise improving or repairing the street, on the real estate abutting on each side of the street improved; and these assessments on each side of the street paved are prorated between the property owners according to the frontage of each lot, whether it sustains the humble and profitless tenement of the poor, or structures of imposing and costly character, affording lucrative rentals to the prosperous. The effect of this assessment, if legal, is to create a lien upon the lot in question superior in dignity to the liens of plaintiffs, and therefore, it is insisted, will deprive them of the security for their debts. Moreover, it will be seen upon examination that not only do the statute of the state authorizing the assessment, and the ordinance of the city, afford to the plaintiffs no right to have the constitutional question involved determined, but also that the appellate court of the state of last resort, namely, the supreme court of Georgia, under similar facts, has denied to the citizen judicial relief from municipal exactions of this sort, even where no benefit inured to the property assessed. In the case of *Hayden v. City of Atlanta*, 70 Ga. 817, that court held that special benefit to the property holder was not regarded as essential to maintain a pavement assessment of this character, and that the

whole question of benefit, whether general or special, is left to the legislative discretion; that the power resides in the state and the legislature to confer upon municipal corporations the right to assess property fronting on the streets; that there is no limit imposed by the constitution of the United States on this power; and that it rested upon the sound discretion of the legislature. This decision was followed and approved in other cases. These cases were decided before the learned and distinguished jurists composing the supreme court of Georgia could have enjoyed the light afforded by the decision of the supreme court of the United States in *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 186, 43 L. Ed. 443, decided in 1898. It is not to be doubted that since the question involves the construction and application of that provision of the fourteenth amendment to the constitution of the United States, which provides, "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," and of that provision of the fifth amendment which provides, "nor shall private property be taken for public use without just compensation," and since this paving assessment is made effective by the state, the supreme court of Georgia would now take pleasure in hastening to adopt as its own the decision of the supreme court of the United States prohibiting similar action by the state of Ohio. It is true, however, that the supreme court of the state has not as yet reconsidered its rulings on this important topic, and that we must be controlled by the supreme court of the nation. The rule as established in *Norwood v. Baker* is perhaps sufficiently stated in the syllabus, as follows:

"The principle underlying special assessments upon private property to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore that the owners do not in fact pay anything in excess of what they receive by reason of such improvements."

And further:

"The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation."

The court, however, qualifies this principle by the following statement:

"But, unless such excess of cost over special benefit be of a material character, it ought not to be regarded by a court of equity, when its aid is invoked to restrain the enforcement of a special assessment."

In that case, as in this before the court, the assessment of the property was by the front foot bounding and abutting upon the improvement. In that case, as in this, the assessment was made a lien and charge against the abutting property owned by the plaintiff. There, as here, the plaintiffs proceeded upon the ground that the assessment in question was in violation of the fourteenth and fifth amendments to the constitution, above quoted. And it will therefore be profitless to attempt any elaboration of the doctrine so clearly announced by the supreme court of the United States. We may say,

however, that it does not in any sense trespass upon the legitimate province of the state legislature. "But," observes Justice Harlan, delivering the opinion of the court, "the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go, consistently with the citizen's right of property." Then, stating the principle as announced in the syllabus, the learned justice continues:

"It is one thing for the legislature to prescribe it as a general rule that property abutting on the street opened by the public would be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum, representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the same was fixed in excess of the benefits received."

It is difficult to perceive any "benefit received" by the owner of lot 4 in square 24, on the corner of Cherry and Fourth streets, in the city of Macon, when the special assessment, as we have seen, amounts to one-fourth of its entire value, and when the imposition of the assessment by the city results in an immediate reduction of one-third of its general taxable value. The city would seem estopped from denying these remarkable facts, for they were ascertained from the finding of its sworn assessors. On the contrary, it not only cannot be denied with any semblance of reason that the excess of these paving charges over special benefits to the property holder are "of a material character," but they are apparently so extravagantly excessive as to shock the mind accustomed to constitutional and rational methods of municipal government. What people in time of peace would tolerate the unconstitutional confiscation of one-fourth of their holdings for general governmental purposes? It is true, however, that through long years of misgovernment, extortion, and oppression, the despairing taxpayer will sometimes all unresistingly submit to unlawful local exactions, which, if they were imposed by the general government, would likely result in revolution.

It is, moreover, urged that a court of equity will not intervene to restrain the collection of taxes, even though these may be illegal. This objection, it is true, is expressive of the general rule; and it is also true that a court of equity will not ordinarily relieve a party against an assessment for taxation unless he tenders or offers to pay what he deems or what is seen to be due. There is, however, an established exception to this rule, and the case under consideration is clearly within its operation. It is this: That where a rule or system of valuation is adopted by those whose duty it is to make the assessments which is designed to operate unequally and to violate a fundamental principle of the constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, then equity may properly interfere to restrain the operation of this unconstitutional exercise of power. Mr. High, in his work on Injunctions, declares that no principle is more firmly established than that

requiring that a taxpayer who seeks the aid of an injunction against the enforcement or collection of a tax has to pay or tender the amount which is conceded to be legally and properly due, or which is plainly seen to be due; but he also says:

"It is held, however, that the general rule requiring payment or tender of the amount actually due, as a condition to equitable relief against the illegal portion of the tax, has no application to the case where the entire tax fails by reason of an illegal assessment. And in such case an injunction is proper, without payment or tender of any portion of the tax, since it is impossible for the court to determine what portion is actually due, there being no valid or legal tax assessed."

See, also, *Village of Norwood v. Baker*, 172 U. S. 292, 293, 19 Sup. Ct. 186, 43 L. Ed. 443.

Since it is true that in this case the mayor and council of the city of Macon based their entire assessment upon frontage on the streets to be paved, without any regard to benefits to the property thus assessed, the entire tax must fail. It was practically a confiscation of the values thus exacted from the property holder, the proceeding was unconstitutional, the entire assessment is void, and it is proper for the court in this case to grant its injunction for the protection of the parties complaining. Indeed, it is conceded by the counsel for all the parties, save the city of Macon, that this paving assessment is null and void. To quote the language of Mr. Anderson in his forcible argument for the defendants:

"Our contention is that the paving assessment, just as set up in this bill, is absolutely void and contrary to the constitution of the United States."

But he contends that it is so distinctly void—that its nullity is so apparent on its face—that it does not create a cloud upon their title or over their rights, which the plaintiffs need seek the aid of the court to remove. Now, it is clear that this tax, if valid, is a lien upon the land; and said Mr. Justice Brown, for the supreme court, in *Ogden City v. Armstrong*, 168 U. S. 236, 18 Sup. Ct. 103, 42 L. Ed. 452:

"If a tax is a lien upon lands, it may then constitute a cloud upon title; and one branch of equity jurisdiction is the removal of apparent clouds upon the title which may diminish the market value of the land, and possibly threaten a loss of it to the owner." "It is doubtless true," the court continues, "that it has been held by this and other courts that if the alleged tax has no semblance of legality, and if upon the face of the proceedings it is wholly unwarranted by law, or for any reason totally void, as disclosed by a mere inspection of the record, such a tax would not constitute a cloud, and that the jurisdiction which is exercised by courts of equity to relieve parties by removal of clouds upon their titles would not attach. But when the illegality or fatal defect does not appear on the face of the record, but must be shown by evidence aliunde, so that the record would make out a *prima facie* right in one who should become a purchaser, * * * or when a deed given on a sale of the land for the tax would be presumptive evidence of good title in the purchaser, so that the purchaser might rely upon the deed for recovery of the land until the irregularities were shown, courts of equity regard the case as coming within their jurisdiction, and have extended relief on the ground that a cloud on the title existed or was imminent."

The case under consideration seems clearly within the scope of this authority. Proof aliunde must be made to show that no benefit resulted to the property from this pavement, and a tax deed given on a sale by the city would be presumptive evidence of good title in the purchaser; and, even should the purchaser take the advice of coun-

sel, he would find that the supreme court of the state has sustained assessments conforming in all respects to that before the court. I think that it would be difficult to discover a more portentous cloud. The acts of the legislature authorizing such assessment are presumed to be constitutional until they are held otherwise. That presumption has been sustained by the supreme appellate tribunal of the state. That decision has not been in terms expressly reversed, although in principle, as we have seen, it is declared erroneous. The city legislature has acted upon it, and has the physical power to sell the property, to put the owner out, and put the purchaser in possession, and to give him a deed which is *prima facie* evidence of his title. This is not a mere irregularity affecting a particular individual, but it is an unconstitutional and most injurious wrong, affecting all the property of holders of a particular class,—a wrong so fundamental that the power which may redress it is conferred upon the courts of the United States. In the present attitude of the state and municipal governments, in a controversy where the constitutional rights of the citizen are in issue it would be scarcely judicious for the courts of the United States to deny relief upon the ground that state action of the most energetic character is so plainly abhorrent to the fundamental law that it can with safety be ignored. It is usually safer to enjoin, than to tolerate violations of the constitution, resulting in the destruction of property rights. That it is necessary for the creditors to attack the lien of the city assessments is clear, from the fact that the act of the legislature gives them rank and priority of payment next in point of dignity to the liens in favor of the city of Macon for taxes due said city. Then their enforcement would preclude the rights of the complainants, for the city taxes rank in point of lien and priority next to the taxes due the state and county, which are liens superior to all others.

The other equities of the complainants are scarcely less important. Although the defendant W. A. Huff was under the obligation to pay the taxes on the property pledged to secure these debts, this was not done, but many tax *fi. fas.* have been issued, levies grossly excessive have been made, deeds have been executed and recorded, and transfers under such sales have been made, it is alleged, for the benefit of the debtor. The unpaid taxes amount to many thousand dollars. Much of this accumulation was properly assessable upon other property of the defendant, distributed throughout the county. While this is true, it is alleged that an attempt has been made to subject the particular property pledged to secure the debts of the complainants to this entire burden of taxation. This, if true, is manifestly inequitable, and the demurrer admits it to be true. The taxation assessed upon all the values owned by W. A. Huff and his *cestuis que trustent*, where they are liable, ought equitably to be apportioned between the property held by them, or pledged to secure their debts, and not fastened upon a particular lot, so as to wipe out the security of particular creditors. It is the duty of the court to so marshal the assets and to distribute these burdens as to make each piece of property bear its own share of the taxes. The liens of these numerous tax *fi. fas.*, irrespective of the paving assess-

ment, if enforced exclusively upon it, would consume the property upon which these complainants have a special lien. The result would be destruction to their rights, while other creditors, and perhaps the debtor, would be proportionably benefited. Besides, the complainants have a general lien upon the equity of redemption of all the property owned by W. A. Huff, or by his children if the debt is against them. This property is alleged to be much greater in extent and much more valuable in character than the city property hereinbefore described. All of it is pledged, in one form or another. It is within the province of the court to so marshal the assets as to charge the outside property with its proportion of the accumulated taxes. This cannot be done at law, because the outside property has been conveyed by deed to particular creditors, who, it seems, have been favored throughout, even to the extent of exempting them from the payment of their due share of taxation. Since it is true, however, that this deed was given as a security for debt, it is competent for the court, through its receiver, under the circumstances, to take all of these properties in charge, set aside sales of the property which appear to be void, because of excessive and fraudulent levies, cancel the unconstitutional paving assessments, pay off debts to secure which deeds are made, and the judgments and mortgages, according to their equities and priorities, then settle with the general judgment creditors and other creditors according to the dignity of their claims, and restore the balance, if any, to the debtor.

The bill is not multifarious. It is a scheme to subjects assets of W. A. Huff and others who are jointly indebted with him to the valid liens of their creditors. It is impossible to leave out his children, because he is holding undivided interests with them and some of them are partly indebted with him, and to others transfers alleged to be illegal have been made.

Nor does it matter that some of the creditors have judgments which do not exceed \$2,000, exclusive of interest and cost. At least one of the judgments exceeds this jurisdictional limit. With this other creditors holding liens of the same general character may unite or they may intervene. The law upon this subject is established.

"For the purpose of preventing a multiplicity of suits, a court of equity will entertain a bill filed by several creditors for the purpose of reaching the property of a common debtor, where such creditors have recovered judgments or decrees." Smith, Eq. Rem. Cred. § 72.

Again:

"Two or more persons unconnected with each other may be properly joined as defendants, as where the title to several pieces of property is in several defendants, and all have been concerned in acts tending to the same illegal result, forming the issue. In the same proceeding some of the defendants may be grantees in alleged fraudulent conveyances, some of them plaintiffs in whose favor judgments have been confessed, and some fraudulent mortgagees. The plaintiff's injury grows out of the fraud of the defendant, in which several parties may unite." Smith, Eq. Rem. Cred. § 74. "A bill filed by a creditor for himself and for the use of other creditors, and when the entire fund is taken possession of by the court for the benefit of all creditors, and an order is made for all to present their claims, entitles all creditors to present their claims, whether they are named in the bill or not, and whether they are judgment, specialty, or simple-contract creditors." Id. § 76.

It is said, however, that the complainant Bidwell cannot sue here, because his judgment was obtained in a state court; and *Walker v. Powers*, 104 U. S. 245, 26 L. Ed. 729, is cited in support of that proposition. It is sufficient to point out that that was a proceeding by an assignee of a judgment, when the assignor and the judgment debtors were both citizens of the same state, and since, in the outset, the court could not have entertained a suit to obtain the judgment, it could not exercise jurisdiction to enforce it. That is not the case here. Bidwell, holding a judgment for a sum exceeding the jurisdictional amount of the court, is a citizen of another state, and was entitled to bring an original suit in this court to enforce his judgment, and may therefore proceed here now. The rule is stated in *Smith, Eq. Rem. Cred.* § 178, as follows:

"The better doctrine, and one supported by reason and the trend of modern judicial decisions, is that a judgment of a United States court may properly be made the basis of a suit in equity in a state court to attack and set aside a fraudulent conveyance. And so a judgment in a state court is a good foundation for a creditors' bill in the federal court."

And Mr. Justice Story, in his great work on the Constitution (volume 2, par. 1313), states that, if a judgment is conclusive in the state where it is pronounced, it is equally conclusive everywhere; citing *Mills v. Duryee*, 7 Cranch, 481, 3 L. Ed. 411; *Hampton v. McConnel*, 3 Wheat. 234, 4 L. Ed. 378; and 1 Kent, Comm. 243, 244. These and other authorities are cited and followed in the recent case of *Alkire Co. v. Richeson* (C. C.) 91 Fed. 79. For the reasons stated, and for others which might be gathered from the elaborate and carefully drawn bill, the demurrer must be overruled.

CHICAGO, B. & Q. R. CO. v. SMYTH, Atty. Gen., et al.

(Circuit Court, D. Nebraska. July 18, 1900.)

1. STATUTES—EVIDENCE OF DUE ENACTMENT—NEBRASKA RULE.

The decisions of the supreme court of Nebraska establish the rule that the due authentication and enrollment of a statute afford only prima facie evidence of its passage; that the legislative journals may be examined for the purpose of ascertaining whether a measure was enacted in the mode prescribed by the constitution, and, if the entries therein explicitly and unequivocally contradict the evidence furnished by the enrolled bill, such entries will control. Such rule, relating to the construction of constitutional and statutory provisions of the state, is binding on the federal courts.

2. SAME—LEGISLATIVE JOURNALS AS EVIDENCE.

To overturn the prima facie evidence afforded by an enrolled bill, it is not enough that the legislative journals do not show that the bill as enrolled passed, but they must affirmatively show that it did not pass.

3. SAME—TITLE OF ACT.

While it is not necessary that the journals of a legislative body should recite in full the title of an act, yet when they purport to do so they are presumed to recite the title correctly, and other evidence will not be received to impeach or contradict such recitals.

4. SAME.

Where the title of an act passed by the legislature is an essential part of the act, as where the state constitution requires the subject of every

act to be clearly expressed in its title, if the title of an act as passed is materially changed after its passage, and before its enrollment and approval by the governor, the act is invalid.

5. SAME—CHANGE OF TITLE BEFORE ENROLLMENT—NEBRASKA ACT CREATING BOARD OF TRANSPORTATION.

The act creating the Nebraska board of transportation, which was enrolled and signed by the governor as having been passed by the legislature at the session of 1887 as senate file 41, under the title, "An act to regulate railroads, prevent unjust discrimination, provide for a board of transportation, and define its duties, and repeal articles 5 and 8 of chapter 72, entitled 'Railroads,' of the Revised Statutes, and all acts and parts of acts in conflict herewith," is invalid; the journal showing that the bill was passed by the house under the title, "A bill for an act to repeal article 8 of chapter 72, entitled 'Railroads,' of the Second Edition of the Compiled Statutes of * * * Nebraska," and the title being, under the constitution, an essential part of the act.

6. SAME—TITLE OF ACT—CONSTITUTIONAL REQUIREMENTS.

Under Const. Neb. art. 3, § 11, which provides that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title," a state board of transportation, with power to regulate and fix rates, cannot be created by an act shown by its title to be one merely for the repeal of a prior statute.

In Equity. On motion for preliminary injunction.

Woolworth & McHugh, for complainant.

C. J. Smyth, Atty. Gen., for defendants.

MUNGER, District Judge. In 1885 the legislature of Nebraska passed an act creating a board of railroad commissioners, consisting of the attorney general, secretary of state, and auditor of public accounts, which afterwards became article 8, c. 72, entitled "Railroads," of the Compiled Statutes of the state. The legislature in 1887 passed an act which, as shown by the enrolled bill signed by the governor and filed with the secretary of state, bears the following title:

"An act to regulate railroads, prevent unjust discrimination, provide for a board of transportation, and define its duties, and repeal articles 5 and 8 of chapter 72, entitled 'Railroads,' of the Revised Statutes, and all acts and parts of acts in conflict herewith."

By this enactment a board of transportation was created, consisting of the attorney general, secretary of state, auditor of public accounts, state treasurer, and commissioner of public lands and buildings. They were invested with certain powers, enabling them to determine and fix reasonable rates for the transportation of property within the state. The said board having made certain orders applying to the complainant's road within the state, complainant brings this action to enjoin any attempted enforcement of such order, alleging as grounds therefor that the said legislative enactment of 1887 creating said board is invalid, for the reason that the same was not passed by the legislature in the manner as required by the constitution of the state. Upon the issues as framed, the single question is presented as to the validity of said act. If the title thereof was adopted by the legislature as provided by the constitution, then complainant is not entitled to the temporary order of injunction now sought. If the title thereof was not passed by the legislature in the manner required by the constitution, then complainant is entitled to a temporary order of injunction.

A history of the act, as shown by the journals of the two houses of the legislature, is, in brief, as follows: Senate file No. 41, as introduced in the senate, was entitled, "A bill for an act to repeal article 8 of chapter 72, entitled 'Railroads,' of the Second Edition of the Compiled Statutes of the State of Nebraska." This title will hereafter, for convenience, be designated as title No. 1. This bill was read a first and second time, referred to and reported by the several committees by title No. 1. During its progress through the senate various amendments to the bill were adopted, until the final passage, when the journal recites senate file No. 41, "A bill," etc. (title No. 1), was read the third time. Thereupon the roll was called upon the passage of the bill, and 19 senators voted in the affirmative, and 13 in the negative. "A constitutional majority having voted in the affirmative, the bill was passed, and the title agreed to as amended." The next step in the proceedings is found in the house journal, reciting: "Message received from the senate notifying the house that the senate had passed senate file No. 41, 'A bill,'" etc. (title No. 1). The journal of the house shows that this bill was read the first time, and ordered to a second reading by the title, "A bill for an act to regulate railroads, prevent unjust discrimination, provide for a board of transportation, and define its duties, and repeal articles 5 and 8 of chapter 72, entitled 'Railroads,' of the Revised Statutes, and all acts and parts of acts in conflict herewith," which title, for convenience, will hereafter be designated as title No. 2. The bill, by title No. 2, was read the second time, and referred to the committee on railroads. The committee on railroads reported the bill by title No. 2, with a majority and minority report. After consideration by the house, the bill came on for a third reading and final passage, when the journal recites that senate file No. 41, "A bill for an act," etc. (title No. 1), was read the third time and put upon its passage. The ayes and nays being called, 64 members voted in the affirmative; 28 in the negative; 8 absent and not voting. The journal recites, "A constitutional majority having voted in favor of the passage of the bill, the bill passed and the title was agreed to." The next step in the proceedings, as shown by the journals, was a message from the house notifying the senate that the house had passed senate file No. 41, "A bill for an act," etc. (title No. 1). The house journal recites: "The speaker gave notice of and signed, in the presence of the house, while capable of transacting business, the following: * * * Senate file No. 41, 'A bill,'" etc. (title No. 1). The house journal further shows that the joint committee on engrossed and enrolled bills reported they had presented to the governor senate file No. 41, "A bill," etc. (title No. 2). In the senate journal we find that the committee on engrossed and enrolled bills reported that they had examined and compared senate file No. 41, "A bill," etc. (title No. 2), and found the same correctly enrolled. The senate journal then recites: "At 10:45 o'clock a. m., in the presence of the senate, the president pro tem. signed senate file No. 41, 'A bill,' etc. (title No. 1)." The senate committee on engrossed and enrolled bills subsequently reported that they presented to the governor, for his approval and signature, senate file No. 41, "A bill," etc. (title No. 2).

Upon this evidence we are called upon to determine whether the act in question is valid. The following rules are to guide us in this determination: (1) In determining the validity of a legislative enactment, the supreme court of Nebraska, in repeated decisions, have held that the due authentication and enrollment of a statute afford only prima facie evidence of its passage; that the legislative journals may be examined for the purpose of ascertaining whether a measure was enacted in the mode prescribed by the constitution, and, if the entries found in such journals explicitly and unequivocally contradict the evidence furnished by the enrolled bill, the former will prevail. *Webster v. City of Hastings*, 59 Neb. —, 81 N. W. 510, and cases cited. (2) Such decisions are not matters of general law relating to evidence, but are constructions of constitutional and statutory provisions of the state, and are binding on the federal court. *Town of South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154. (3) To overturn the prima facie evidence afforded by the enrolled bill, it is not enough that the journals do not show that the bill as enrolled passed, but the journals must affirmatively show that the bill did not pass. (4) While it is not necessary that the journals of the legislative body should recite in full the title of the act, yet when they purport so to do they are presumed to recite the title correctly, and other evidence will not be received to impeach or contradict such recitals. 23 Am. & Eng. Enc. Law, 211, 212. (5) If the title of an act as passed by the legislature is materially changed after its passage, and before its enrollment and approval by the governor, the act is invalid.

Does the evidence thus afforded by the journals affirmatively show that title No. 2 did not pass both houses of the legislature? This involves an inquiry as to the relation which the title of a bill sustains to the bill itself. The constitution of this state (section 10, art. 3) provides:

"That no law shall be enacted except by bill; no bill shall be passed unless by assent of a majority of all the members elected to each house of the legislature, and the question upon final passage shall be taken immediately upon its last reading, and the yeas and nays shall be entered upon the journal."

In section 11 of said article it is provided:

"No bill shall contain more than one subject, and the same shall be clearly expressed in its title. * * * The presiding officer of each house shall sign, in the presence of the house over which he presides while the same is in session and capable of transacting business, all bills and concurrent resolutions passed by the legislature."

Here we have mandatory provisions of the constitution requiring every legislative enactment, to become a valid law, to have the assent of a majority of the members elected to each house of the legislature, and the journal of each house is required to show such assent by an entry of the yeas and nays upon the final passage. It is the assent of the majority of the members of each house to the entire bill, and not to some sections or portions of the bill, that is required to be entered by yea and nay vote on the journal. Again, it is required that the bill shall contain no more than one subject, and the same shall be clearly expressed in its title. This clearly implies that every bill shall have a title, and that no law is valid unless the bill there-

for has a title. That being so, it clearly follows that the title is a part of the essentials of the bill, within the meaning of the constitution. This is made clear when we consider the object and purpose of this constitutional provision. In *Cooley*, Const. Lim. (6th Ed.) p. 169, it is said:

"The title of an act was formerly considered no part of it; and although it might be looked to as a guide to the intent of the lawmakers, when the body of the statute appeared to be in any respect ambiguous or doubtful, yet it could not enlarge or restrain the provisions of the act itself, and the latter might, therefore, be good when it and the title were in conflict. * * * Titles to legislative acts, however, have recently, in some states, come to possess very great importance, by reason of constitutional provisions which not only require that they shall correctly indicate the purpose of the law, but which absolutely make the title to control, and exclude everything from effect and operation as law which is incorporated in the body of the act, but is not within the purpose indicated by the title."

The supreme court of this state, in *White v. City of Lincoln*, 5 Neb. 505, speaking through Maxwell, J., say:

"The object of the constitutional provision that 'no bill shall contain more than one subject, which shall be clearly expressed in its title,' is to prevent surreptitious legislation by incorporating into a bill obnoxious provisions which have no connection with the general object of the bill, and of which the title gives no indication;" and quote with approval from the opinion in *People v. Mahaney*, 13 Mich. 494, the following: "The practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the state. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect."

Such being the object and purpose of the constitutional provision in question, it logically follows that a valid law could not be enacted by the passage by the legislature of a bill having no title, and afterwards affixing one thereto. This is shown by the supreme court in *Webster v. City of Hastings*, 59 Neb. —, 81 N. W. 510, writing by Sullivan, J., in which it is said:

"One of the contentions of counsel for the plaintiff is that the act in question is void because its present title is substantially different from the title under which it passed the legislature. Without giving in detail the history of the measure as disclosed by the legislative journals, and taking no account of an obvious clerical mistake, it may be said that the bill, during its entire progress through the house and senate, and up to the time of its enrollment, was invariably designated and referred to as 'A bill for an act to amend sections one (1), two (2), three (3), and four (4) of chapter sixteen (16) of "An act entitled an act to provide for the organization, government and powers of cities of the second class having more than ten thousand inhabitants," approved March 1, 1883.' The present title of the act, namely, 'An act to amend the title and sections one (1), two (2), three (3) and four (4) of an act entitled 'An act to provide for the organization, government and powers of cities of the second class having more than ten thousand inhabitants,' approved March 1, 1883, is first mentioned in the report of the house committee on engrossed and enrolled bills, announcing the enrollment of the measure. That the title was changed by inserting therein the words 'the title and' after the bill had passed the legislature, and while it was being prepared for the signature of the executive, is a conclusion that can-

not be avoided without disregarding entirely the evidence of the legislative journals. This, under what is now the settled doctrine of this court, we cannot do. The rule established by our former decisions is that the due authentication and enrollment of a statute afford only *prima facie* evidence of its passage, and that the legislative journals may be examined for the purpose of ascertaining whether the measure was enacted in the mode prescribed by the constitution. If the entries found in the journals explicitly and unequivocally contradict the evidence furnished by the enrolled bill, the former will prevail. The journals, being the records of the legislative proceedings kept in obedience to the command of the constitution, are considered the best evidence of what affirmatively appears in them regarding the enactment of laws."

This pronouncement by Judge Sullivan in effect says that the bill had a title when it passed the legislature, which title was materially changed after the passage of the bill and while it was being enrolled for the signature of the governor; that by reason of such change the statute was invalid. In other words, that when the legislative journals show that a bill, at the time it is passed, has a certain title, such bill, when enrolled and presented to the executive for his signature, must retain the same title.

I am referred to the cases of *Larrison v. Railroad Co.*, 77 Ill. 11, *Attorney General v. Rice*, 64 Mich. 385, 31 N. W. 203, and *Cotting v. Stock-Yards Co.* (C. C.) 82 Fed. 839, as holding a contrary rule. If they do, they are, to my mind, in conflict with the decisions of the supreme court of this state, which are the guide for this court.

In *Larrison v. Railroad Co.*, senate file No. 453, for "An act to incorporate the Peoria, Atlanta and Danville Railroad Company," was introduced, read the first and second times, and referred to the committee on railroads. The bill was reported back from the committee as "An act to incorporate the Peoria, Atlanta and Decatur Railroad Company," with the recommendation that it pass as amended. The bill entitled as thus amended was read the third time, and regularly passed. The contention in the case was that the change in the title by substituting the word "Decatur" for the word "Danville," and the amendments in the body of the bill, rendered it a new and distinct bill, or, as said by the court:

"The objection taken is that there were two bills of the same number, but of different titles; that one was regularly introduced, twice read, and referred to the appropriate committee, and that a member of the same committee reported back another bill of the same number; that the act under which the company claims was but once read before its passage. If this position is true, then the bill failed, for a want of compliance with constitutional requirements, to become a law."

Then, after showing that there was but one bill, which was amended in committee, the court further say:

"The constitution does not require bills to be entitled, but that is done as a means of identification. If a bill were introduced without a title, and regularly passed, and the title then adopted, we are unable to see that there would be any constitutional objection to such a law for that reason. The title to a bill is usually adopted after it has passed the house, and is not an essential part of the bill, although it is of a law."

This language of the court is presented for my consideration in support of the proposition that the title is no part of the bill; that a bill may be passed without a title, and a title subsequently adopted

by the legislature. Such I do not think the law. The very object of the constitutional provision requiring every bill to have a title would be defeated by such a construction. Such is not the law in this state, as announced by the supreme court in the decisions referred to. This language of the supreme court of Illinois is mere obiter. The expression was doubtless correct as applied to bills of a general nature, as the act there in question was passed under the constitution of that state adopted in 1848, which contained no provision requiring bills of a general nature to have a title, or to contain no more than one subject. To say that under the constitution of Nebraska the title is no part of the bill, and may be adopted by the legislature subsequent to the passage of the bill, and without the same formalities required in the passage of the bill itself, is in effect to hold that, after the passage of a bill by the majority elected to membership in the body, a minority of the members may subsequently, when constituting the majority of a quorum, adopt a title foreign to the object and purpose of the bill, thus rendering the act invalid, and thereby defeat the expressed action of a majority.

Attorney General v. Rice, 64 Mich. 385, 31 N. W. 203, involved a construction of the constitutional provision of that state providing that no new bill should be introduced after the first 50 days of the session. The facts were that during the first 50 days of the session a bill was introduced to organize the township of Au Train. While said bill was pending, and after the expiration of 50 days, a substitute was offered; the substitute being a bill to organize the township of Ironwood, in the county of Ontonagon. It was urged that the substitute, being an entirely new bill, was invalid, because it first appeared after the 50 days of the session. It was urged on the part of the attorney general that the constitution was violated in its spirit, because the title of the bill as introduced did not express the object of the act as passed. The court said:

"We cannot extend the provisions of the constitution beyond its express terms in this respect. If the object of the act as passed is fully expressed in its title, the form or status of such title at its introduction, or during any of the stages of legislation before it becomes a law, is immaterial. To hold otherwise would in many cases prevent any alteration or amendment of a bill after its introduction, as in legislative practice it frequently becomes necessary to amend the title as introduced in order to conform to changes in the bill."

There was no question in that case of any change in the title of the bill as passed and the bill as enrolled, the court simply holding that it was competent for the legislature to amend, not only the body of a bill, but the title, during its progress through the body. True it is, the court in that same case quote from *Larrison v. Railroad Co.*, the following:

"The title to a bill is usually adopted after it has passed the house, and is not an essential part of the bill, although it is of a law."

The constitution of Michigan requires every bill to be read three times in each house before the final passage thereof; that no bill shall become a law without the concurrence of a majority of all the members elected from each house, and on the final passage of all bills the vote shall be taken by yeas and nays and entered on the

journal. The constitution does not require that every bill shall have the object thereof expressed in its title. The constitutional provision is, "No law shall embrace more than one object, which shall be expressed in its title" (article 4, § 20); and the court may well have construed that provision to mean that the title "is not an essential part of the bill, though it is of a law."

In *Cotting v. Stock-Yards Co.* (C. C.) 82 Fed. 839, the late Judge Foster says:

"Without reference to the oral testimony of members of the legislature as to what was done by that body in its proceedings touching this law, and adopting this title, we find from the house journals that house bill No. 87, 'An act to regulate stock yards, and providing punishment for the violation thereof,' was introduced on January 15, 1897, and referred to the committee on live stock. On February 3d the chairman of that committee reported the bill back to the house, with a substitute. From that time forward this substitute is described in the journals as 'substitute for house bill No. 87, an act to regulate stock yards, and providing punishment for the violation thereof.' This substitute was finally passed, and its title, as published, appears for the first and only time in the journal in the report of the committee on enrolled bills. The engrossed and enrolled bills both bear the title as published. It seems that the title, wherever it is used in connection with house bill 87, was the title of the original bill, and not of the substitute; and all that we know of the substitute or of its title is that it was a substitute for 'house bill 87, an act to regulate stock yards,' etc. The chief object of numbering bills is to identify them. There is nothing in the constitution or laws requiring the journals to disclose the title of any bill. All the legislative proceedings could have been had on this substitute, and its identity preserved, by simply calling it, 'Substitute for House Bill No. 87.' When the title of this act does appear in the journals, it is in the words of the act as enrolled and published in the official paper and chapter 240 of the Session Laws. It seems to me, this is sufficient."

This does not in any respect conflict with the view I have expressed. Judge Foster expressly finds that the journals did not attempt to show what the title of the substitute was, but that the journal showed that there was a substitute for house bill 87, further describing house bill 87 by its original title, but that the journal did not purport to show that the title thus used in describing house bill 87 was the title which the substitute bore. I have no doubt that it is sufficient for the journal to describe a bill by its number, and that it is not essential that the journal should contain either the body or the title of the bill; but, whenever the journal does undertake to recite the body of the bill or the title, such recital in the journal is conclusive evidence of the correctness thereof. 23 Am. & Eng. Enc. Law, 211, 212.

In the present case the journal of the house, in clear, explicit, and unambiguous terms, states that the title of senate file No. 41 upon the passage of the bill through the house was, "A bill for an act," etc. (title No. 1). If the title of the bill be no part thereof, and may be adopted after the passage of the bill, we have the recital in the journal immediately after the recording of the yeas and nays that, "a constitutional majority having voted in favor of the passage of the bill, the bill passed and the title was agreed to." Which title is here referred to? Clearly, the title which the bill had at the time of its passage, immediately preceding the statement that the title was agreed to. It is urged, however, that the statements entered in the journal, when considered as a whole, leave it so uncertain as to which title was

adopted that the evidence afforded by the journal is insufficient to overcome the *prima facie* evidence which the enrolled bill establishes. This is urged: First, because the bill in report of committees, and on the first and second readings, had another and different title than the one shown on its final passage. That this is not sufficient is held in *Re Granger*, 56 Neb. 260, 76 N. W. 588. And, second, because the bill as enrolled for the signature of the governor had the title, "An act," etc. (title No. 2). Such was the case in *Webster v. City of Hastings*. It is the title of the bill which is adopted by the legislature that controls, not the title by which the bill may have been introduced, or which it may have in reports of committees, or as enrolled.

The journal showing that the bill as enrolled and signed by the governor did not pass the house, it only remains to determine the effect thereof. That the creation of a board of transportation, with power to regulate and fix reasonable rates for the transportation of commodities, could not be had under a bill the title of which was one simply to repeal an existing law, needs no argument or citation of authorities. It follows from the foregoing that the board of transportation has no legal existence, and the temporary injunction prayed is granted.

WONG WAI v. WILLIAMSON et al.

(Circuit Court, N. D. California. July 3, 1900.)

HEALTH—QUARANTINE REGULATIONS—VIOLATION OF INJUNCTION.

The court entered a decree enjoining the enforcement of a quarantine regulation prohibiting Chinese persons from leaving San Francisco without first submitting to inoculation, promulgated in part by defendant, as quarantine officer of the port, under Act March 27, 1890, authorizing the federal government to take measures to prevent the spread of contagious diseases from one state or territory to another; such injunction being based on the ground that the statute did not authorize the federal authorities to quarantine as between points within the same state, and on the further ground that the regulation was unconstitutional, as applying only to persons of a particular race, as a class. *Held*, that a subsequent enforcement of the regulation, modified to apply to all persons leaving for points without the state, who were required to procure a certificate from the quarantine officer, was not a violation of the injunction.

On Order to Show Cause for Contempt.

Reddy, Campbell & Metson, Maguire & Gallagher, Samuel M. Shortridge, John E. Bennett, and Robert Ferral, for complainant.

F. L. Coombs, U. S. Atty., for defendant J. J. Kinyoun.

Before MORROW, Circuit Judge, and DE HAVEN, District Judge.

MORROW, Circuit Judge (orally). On the 28th day of May, 1900, this court issued a writ of injunction in this cause, enjoining and restraining the defendants, comprising the board of health of the city and county of San Francisco, and J. J. Kinyoun, federal quarantine officer at this port, from inoculating the complainant and other Chinese residents of this city against their will; from imprisoning, restraining, or confining the complainant, or any of the Chinese resi-

dents of this city and county, within the limits thereof; and from otherwise interfering with or restraining the complainant, or any of said Chinese residents, in the exercise of their personal liberty to freely pass from said city and county of San Francisco to other parts of the state of California. On the 16th day of June, 1900, Wong Wai, the complainant, filed an affidavit stating that the defendant J. J. Kinyoun, in disregard and defiance of said order of injunction, and in contempt of this court, "prevented and prevents your affiant and others from passing beyond the territorial limits of said city and county of San Francisco, and restrains and confines your affiant and others within said city and county, without any right whatever, and in disobedience of said order of injunction." It appears that on June 16, 1900, the complainant was desirous of taking passage on the steamer Orizaba for the port of Eureka, in this state, but was denied that privilege by the agents of the steamship company. Affidavits were introduced, of four Chinese persons other than the complainant, residents of the former quarantined district of San Francisco, to the effect that on the same day they were also desirous of departing to Eureka and to other places within the state of California, but were unable to obtain transportation without a certificate from the defendant Kinyoun that the holder had in all respects complied with the United States quarantine laws and regulations, and was, in the opinion of the quarantine officer, free from the infection of plague or the danger of conveying the same; that they presented themselves before said defendant Kinyoun, and said certificate was refused by him for the sole reason that the applicants were Chinese. It is also averred that the officers and agents of the steamship company, in refusing transportation to the affiants, acted under the direct orders of said Kinyoun, and not otherwise; and that said Kinyoun had stated to said officers and agents that, if any one were taken on board said steamship without said certificate, the said steamship would be quarantined at its place of destination. Accompanying this evidence is the affidavit of Milton Bernard, a clerk in the employ of a firm of attorneys representing the complainant herein, stating that he accompanied the several Chinese persons to the office of Dr. Kinyoun, and substantiating the statements contained in their affidavits. Dr. Kinyoun, in his return and reply affidavit, declares the statements of the complainant to be untrue; that, to the best of his knowledge, he did not see the complainant or the other Chinese on the 16th day of June, and did not issue orders or directions pertaining to them. He further states that, if the complainant or others had applied for certificates to leave San Francisco for Eureka or other parts of the state, he would have informed them that the transportation company was acting without authority from him in requiring such certificates, and that, on the contrary, his orders and directions to his assistants and subordinates were that certificates should not be required as a warrant for the traveling of any persons from San Francisco to any other part of this state. The return and affidavit are both under oath. Affidavits of the assistant surgeons in the United States marine hospital service detailed to

assist Dr. Kinyoun also deny knowledge of the issuance of any orders by Dr. Kinyoun since May 28, 1900, requiring certificates of health to be obtained by persons desiring to travel between different parts of the state.

The opinion of the court in the injunction proceedings in this case held that the quarantine restrictions and regulations imposed by the defendants upon the complainant in traveling from San Francisco to other parts of the state were illegal and void, and, so far as the judgment and opinion of the court related to the defendant Dr. J. J. Kinyoun, and his conduct as involved in the present contempt proceedings, it declared the law to be: First, that, as quarantine officer in the marine hospital service of the United States at the port of San Francisco, he had no jurisdiction, under the act of March 27, 1890, to impose quarantine regulations or restrictions upon any class of persons traveling from place to place within the state; second, that any quarantine regulation or restriction imposed upon any particular class of persons, as Chinese or Japanese, and not imposed upon others similarly situated, was an arbitrary and unreasonable interference with, and discrimination against, the individual liberty of the persons regulated and restrained, contrary to the provisions of the fourteenth amendment to the constitution of the United States, and therefore void. It is charged that the defendant Dr. Kinyoun has violated the injunction in both of these particulars. Examining his acts in this connection, we find from the evidence produced upon the trial that on June 14th he telegraphed his superior officer at Washington, with regard to anticipated action of the court, as follows:

"Supervising Surgeon General, Washington, D. C.: If federal court orders abandonment cordon Chinese quarter, thereby permitting persons from infected district to depart from city, will, unless directed otherwise, enforce regulations of May 21 against all persons leaving San Francisco for other states. Will instruct common carriers to refuse transportation all persons desiring to leave San Francisco to other states unless on certificate marine hospital officer. Will re-enforce guards state lines; also, notify state boards surrounding states actual conditions existing here. Kinyoun."

On the day following, the court having enjoined the quarantine regulations theretofore existing, Dr. Kinyoun issued the following orders to the transportation companies in this city:

"San Francisco Quarantine.

"San Francisco, Cal., June 15, 1900.

"In accordance with the law of March 27, 1890, and the regulations made thereunder, and promulgated by order of the president under date of May 21, 1900, you are hereby notified and directed, until further orders, not to issue transportation to any one leaving San Francisco for other states or territories of the United States unless on presentation of certificate signed by a marine hospital officer. Inspectors of the marine hospital service now stationed at the state borders have been instructed to allow no passengers coming from San Francisco to pass the borders of the state on any common carrier unless a certificate is furnished. This has been made necessary on account of the lifting of the quarantine by order of the federal court, thereby allowing people who have possibly been exposed to the infection of the plague to leave this city for other states.

"Respectfully,

J. J. Kinyoun,
"Surgeon M. H. S., Quarantine Officer."

And on the same day he sent the following telegram to quarantine officers and boards of health at Eureka and San Diego, in California, and to the same officers in other states:

"Federal court dissolves quarantine imposed by local board of health on Chinese district on account of eleven deaths from plague occurring from March seventh until June second. Would suggest precautionary measures be instituted against all persons coming from the infected district. Have notified common carriers under law 1890 refuse transportation all persons leaving San Francisco for other states unless provided with certificate signed by marine hospital officer. Kinyoun."

The purpose of the injunction in this case was to relieve the complainant and those similarly situated from the restraint and imprisonment which was the subject of controversy in the case. That restraint and imprisonment was charged to be that the complainants were not permitted to depart from San Francisco for other places within this state, and were confined within the territorial limits of San Francisco unless they submitted to inoculation by Haffkine Prophylactic. It was determined that this restraint and imprisonment imposed upon the complainants by the defendants was, under the circumstances, illegal. The defendants, including the defendant Kinyoun, were accordingly directed by the injunction to desist from imposing the condition of inoculation upon complainants, and were required to permit them to freely pass from said city and county of San Francisco to other places in this state. In other words, the order of the court relieved the complainants from the restraint and imprisonment described in the bill of complaint, but it did not extend to or include a restraint or an actual or constructive imprisonment resulting from other conditions or growing out of other causes. Hence the orders and regulations issued by the defendant Kinyoun, directed to persons leaving San Francisco for other states and territories, did not come within the terms of the injunction. The original case did not involve that question, and it was not passed upon by the court. The only provision of these orders applicable to persons going from one part of the state to another is the suggestion contained in the telegram to the quarantine officers at Eureka, San Diego, and other places, wherein the defendant Kinyoun said, "Would suggest precautionary measures be instituted against all persons coming from the infected district." The infected district here referred to was the city of San Francisco, but the order itself had no relation to the departure of persons from San Francisco. At most, it was but a suggestion to an officer at another port to take precautionary measures against the introduction of infected persons into such places. What those measures were to be, does not appear from the order, nor is it explained in any of the testimony that has been introduced upon the hearing.

It is contended, however, as against the acts of the defendant Kinyoun, that in an interview with Capt. C. M. Goodall, of the Pacific Coast Steamship Company, he informed the latter that the orders which had been issued concerning travel between San Francisco and other states and territories were applicable to persons traveling between San Francisco and the port of Eureka. This claim is not supported by the testimony of Capt. Goodall. Indeed, the testimony of

Capt. Goodall and of the defendant Kinyoun are substantially in accord, to the effect that the defendant Kinyoun simply gave it as his opinion that vessels arriving at the port of Eureka would be subject to inspection by the quarantine officer at that port, and that such an inspection might result in placing the vessel and its passengers in quarantine, unless, in addition to the regular sanitary inspection of the vessel at San Francisco, the passengers had certificates of health from the marine hospital officer at San Francisco. But the defendant Kinyoun does not appear to have required, as a condition or restriction upon the departure of either the vessel or the passengers, that passengers should provide themselves with these health certificates. It was optional with the passengers to procure health certificates or not, as they should see fit, as a matter of convenience or protection to themselves. We must therefore hold that the defendant Kinyoun did not violate the order of the court in restraining the complainant or the other Chinese persons mentioned from departing from the city and county of San Francisco for the port of Eureka, as charged in the petition for the order to show cause.

We find no evidence to support the complainant's contention that after the injunction had been issued the defendant Kinyoun continued to discriminate, in his orders and regulations, against the Chinese as a class. It is true, there was some testimony introduced to the effect that the defendant required of the complainant, and other Chinese applicants for health certificates, information as to whether they had been exposed to the plague or had been within the quarantined district, but it does not appear that this information was required of Chinese applicants exclusively. So far as appears from the testimony before the court, this information was required of all persons applying for health certificates. This feature of the case may therefore be dismissed without further comment.

It is further urged that the court determined in this case that the regulations of May 21, 1900, issued by the surgeon general of the marine hospital service, were without authority of law, because no presidential proclamation has been issued, as required by the act of March 27, 1890, authorizing such regulations, and that enforcement of these regulations by the defendant Kinyoun, as required by his telegrams of June 15, 1900, was itself a contempt of court. The answer to this contention is that the court did not find it necessary to decide whether the regulations of May 21, 1900, were duly authorized by presidential proclamation or not, and therefore did not decide that question. What the court did was to suggest that it might be a question in the case, if it were necessary to be considered, but placed the decision upon other grounds. It follows from what has been said that it does not appear that the defendant Kinyoun has violated the injunction of the court in this case, and the order to show cause will therefore be discharged.

DE HAVEN, District Judge, concurs in this opinion.

UNITED STATES v. NORTHERN PAC. R. CO. et al.

(Circuit Court, D. Montana. July 22, 1900.)

No. 589.

1. PUBLIC LANDS—RAILROAD GRANTS—CONSTRUCTION.

Under 13 Stat. 365, granting to the Northern Pacific Railroad Company every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile on each side of said railroad line, as said company might adopt, whenever on the line thereof the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from exemption or other claims or rights at the time the line of said railroad was definitely fixed and a plat thereof filed in the office of the commissioner of the general land office, the grant to the railroad company attached to all such lands, within the limits designated, as were not sold, or subject to sale, entry, or pre-emption right at the time the general route of defendant's road became fixed by the definite location thereof.

2. SAME—LANDS EXCEPTED—CONSTRUCTION.

The fact that certain lands had been filed upon in the proper land office of the United States before defendant's railroad was definitely fixed opposite thereto is not sufficient to include them in the lands excepted from the grant to the Northern Pacific Railroad Company, under 13 Stat. 365, and described as not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road was definitely fixed, if proof of occupancy of and payment for said land was not made within 30 months after the date of such filing.

John W. Griggs, Atty. Gen., and Wm. B. Rodgers, Dist. Atty., for plaintiff.

James B. Kerr and Wm. Wallace, Jr., for defendants.

KNOWLES, District Judge. This suit is instituted by the United States for the purpose of compelling the defendant the Northern Pacific Railroad Company to return to it a certain patent to certain lands described therein, which patent was issued to said defendant on the 4th day of April, 1896; and also to compel a reconveyance of said lands by said defendant to the United States. It is claimed in the bill that this patent was erroneously issued to said defendant under the belief that said lands were embraced within the terms of a grant to it by complainant, which said grant was dated July 2, A. D. 1864, and was made to aid said company in constructing the Northern Pacific Railroad. The lands described are part of an odd section of land within the limits of said grant, and passed to said company thereby, unless they came within some of the exceptions in said grant, and were excluded therefrom. The statute making the grant to the Northern Pacific Railroad Company provides as follows:

"There be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of the line of said railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved,

sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said railroad is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office." 13 Stat. 365.

In accordance with the terms of this statute it has been held by this court in the case of *Railroad Co. v. Sanders* (C. C.) 47 Fed. 611, that the grant to the plaintiff would, as a matter of fact, attach to all such lands as were within the limits of its grant as were not sold, or subject to sale, entry, or pre-emption right, at the time the general route of defendant's road became fixed by the definite location thereof. This decision was affirmed, in effect, in the case of *Railroad Co. v. Sanders*, 166 U. S. 620, 17 Sup. Ct. 671, 41 L. Ed. 1139, and again in *U. S. v. Oregon & C. R. Co.*, 176 U. S. 28, 50, 20 Sup. Ct. 261, Adv. S. U. S. 261, 44 L. Ed. —. The terms of the grant clearly indicate that such are the rights of the defendant.

The question is now presented: Was the land mentioned in the bill of that class which may be described as not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road was definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office? The only fact set forth which it is claimed would have the effect of showing that this land was not free from pre-emption right is this: It is set forth that Baltis Miller filed upon this land in the proper land office of the United States in the district of Montana, and that this filing had not been canceled by any action of the United States land officers on the 6th day of July, 1882, when the line of the defendant's railroad was definitely fixed opposite thereto. If this was necessary, it must be held that this land was excluded from the grant to defendant the Northern Pacific Railroad Company. It has been recently held, however, by the supreme court of the United States, in the case of *Railway Co. v. De Lacy*, 174 U. S. 622, 19 Sup. Ct. 791, 43 L. Ed. 1111, that the law of congress, by its own force, canceled this filing if proof of occupancy of and payment for said land was not made within 30 months after the date of such filing. In discussing this point the court used the following language:

"For the reason which we have already given, we think it was unnecessary to enter the cancellation on the record of the office in order to permit the law of congress to have its legal effect. That effect should not be dependent upon the action or nonaction of any officer of the land department. When no proof and no payment have been made within the time provided by law, the record will show that fact, and that the right of the claimant has expired, and the claim itself has ceased to exist."

The bill in this case shows that no proof of occupation upon or payment for these lands was made within said time by the said Baltis Miller, and therefore the demurrer should be sustained, and it is so ordered.

NEVADA NICKEL SYNDICATE, Limited, v. NATIONAL NICKEL CO. et al.

(Circuit Court, D. Nevada. July 23, 1900.)

No. 641.

1. JUDICIAL SALE—INSUFFICIENT NOTICE—WAIVER.

The provision of Act March 3, 1893, § 3 (27 Stat. 751), that "no sale of real estate under any order, judgment or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale," is intended for the benefit and protection of the judgment defendant, and creates a privilege or right which he may insist upon or waive. A failure to observe such requirement does not render a sale void, but only voidable, and the defect is cured by confirmation after due notice to the defendant, and without objection from him.

2. SAME—GROUNDS FOR SETTING ASIDE AFTER CONFIRMATION.

The fact that all the property of a defendant corporation, both personal and real, is sold under a decree in one parcel, as a whole, affords no ground for setting aside such sale on motion of the defendant, where the decree and order of sale expressly directed the sale to be made in that manner, and, although regularly served with copies thereof, the defendant made no objection on that ground, and especially where it is not shown that the price realized was inadequate, or that the defendant suffered any injury from the manner of sale.

3. SAME—IRREGULARITIES CURED BY CONFIRMATION.

Mere errors in a decree, in directing the manner of sale of property thereunder, or irregularities in such sale, afford no ground for setting aside such sale after confirmation had upon due notice to the defendant, and without objection.

4. SAME.

The fact that a decree provided that a sale of property made thereunder should be reported for confirmation after the expiration of the six months allowed for redemption does not render invalid a confirmation entered before that time, after due notice to the defendant of the application therefor, and without objection on its part.

5. SAME—NOTICE OF APPLICATION FOR CONFIRMATION.

Where the law makes no provision for the service of notice on the defendant of an application for confirmation of a sale, a notice served upon the defendant's attorney of record constitutes due notice to the defendant.

6. JUDGMENTS—COLLATERAL IMPEACHMENT.

The validity of a judgment rendered by a justice of the peace against a corporation defendant cannot be collaterally attacked by a stranger to such judgment on the grounds that such defendant is not correctly named in the title of the cause, or that the person on whom service was made was not an agent of such defendant on whom service could legally be made, where the correct name of the defendant is given in the body of the judgment, which also contains a finding that the person served was the duly-authorized agent of such defendant, and where the defendant itself makes no objection to the judgment.

Motions on behalf of defendant the National Nickel Company and one Sylvester F. Field, who claims to be a judgment creditor of defendant, having the right of redemption, to vacate a sale made by the special master, and to set aside the order of the court confirming the sale.

The motions made herein are based upon affidavits, upon the decree of the court, order of sale, return of the special master, the certificate of sale, order confirming the sale, and other documents pertinent to the motions. Counter affidavits were presented, and other documents submitted, in opposition to the motions. From the record, as presented upon these motions, the following facts appear: On the 12th day of August, 1899, a decree was entered in

this cause, due notice of which was given to the defendant's attorney, and copy served upon D. J. Noyes, the general managing agent of defendant on the 15th day of August, 1899. The decree, among other things, provides: "It is further ordered, adjudged, and decreed that said lands, premises, and property hereinafter described, or so much thereof as may be necessary, be sold by J. F. Emmitt, * * * who is hereby appointed a special master in this suit for the purpose of making said sale and executing the certificates, bills of sale, and deeds hereinafter provided for, and that said sale be made at public auction, and that all said lands, premises, and property be sold in one parcel, as a whole; that at such sale plaintiff * * * may bid and become purchaser, and that upon making such sales the said master shall give to the purchaser a bill of sale and immediate delivery of all personal property sold by him under this decree, delivering said personal property, and that said master give to the purchaser of any real property a certificate of sale, containing a particular description of the land and property, the price bid for the same, the price paid, and a statement that the land and realty sold is subject to redemption; that said master shall file a * * * certificate with the clerk of this court; that such lands and real property so sold may be redeemed from such sale by persons or corporations authorized by the statutes of the state of Nevada at the time and in the manner as provided by said statutes; that, if no redemption is made within six months after such sale, the said master shall report such sales to this court, and, upon the confirmation of such sale by the court, that said master shall execute and deliver to the purchaser a deed of the property bought by him, and, upon the production of such deed or conveyance by the purchaser, that he be let into possession of the land, premises, and property bought by him." After giving a description of the real estate and personal property, the decree further provides: "It is further ordered, adjudged, and decreed that said master, before making said sale of said lands, premises, and property, shall post notice of the time, the place of said sale, particularly describing said lands, premises, and property, for twenty days, successively, in three public places in each township where said property, or any part thereof, is situated, and also in the township or city where said property is to be sold; and, there being no newspaper printed or published in said Churchill county, it is further ordered, adjudged, and decreed that said master publish a copy of said notice in the Silver State, a newspaper printed and published at the town of Winnemucca, in the county of Humboldt, state of Nevada, for the same period of twenty days. It is further ordered, adjudged, and decreed that said sale be made at public auction, for cash, to the highest bidder, between the hours of nine in the morning and five in the afternoon, at the door of the county court house of said Churchill county, at the town of Stillwater." On November 3, 1899, an order of sale was issued and placed in the hands of the master for execution, and on the 13th day of January, 1900, the special master made return, among other things, as follows: "That under and by virtue and in pursuance of the annexed decree and order of sale, by me received on the 3d day of November, A. D. 1899, I did on the 13th day of November, A. D. 1899, levy upon the lands, mining claims, lodes, veins, and the premises and the improvements thereon, and personal property, as described in the said annexed decree and order of sale, * * * and I advertised the property [describing the same] * * * to be sold by me in front of the court-house door in the town of Stillwater, county of Churchill, state of Nevada, on the 9th day of December, A. D. 1899, at the hour of one o'clock p. m.; that previous to said sale I posted notices particularly describing the property, for a period of twenty days, in three public places of the township where the property is situate, and also in the township where the property was to be sold, and also caused due and legal written notice thereof to be published for a period of twenty successive days preceding said sale in the Silver State, a newspaper printed and published in the town of Winnemucca, Humboldt county, state of Nevada, * * * and that on the 9th day of December, 1899, the day on which said premises were so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale, and exposed the said premises for sale in one parcel, pursuant to the said decree and order of sale, and at the request of the judgment debtor, at public auction, according to law, to the highest bidder, for cash, when the

Nevada Nickel Syndicate, Limited, being the highest bidder therefor, the said premises were struck off by me to the said Nevada Nickel Syndicate for the sum of \$38,071.01, * * * which was the whole price bid, and which I acknowledge to have received; and that I delivered to said purchaser a certificate of said sale. * * * And I herewith return said judgment and decree fully satisfied." The certificate of sale which the special master was required by the decree to file with the clerk of this court was filed December 18, 1899, and the special master therein certifies "that the said property was sold in one lot or parcel, as directed by said decree and order of sale." It further appears that on the 4th day of December, 1899, five days prior to the sale, John Leighton, president of the defendant company, served notice upon the special master not to sell certain personal property which he had levied on for sale, claiming the same to belong to him; that a similar notice was served upon the special master by S. F. Field, who was the assistant secretary of the defendant corporation, one of its directors, and the alleged judgment creditor of the defendant corporation, claiming certain personal property described in the notice, to belong to him; that on the 22d day of January, 1900, the plaintiff gave notice that it would apply to this court to confirm the sale on January 27, 1900; that a copy of this notice was served upon, and service thereof acknowledged by, the attorney for the defendant the National Nickel Company, and that at said time a copy of the master's return was also served upon said counsel; that on the 27th day of January, 1900, no exception to said master's report having been filed, and it appearing that sufficient notice of the hearing of said application had been given to the defendant, an order was made confirming the sale as made by the special master; that on the 7th day of February, 1900, the defendant filed its assignment of errors, and an appeal was allowed to the circuit court of appeals; that this appeal was afterwards dismissed by the circuit court of appeals for the Ninth circuit, under rule 16 of that court (32 C. C. A. clix., 90 Fed. clix.). *National Nickel Co. v. Nevada Nickel Syndicate* (C. C. A.) 101 Fed. 1006.

The statute of the United States entitled "An act to regulate the manner in which property shall be sold under orders and decrees of any United States courts," approved March 3, 1893, provides as follows:

"Section 1. That all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the courthouse of the county, parish or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct.

"Sec. 2. That all personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner.

"Sec. 3. That hereafter no sale of real estate under any order, judgment or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in the county and state where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice of sale herein provided for to be made in such other papers as may seem proper." 27 Stat. 751.

George W. Baker, for the motions.

W. E. F. Deal, opposed.

HAWLEY, District Judge (after stating the facts.) The foregoing facts bring forcibly to the mind the absolute necessity upon the part of counsel, of the courts, and of their officers to use extra care and caution in the performance of their respective duties, and to see

that proper steps are taken, in strict accordance with the requirements of the law, in all judicial proceedings, so that the same will stand the test of the closest scrutiny, and be invulnerable to any after objections to their legality in form or substance. It is almost impossible for this court, with the volume of business before it, to searchingly examine in minute detail every pleading, order, decree, or other process which may be presented for approval. It is very often compelled, in the very nature of its business, to rely to a great extent upon its officers, and upon the attorneys regularly employed in a given case, to see that all the details are correctly set forth in conformity with law. There is but one perfectly safe road to travel in order to avoid difficulty. The path marked out by the law should be strictly followed. When it is departed from there is always more or less danger. It is true that there are many mere irregularities, and some departures from the statutes, often made, that are not of sufficient degree to vitiate the proceedings; but if they exist they furnish a foundation for future litigation and expense, which might readily, by ordinary care, have been guarded against, to say nothing of the extra trouble to the courts, for they are "born unto trouble as the sparks fly upward." The national courts, for self-protection, have almost universally, in the matter of important orders and decrees, required that they should first be submitted to opposing counsel, and not signed until the objections, if any, are passed upon and settled by the courts. Such has been the practice of this court, but for divers reasons was departed from in the present case, on account of the delay that would otherwise have occurred in the absence of defendants' counsel. Hence arises the present controversy. At the outset it must be understood that, in the discussion of questions involved herein, no objections tending to impeach the validity of the decree or regularity of the proceedings prior to the order of sale can be heard or considered on these motions. A decree which the court had jurisdiction to render, not appealed from, is final and binding, in so far as it affects the parties thereto, whether erroneous or not. Whenever a sale of property is decreed by a court of equity as the result of a litigation in a suit of which the court had jurisdiction, it is the policy of the law that it shall not be set aside for trifling causes, or for any matters which the complaining party might have attended to and had corrected; and whenever such a sale is attacked by a party to the suit the court will closely scrutinize all previous actions of the parties during the litigation which may throw light upon or tend to explain their actions or conduct with reference to the sale. The law does not tolerate that a party who might have taken an objection to the time, terms, and manner of the sale, as provided for in the decree, should designedly wait until the property has been sold to the other party, and then attempt to set aside the sale on any of such grounds. *Mining Co. v. Mason*, 145 U. S. 349, 356, 363, 12 Sup. Ct. 887, 36 L. Ed. 732.

The motion on behalf of the National Nickel Company will be first considered. It reads as follows:

"You will please take notice that the defendant * * * will move the said court * * * to set aside and annul the order heretofore made by said

court upon the 27th day of January, 1900, confirming the report of sale made by J. F. Emmitt, special master, under the decree and order of sale issued in said cause, upon the judgment and decree made therein, and entered as of August 7, 1899, and for an order vacating and setting aside said sale, upon the ground and for the reason that said confirmation by said court was improvidently made without notice to the said defendant National Nickel Company, and for the further reason that the notice and copy of the return of sale served upon the attorney for the defendant for the confirmation of said sale, dated the 22d day of January, 1900, misled and deceived the attorney for the defendant the National Nickel Company, in this: that it alleged and stated that the sale made by special master of the property of the defendant National Nickel Company, mentioned and described in said order of sale, was made by the master, in the manner therein stated, at the request of the said judgment debtor, National Nickel Company, and for the further reason that said confirmation was made contrary to the decree and order of sale issued herein, which provided that said confirmation should be had after the time for redemption of the real estate under said sale had expired, in case no redemption was had, and for the additional reason that said sale so made was improperly and insufficiently advertised, and deprived this defendant, the National Nickel Company, of a substantial right to have the proceeds of the personal property sold under said decree and order of sale applied pro tanto in satisfaction of the judgment rendered in said action, and thereby reduce the amount necessary to be paid by this defendant, the National Nickel Company, to redeem its mines, mining claims, and real property from the sale so made,—and for such other and further relief as may be just.”

The most important question involved upon this motion is whether the sale of the property, it not having been made in accordance with the provisions of the statute (27 Stat. 751), is void, or only voidable. If absolutely void, as contended for by defendant, that would dispose of the motion, without reference to the other objections urged on behalf of the moving parties. If only voidable, then questions will arise whether the defendant can, under the facts as presented, maintain its motion. In *Wilson v. Insurance Co.*, 12 C. C. A. 505, 65 Fed. 38, where, as here, the publication was not made “for at least four weeks,” the court said:

“As the act of congress positively prohibits such a sale unless ‘at least four weeks’ publication has been made and is complete before the sale, this sale cannot be sustained.”

This is claimed to be directly in point, and conclusive as to the actual invalidity of the sale; but that case is distinguished from this, in that there the objections were urged against the confirmation of the sale by the court, and that here no such objection was urged until after the confirmation of the sale, although due and timely notice was given to the defendant of the time of confirmation. It is admitted that, if the defendant had appeared and protested against the confirmation of the sale upon the ground that the notice of sale had not been given as required by the statute, the court would have refused to make the decree confirming the sale, but the plaintiff claims that, the defendant having failed to make its objections at the proper time, it is bound by the decree of confirmation; that the sale is *res judicata*, and cannot now be inquired into; that the error complained of is a mere irregularity, which has been cured by the consent and acquiescence of the defendant; and that the motion comes too late. Which of these contentions is correct? A judicial sale is one made as a result of judicial proceedings by a person legally appointed by the court for that purpose. It is a sale made *pendente lite*. The court is the vendor,

and the person appointed to make the sale is the mere agent of the court. The sale is not absolute until confirmed. The order of confirmation gives the judicial sanction of the court, and when made it relates back to the time of sale, and cures all defects and irregularities, except those founded in want of jurisdiction or in fraud. The court has power to confirm the sale, although the terms of the decree may not have been strictly followed. The matter of confirmation rests peculiarly upon the sound discretion of the court, to be judicially exercised in view of all the surrounding facts and circumstances, and in the interest of fairness, justice, and the legal rights of the respective parties. 12 Enc. Pl. & Prac. 6, 80, and authorities there cited; Ror. Jud. Sales, §§ 1-32, 106, et seq., and authorities there cited; 2 Freem. Ex'ns, § 286, and authorities there cited. The authorities bearing upon the question of judicial sales, the defects and irregularities so often occurring therein, and of the effect of the order of confirmation are not entirely harmonious. "It is sometimes said that a sale made under a decree must pursue the directions therein contained; that a departure from these directions renders the sale void. But to invoke this rule the departure must be of a very material character, and must, we think, be a departure which has not been approved by a decree of confirmation entered in the court which ordered and had supervision of the sale." Freem. Jud. Sales, § 21. It was expressly held by the supreme court in *Deputron v. Young*, 134 U. S. 242, 259, 10 Sup. Ct. 539, 33 L. Ed. 923, in reviewing the decisions of the supreme court of Nebraska upon this subject, that the purchaser "is concluded by the result of the proceedings to confirm or annul the same." In 2 Freem. Ex'ns, § 340, the author says:

"There are many irregularities of sufficient gravity to warrant the vacating of a writ on prompt application, but which the defendant will not be able to successfully assert after he has been guilty of tacitly ratifying the irregularity by his unwarrantable delay. * * * Wherever the irregularity is such that the defendant can be deemed to have waived it by his laches in not sooner complaining, or where it is of such a character that it can be cured by amending the writ, we think it cannot render the sale void, although the plaintiff may have purchased."

In *McBride v. Gwynn* (D. C.) 33 Fed. 402, the court held that lapse of time prevented the moving party from setting aside a sale where the notice of sale was not given for the full period of time required by the decree. If the sale was void for that reason, no lapse of time could make it valid. A void act has no legal existence. The case, therefore, is an authority on the point that a sale thus made is not absolutely void. In that case the grounds of the motion to vacate the sale were: (1) The report was not confirmed; (2) the master had no authority to execute the deed until the sale was confirmed; and (3) the report of the sale was pending on exceptions to its confirmation. The court, among other things, said:

"The irregularities of the sale were such as would undoubtedly have been accepted as sufficient to cause the sale to be set aside, and a new one ordered, upon a motion made immediately after the sale; but that was not done, and no objection to the sale appears to have been brought forward until two years after it was made. Under such circumstances, unless the matters complained of are such as make the sale void, or of such extraordinary character as to show that it was entirely unfair and unreasonable, they ought not to be allowed or entertained."

After discussing the question as to whether the notice of sale had been given for a sufficient period of time, and declaring that a decided preponderance of the authorities maintain the proposition that the statutes requiring notice of sale to be given for a specific time are directory merely, the court further said:

"If it be conceded that the notice here was lacking in the requisite time required by the order and decree in one day, I think that the defendant, after so long a time has elapsed, is not at liberty to avail itself of it."

See, also, *Freem. Jud. Sales*, § 28; *Goodwin v. Burns*, 21 Mich. 211, 214; *Lyon v. Brunson*, 48 Mich. 194, 12 N. W. 32.

In *Rounsaville v. Hazen*, 33 Kan. 71, 76, 5 Pac. 422, it was contended on appeal that the lower court erred in holding that the notice of sale therein given was valid. It appeared from the evidence that this notice was published in a weekly newspaper on March 30th, April 20th, and April 27th of the year 1882, for the sale which was to take place and did take place on April 29th of that year, and that the notice was not published in such newspaper on April 6th or April 13th, but for some unexplained reason was omitted from the issues of the paper on those days and of those dates. The court said:

"Does this omission render the notice void? We think it renders the notice voidable, and for that reason the sale might have been vacated or set aside upon proper motion before its confirmation. *McCurdy v. Baker*, 11 Kan. 111; *Whitaker v. Beach*, 12 Kan. 492. But we do not think that the omission renders the sale void, or that it may be treated as void in any collateral proceeding or upon any collateral attack."

In *Conley v. Redwine* (Ga.) 35 S. E. 92, the sale was not properly advertised, for the reason that there were not four insertions in four consecutive weeks in the newspaper in which the notice of sale was published, as required by statute; and the question which the court considered was whether or not this defect was such as to render the sale void, or whether it was simply an irregularity. The court, after citing numerous authorities, held that it was not void, and that the statute requiring specific notice of a sale was merely directory. In *Doe v. Jackson*, 51 Ala. 514, 517, the validity of a sale made by a guardian of an infant was attacked upon the ground that only 3 weeks' notice of the sale was given, instead of 40 days, required by statute. The court held that "the notice given of the sale was a mere irregularity." In *Griffith v. Harvester Co.*, 92 Iowa, 634, 641, 643, 61 N. W. 243, the question was presented whether a judgment which was obtained against a party by a defective service of notice for a period shorter than the statute required was not void. The court said:

"The right of the harvester company to serve the notice to Griffith by publication, or personally outside of the state, is not in dispute; and the case is governed by the rules which determine the sufficiency of a service of notice, and the consequence of defective service. It is well settled in this state that where there has been a service of a required notice, and the proper court has determined that the service was sufficient, the subsequent proceedings based on such service are not void, but, at most, only voidable on proper application. * * * Our opinion is that the failure to serve the notice upon Griffith twenty clear days before the first day of the term at which judgment was rendered did not make the judgment rendered void, and that as he failed to take advantage of the defect in the manner provided by statute, and has not shown any reasonable excuse for his failure to do so, nor any defense to the

action, the judgment will not be set aside now because of the defective service. * * * The plaintiff has no just grounds for complaint. The original notice which was served upon him notified him of the commencement of the action, and also that a writ of attachment had issued against his property. It is shown that he did not know of the sale, but it is not shown that he did not know that judgment had been rendered for the sale of the land. No diligence whatever on his part to appear in the case, to ascertain what had been done, or to make redemption from the sale, is shown. So far as we are advised, he did nothing whatever after the notice was served on him, until after the time for redemption had expired and the sheriff's deed had been executed. As he failed to take advantage of his statutory right to object to the judgment, and has shown no excuse whatever for his failure, and has made no attempt to redeem from the sale, there is no ground upon which a court of equity can grant him relief."

In *Berlin v. Melhorn*, 75 Va. 639, 641, the court, in discussing these questions, said:

"We think it may be safely laid down, as a general rule deducible from the authorities, that, after a judicial sale has been absolutely confirmed by the court which ordered it, it will not be set aside, except for fraud, mistake, surprise, or other cause for which equity would give like relief if the sale had been made by the parties in interest, instead of by the court."

Fidelity Ins. & Safe-Deposit Co. v. Roanoke St. Ry. Co. (C. C.) 98 Fed. 475, 476, and authorities there cited; 2 Beach, Mod. Eq. Prac. §§ 821, 822; *Jeter v. Hewitt*, 22 How. 352, 362, 16 L. Ed. 345; *Montgomery v. Samory*, 99 U. S. 482, 489, 25 L. Ed. 375; *Langyher v. Paterson*, 77 Va. 470, 473; *Harman v. Copenhaver*, 89 Va. 836, 841, 17 S. E. 482; *Robertson v. Smith*, 94 Va. 250, 253, 26 S. E. 579; *Frink v. Roe*, 70 Cal. 297, 302, 11 Pac. 820; *Leinenweber v. Brown*, 24 Or. 548, 34 Pac. 475, 38 Pac. 4; *Parker v. Dacres*, 1 Wash. St. 190, 193, 24 Pac. 192; *Gardner v. Railroad Co.*, 102 Ala. 635, 643, 15 South. 271; *Best v. Zutavern* (Neb.) 74 N. W. 81; *Ror. Jud. Sales*, § 100.

In *Schroeder v. Young*, 161 U. S. 334, 342, 345, 16 Sup. Ct. 512, 40 L. Ed. 721, there is a clear exposition of the circumstances under which a court would be required to set aside a sale, even after the time of redemption had expired,—as, for instance, where undue advantage had been taken to the prejudice of the owner, or where the owner had been lulled into a false security, or the sale of the property was collusively made for the benefit of the purchaser, etc. The court, among other things, said that:

"In this class of cases, where fraudulent conduct is imputed to the parties conducting the sale, there is a concurrent jurisdiction of a court of equity, founded upon its general right to relieve from the consequences of fraud, accident, or mistake, which may be exercised, notwithstanding the statutory period for redemption has expired."

No such facts appear in the present case.

In Nebraska there is a statute which provides for the more "equitable appraisement of real property under judicial sales." Laws 1875, p. 60. It requires in all cases that the officer making the sale "shall call an inquest of two disinterested freeholders * * * and administer to them an oath impartially to appraise the interest" of the defendant in the property "at its real value in money, and such appraisement shall be signed by such officer and said freeholder respectively." Id. § 1. That statute is as imperative in its terms as is the statute under consideration in this case. In *Neligh v. Keene*, 16

Neb. 407, 20 N. W. 277, where it was admitted that there was no appraisal, and that the notice of sale was published in a newspaper in Omaha, and that there was no notice published in the county where the property was situated, the contention was that, in the light of these palpable errors and departures from the statutes of that state, the sale was absolutely void, and that the purchaser acquired no title thereby. The court, in discussing these questions, among other things said:

"A sale without an appraisal is not void. At most, it is erroneous. The court acquired jurisdiction by the service of process, and this jurisdiction continued until the sale was made and confirmed, and the deed executed. Errors may have been committed, but it was the duty of the party complaining of the same to endeavor to correct them in some of the modes provided by law. If he has failed to do so, he cannot treat the judgment as void. * * * Where the court has jurisdiction the confirmation of the sale cures all defects and irregularities in the proceedings, and such order cannot be attacked collaterally. [Citing cases.] This being the law, all the irregularities complained of, including the publication of the notice of sale, were cured by the confirmation, and the purchaser under the decree obtained all the plaintiff's title by the master's deed."

See, also, *Wilcox v. Raben*, 24 Neb. 368, 38 N. W. 844; *Watson v. Tromble*, 33 Neb. 450, 453, 50 N. W. 331; *Bell v. Green*, 38 Ark. 78, 80.

The provision of the statute of the United States requiring that in all cases four weeks' notice should be given of the time of sale was intended for the benefit and protection of the judgment debtor, and created a privilege and right which the judgment debtor in any case may insist upon or waive. In the present case the right so given was waived by the failure of defendant to make any objection upon that ground prior to the confirmation of the sale.

Having arrived at the conclusion that the sale was not void, it becomes necessary to consider whether the errors in the decree and mistake in the master's return are of such a nature as to require this court to set aside the sale. The defendant claims that by the peculiar provisions of the decree it was led to believe that the confirmation would not be made until the period for redemption had expired; but the affidavits show that defendant had due notice of the time set for the confirmation, and, if it desired to avail itself of this irregularity (if it were irregular), it ought then to have appeared and objected to the confirmation on the ground that by the terms of the decree the time for confirmation had not yet arrived. The reasons given by defendant for not appearing to contest the confirmation of the sale are not sufficient to warrant this court in making an order setting aside the confirmation. D. J. Noyes, the managing agent of the defendant, in his affidavit says: That in making the order of confirmation the defendant—

"Was given no reasonable notice or opportunity to appear and resist the same. * * * That upon the report of said sale to this court by said master it is positively averred under oath that the said sale was made by him, in the manner therein stated and particularly mentioned and set forth, in one parcel, both real and personal property, at the request of the judgment debtor, which affiant states is without foundation in point of fact, and that this statement in the master's report, as affiant is now advised, was made by inadvertence and is erroneous, and that said statement prevented this affiant,

as the agent of the defendant National Nickel Company, from appearing in said court in opposition to the confirmation of the sale upon the 27th day of January, 1900. Affiant further states that he was not present when the sale was made, and was not advised as to what action was taken by the National Nickel Company or its officers respecting the same, and believed when the said master reported said sale under oath, and that the same was sold in the manner therein described at the request of the judgment debtor, that the same was true, and was advised by the attorney for the defendant National Nickel Company that, if such sales were made at the request of the judgment debtor in the manner therein set forth, that a confirmation of the sale could not be successfully resisted, and that it would be useless to appear and oppose the same, and for that reason, and none other, no opposition was made to such confirmation. * * * Affiant further states that the confirmation of said sale inflicts the grossest injustice upon the defendant National Nickel Company. * * * Affiant further states that no notice of said confirmation was ever served upon any agent or officer of the defendant, * * * except the notice * * * which was served upon G. W. Baker, Esq., attorney for the defendant, a few days prior to the time set for confirmation."

The affidavit of defendant's attorney states that he relied upon the statement made by the special master, under oath, that the sale was made, as set forth in his return—

"At the request of the judgment debtor, and therefore took no steps to resist said confirmation, believing that the said sale was made in conformity with the request and demand of the said defendant company. Affiant further states that he consulted with D. J. Noyes, one of the agents of the defendant, in San Francisco, regarding the confirmation of said sale, and advised the said D. J. Noyes that, under the return of said master that the sale was made in the manner therein stated at the request of the defendant company, that this fact precluded any resistance to the confirmation thereof. Affiant further states that he has since been informed, within a few days past, by the attorney for the plaintiff, that there was no such request made by the defendant or any of its agents to said special master. Affiant further states that, as an attorney for the defendant National Nickel Company, he would have appeared in said court at the date set for the confirmation of said sale, and resisted the same, were it not for the fact that he believed, from the return of the special master, that the same was made in the manner stated in said return at the request of the judgment debtor, the National Nickel Company."

There are some portions of the affidavit of the managing agent that demand more than a passing notice. The entire affidavit was evidently carefully drawn. The omission to state certain material facts is one of its prominent features. It points out all the defects and irregularities, but is entirely silent as to the acquiescence of the defendant in relation thereto. It is bold in its statement that the "grossest injustice" has been done to the defendant, but fails to state in what respect any injustice has been done, or in what manner the defendant has been injured. It conspicuously points out with great clearness the alleged errors of the court and the inadvertence and mistake of the special master, but is entirely silent as to the negligence of the defendant and its failure to have such errors and mistakes corrected. It makes no allusion to the certificate of sale filed December 18, 1899, which was sufficient to give constructive notice to the defendant that the sale was actually made as required by the decree of this court. For ought that appears in the affidavit, the managing agent may have had personal knowledge of the fact stated in the certificate of sale, which, if true, would of itself be at least sufficient to put him on inquiry as to the truth of the matter. This, taken in con-

nection with the fact that the decree expressly declares that the property be sold in one parcel, is enough to question the good faith of the defendant in making this motion. But, independent of this fact, it is absolutely clear that the defendant was not misled by the mistake made by the special master in his return of the sale. The law does not require the plaintiff to serve any notice of the confirmation upon any officer or agent of the corporation. The service, if any was required, was sufficient upon the attorney. There is no statement that the attorney failed to notify the "managing agent" of the time set for confirmation. The law presumes he did his duty. Notice to him was, in the eye of the law, due notice to the defendant. In the absence of any fraud or excusable delay, the knowledge of the defendant's managing agent must be considered as its knowledge, and his negligence must be treated as the negligence of the defendant. It was his duty to keep himself advised of all that was done by the special master, and especially as to the mode of sale, in order to protect the interest of his principal. He certainly could not purposely remain away and plead ignorance in this regard in order to prolong the right of defendant to vacate the sale. He had no right to close his eyes when common prudence and ordinary attention demanded they should be kept open. The defendant's attorney and its managing agent had due and timely notice of the decree, the time of sale, and of the confirmation, and, as was said in *Vigoureux v. Murphy*, 54 Cal. 346, 352, "a knowledge of these facts was in legal effect equivalent to a knowledge of the sale." The defendant is a foreign corporation, and is not shown to have had any other officer or agent within this state. From the way the defendant has managed its business, it is apparent that its managing agent must have known that it could not have had any other officer or agent at the sale. Hence the statement that he "was not advised as to what action was taken by the National Nickel Company or its officers" at the time of sale falls far short of sustaining the proposition that he was or could have been misled by the statement in the special master's return that the sale was made as a whole "at the request of the judgment debtor." Throughout the entire litigation Mr. Noyes has represented the defendant. He was its mentor, its guide, its witness, its moving spirit, director, and trusted friend. His conduct and acts have been such as to convince the court that no important move has been made by defendant in the protection of its rights without his counsel and advice, and the court is unwilling to believe that he could have been misled or deceived in the manner stated. It would be a reflection upon his character, his intelligence, his shrewdness, and ability, to impute to him any want of knowledge as to what the defendant was doing or intended to do with reference to the property and premises in question. It is true that the statement made in the master's return, drawn by plaintiff's counsel, to the effect that the property, real and personal, was exposed for sale in one parcel "at the request of the judgment debtor," is not correct. It was inadvertently made, and permission has been given the officer to amend his return in this respect so as to conform to the truth. Did this erroneous statement mislead the defendant to its injury? It relates only to the sale of the property in one parcel. It has no relation

to the other objections urged to the confirmation of the sale. The defendant did not appear to oppose the confirmation, because its agent and its attorney thought that, if it requested the property to be sold in one parcel, it was useless to object; that is, object on that ground. If it had other objections to make, no reason whatever is given why it failed to appear and oppose the confirmation on the other grounds now urged. The excuse offered for nonattendance is based on that one ground: "And for that reason, and none other, no opposition was made to such confirmation." What would have been the result if the defendant had appeared and urged that ground alone against the confirmation? It must be remembered that the decree and order of sale, a copy of which was regularly served upon the defendant's managing agent and attorney long prior to the day of sale, expressly provided "that all said lands, premises, and property be sold in one parcel, as a whole." The defendant and its managing agent were bound to know and did know that it would be so sold unless objections were promptly made to this provision of the decree. If the defendant had so desired, it could have objected to this part of the decree, and asked for and secured a modification thereof, requiring the personal property to be sold separately prior to the sale of real estate. No such application was made. Moreover, neither the defendant nor any of its agents nor its attorney appeared on the day of sale, or ever made any demand upon the court or the special master to have said property, or any part thereof, sold in separate parcels. Under these circumstances, it is evident that the sale would not have been set aside on the ground that the property was sold in one parcel, even if defendant's counsel had been present and urged that ground at the time of the confirmation. The authorities upon this subject are to the effect that a sale of property as a whole, instead of in parcels, ought always to be confirmed, where, as here, no objection was made to the decree directing that it be sold as a whole. Especially is this true where there is no proof tending to show that the personal property, or any part of the property, real or personal, would have sold for a sum sufficient to satisfy the judgment and costs. *White v. Crow*, 110 U. S. 183, 189, 4 Sup. Ct. 71, 28 L. Ed. 113; *Central Trust Co. v. Sheffield & Birmingham Coal, Iron & Ry. Co. (C. C.)* 60 Fed. 9, 17; *Swenson v. Halberg*, 1 McCrary, 96, 1 Fed. 444; *Marston v. White*, 91 Cal. 37, 40, 27 Pac. 588; *Hudepohl v. Mining Co.*, 94 Cal. 588, 591, 29 Pac. 1025; *Bressler v. Martin*, 42 Ill. App. 356, 362; *Insurance Co. v. Brown*, 81 Iowa, 42, 46 N. W. 749; *Bank v. Quick*, 71 Mich. 534, 537, 39 N. W. 752. There is no claim that the price bid for the property as a whole was inadequate. The property sold for its full value. The plaintiff became the purchaser, and bid the amount of its judgment, including costs. There is no showing made on the part of the defendant that it has in any way been injured. Its right of redemption has not been impaired. In fact, it has been enlarged, because under the decree it is given the right to redeem the personal property as well as the real estate. The general principle is well settled that mere informalities or irregularities in a judicial sale do not constitute sufficient ground to set it aside unless the moving party can show that he has suffered injury thereby. *Stockmeyer v. Tobin*, 139 U. S. 176, 196, 11 Sup. Ct.

504, 35 L. Ed. 123, and authorities there cited. But, in any event, it seems clear to my mind that the defendant, by reason of its failure to make objections to the decree, or at the time of the sale to make a request that it be sold separately, is now deprived of the right to have the sale set aside, and a new order of sale made, requiring the personal property to be sold separately, in order that it may be given the privilege of redeeming the real estate. As was said in *Smith v. Randall*, 6 Cal. 47, 52, "to set aside the sale on this ground, under the circumstances, would be to allow a party to take advantage of his own deceit or negligence." The defendant, by its failure to object to the clause in the decree "that all said lands, premises, and property be sold in one parcel, as a whole," must be held to have consented and acquiesced in this mode of sale, and is now as much estopped from urging this objection as it would be if it had appeared at the day of sale and requested that the property should be sold in a lump.

With reference to the motion made by the judgment creditor "for an order of said court directing the special master appointed by the said court to sell the property of the National Nickel Company, to make and file a certificate of sale of the real property of the defendant National Nickel Company, which is subject to redemption, and the amount for which such redemption may be had," but little need be said. Prior to the argument of this motion the plaintiff filed the following offer:

"And now comes the plaintiff in the above-entitled action, and offers to pay to Sylvester F. Field, the sum of \$299.74 damages and \$110.15 costs of suit in cash, and any and all other sums to said Sylvester F. Field that this court may find due upon any judgment against defendant National Nickel Company, mentioned in the petition of said Sylvester F. Field, filed in the above-entitled cause, praying that the sale made by the special master, J. F. Emmitt, under the decree entered in said cause be set aside; and, in case said offer is not accepted, said plaintiff will abide by and obey any order said court may make upon deciding the motions pending to set aside said sale, as to the payment of any amount found by the court to be due upon said judgment."

Under this offer the only question is whether the judgment obtained in the justice's court against the defendant is valid. It is claimed that the judgment is not a judgment against the defendant National Nickel Company, and that it is invalid because it is not shown that summons was served upon any authorized agent of the defendant. In the certified copy of the judgment rendered in the justice's court of Humboldt county, and filed in Nye county, the title is:

"A. Fellz, Plaintiff, v. A. E. Lasher and The Nevada National Nickel Mining Company, Defendants."

In the entry of the judgment the following recitals appear:

"A. E. Lasher appears for himself, and for himself only, and not as agent of the defendant the National Nickel Company. A. E. Lasher making no denial either for himself or the defendant of the amount claimed by the plaintiff in the original complaint, and each of said defendants having been regularly served with process, Mr. A. E. Lasher, being duly sworn, states on oath that he is in the employ of the defendant company as their agent, and that he attended to their business in the absence of his principal or its officers, Mr. D. J. Noyes and Mr. John Leighton. He further testified and admitted under oath that he had been duly served with process for himself and as such agent. Such being the proofs submitted upon the part of the plaintiff, and the defendants not submitting any proof to the contrary, and the

court having jurisdiction over the cause and the parties, it is therefore ordered: (1) That the defendants are jointly and severally indebted to said plaintiff in the sum of \$299.74, as set forth in the complaint on file herein. Defendant A. E. Lasher appeared, admitting the account. Said defendant National Nickel Company, although duly served with process by service upon A. E. Lasher, its duly-qualified agent and representative, failed to make any appearance whatever. Wherefore, no answer being filed by said defendants, and no counterclaim being submitted to the court for consideration herein, judgment is hereby entered against said defendants in favor of the plaintiff for the sum of \$299.74, mentioned in the complaint, and costs of suit, taxed at \$110.15."

In the assignment of this judgment by A. Feliz to Sylvester F. Field appears the following:

"I have this day assigned, sold, transferred, and set over to Sylvester F. Field that judgment recovered by me against the National Nickel Company for \$299.74 and costs of suit," etc.

And thereafter the judgment is referred to as having been entered and docketed as follows:

"A. Feliz, Plaintiff, v. A. E. Lasher and The Nevada National Nickel Mining Company."

I am of opinion that the irregularities relied upon by the plaintiff are not of such a character as to justify this court in holding that there was no valid judgment against the defendant. The recitals in the body of the judgment cure the clerical mistake made in the title of the cause. It may be that the defendant might have had the judgment set aside on both of the grounds relied upon by the plaintiff; but it does affirmatively appear that Lasher was an agent of the defendant, and, in the absence of any proof that he was not such an agent as to warrant a service of summons upon him to be binding, I do not think the plaintiff is in a position to raise that point. It is apparent upon the face of the petition of the judgment creditor that he and the defendant are not at war with each other on these points, but are a unit in their desire to take advantage of the mistakes made by the plaintiff. The affidavit to the petition of the judgment creditor is made by the managing agent of the defendant, who states therein "that he is the attorney in fact of Sylvester F. Field, and attending to his business as such in the states of California and Nevada; that the said Sylvester F. Field is a resident and citizen of the state of New York, and for that reason this verification is made by this affiant." Affiant further states that he is personally cognizant of all the facts, and that "the statements therein contained are true, of his own knowledge." The motion of the defendant is denied. The plaintiff having paid into court the amount due on the judgment, it is further ordered that the motion of the judgment creditor be, and the same is hereby, denied. The plaintiff is entitled to recover its costs incurred by reason of the respective motions.

TOWLES v. SOUTHERN R. CO.

(Circuit Court, W. D. Tennessee. July 14, 1900.)

1. RAILROADS—OPERATION OF TRAINS—STATUTE REQUIRING LOOKOUT—LIABILITY FOR ACCIDENT—LIMITATION ON OPERATION OF STATUTE.

Mill. & V. Code Tenn. §§ 1298-1300, requiring railroad companies to keep the engineer, fireman, or some other person upon the lookout ahead, and, when any person appears upon its road, to sound the alarm whistle, put on the brakes, and employ every possible means to stop the train, and providing that every railroad company that fails to observe these precautions shall be responsible for all damages resulting from any accident, are not applicable to the operation of trains where, because of the locality or existing conditions, compliance with the statute is impossible, as where engines or cars are going through the process of switching, and cars are necessarily being pushed, instead of being pulled, by the engine.

2. SAME.

The emancipation of railroad companies from the operation of the above statute is not confined to any locality known as "yards" or "depot grounds," but extends as well to adjacent grounds, and to any place where the company must inevitably engage in movements and maneuvers that practically force it to move trains or cuts of cars by pushing, instead of pulling, with the engine, as contemplated by the statute.

3. SAME—COMMON-LAW OBLIGATION—NEGLIGENCE—PERSONAL INJURY.

Although a railroad company be relieved from the liability imposed by Mill. & V. Code Tenn. §§ 1298, 1299, for a personal injury caused by its failure to maintain a lookout, because of the impossibility of doing so under the conditions in which its train was being operated at the time of the accident, it may still be liable, because of the breach of its common-law obligation to the party injured in negligently managing its train after it knew that deceased was on its track, and in a place of danger.

Motion to Direct Verdict.

F. P. Poston, for the motion.

W. W. Goodwin, opposed.

HAMMOND, J. The motion of the defendant company to direct a verdict in its favor is granted as to the first count in the declaration, but is denied as to the second. The first count is upon the statute, and is predicated of a disobedience of its regulations for running railroad trains, negligence being charged in respect of that on the occasion of killing Towles. Mill. & V. Code Tenn. §§ 1298-1300. The second count, however, is apart from the statute, and charges negligence in respect of the common-law obligation of the defendant company towards Towles on that occasion. As to the second count, it seems to me quite plain that there is a question for the jury, notwithstanding the contributory negligence of Towles, in this: that it is for them to say whether the train hands of the defendant company were negligent in managing the train after they knew of Towles' presence on the track in a place of danger. *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. That question will be hereafter submitted to the jury under proper instructions. For the present the court will give its reasons for directing the verdict in favor of the defendant company on the count based on the statute.

I have sought, since the court adjourned, to examine every case in the supreme court of Tennessee dealing with the subject of exceptions to the statute, established by judicial construction, so far as they relate to the locality of the injury, the character of work being done by the train at the time, and the peculiarities of its movements. None of them is a precedent for this case, and, if the language of the opinions is to be strictly limited to the facts of the case in hand, the most that can be said of them is that they are full of obiter dicta that may cover this case. But by adjudication and opinion they abundantly establish a principle of judicial construction in favor of emancipation from the absolutism of the statute that governs this case and justifies this judgment. Tersely stated, it is that the statute does not apply whenever obedience is impossible, although it may be that a collision has occurred, and some one or some thing has been injured, by the negligence of the company. The inculpatory negligence must be found elsewhere, if at all, than in an obvious disregard of the statute, if that disregard has been inevitably imposed on the company by the circumstances of the case,—which is the case here. Contributory negligence being usually an adequate defense elsewhere than under the statute, there is always a struggle to drive a given case under the statute, however incongruous the facts may be in that situation; while, on the other hand, the statute is so absolute, and the railroad company is so helpless under it, that there is a struggle oftentimes to bring the case from under the statute, and within the sheltering cover of contributory negligence, that becomes quite as incongruous in situation as the other. Plain, practical consideration of mutual relief against any inelasticity of construction will save the statute from any absurdities of situation. One has only to read the statute to see that as to that subsection involved in this case, which relates to obstructions of persons or animals appearing on the track within view of a running train, it was never designed to apply to a train with the cars in front of the engine, nor to engines or cars engaged in or going through the process of "switching," while, at least, they were going backwards. And for the very simple reason that the engineer and fireman cannot be "always upon the lookout ahead" in such a situation. Of course, the courts would not allow a traveling train to escape the regulation of the statute by assuming through choice this situation, and running all their trains backwards, or with the engine behind the cars, where no lookout could be kept ahead; and we find them in such a case holding that that very formation of the train is a violation of the statute, and the liability for any injury done becomes, indeed, absolute. *Railway Co. v. Wilson*, 90 Tenn. 271, 16 S. W. 613. It is conceded by the learned counsel for the defendant company that this is so as to "a regular" train on the "main track" and in a street of a town. We need not stop here to inquire as to the suggestiveness of these limitations as the rule of judgment in that case. It was in the street of a town, but it does not appear whether it was a "regular train," nor whether it was the "main track." Nor was that, in my opinion, the rule of judgment. The engine was pushing a train of nine cars "into the company's yard." It might have been a mere "cut" of cars, and not "a train," which is a word loosely used; may not have

been "a regular train," and may not have been on a "main track"; and other decisions show that the fact of its being a street was a mere incident, and not a condition, of the situation, since the absolute liability for running "a train" in that fashion applies as well to the yards of the company as to the main line and streets. The reason of the decision was that it was possible for the company to have obeyed the statute by running the engine in front, head on, with the engineer and fireman in the normal condition of being lookouts ahead, and ready to save life or property by complying with the regulations of the statute for that purpose. It was running the other way for the mere "convenience" of the company, as the court held. I can imagine the most regular train—say a "Limited" or a "Cannon Ball"—put in a situation on the main track many miles from any yard or depot grounds or side track, or running through the yards or depot grounds and on a "side track," for that matter, and yet not within the statute, and necessarily without it. Imagine a wreck, or the collapse of a bridge, night or day, and the compulsion of the management to run the train backwards with the locomotive behind the cars, and itself running backwards. That is not the condition of the statute. Practically, compliance with its regulations is impossible. Temporarily, at least, the statutory plan is dislocated, and inevitably the statute temporarily must be abandoned. The company and its train management are not without responsibility in the premises; but it is responsibility to the common law, and not the statute, it would seem, to all reasonable consideration. They would be required to do what a reasonably prudent railroad management should do under that dislocated condition, and not what the statute peremptorily commands under an entirely different condition, as shown by its own words of description. Hence I do not think the question always depends on mere locality, if ever it does, but on conditions, some of which may, under given circumstances, be confined by locality or be dominated by that condition of itself.

A struggle has been made here to establish the place where the accident happened as within the "yard" of the defendant company, in order to bring it within the decisions holding that the statute does not apply to switching operations within the company's yards. The court quite agrees with the learned counsel of the plaintiff that this position is wholly untenable. These cases refer to what appears in the facts of this case, and is called the "inner yard," but not to the stretch of tracks beyond, called the "outside yard." Superintendent Pegram's testimony shows that railroad companies mark and call their "yard limits" a stretch of tracks leading out as far as necessary, sometimes for 10 or 12 miles, as in Chicago, and in this case for $2\frac{1}{2}$ miles from the Madison street "inner yard," and a mile and a half from the scene of this accident. He explains that, to avoid so many train dispatchers, and constantly changing train orders, these limits represent what we may call the territory of the switch and other engines engaged in and about the terminal or like station business in the movements of the cars and trains not strictly "on the road." Within these limits the engines, whether switch engines or others, move at will, according to the exigencies of the business, but under orders to watch for incoming or outgoing "trains" for the road, and to side track when they appear.

These road trains coming or going when they get to these limits lose their freedom of the right of way, and must move under control, and avoid collisions with the others,—each avoiding interference with the other under the special rules for that situation,—something like the rules of harbor navigation, as distinguished from open sea navigation, if we may use that illustration. These are not the “station yards,” “depot grounds,” “switching yards,” where trains are made up, etc., as shown in the Tennessee decisions relied upon by the defendant company. It would be intolerable to allow a company to thus at will exempt itself by marking long stretches of its tracks “yards,” and would virtually abrogate the statute in the cities and towns. But the principle of emancipation from the absolutism of this statute, as construed by the courts, is not confined to any locality known as “yards,” “station grounds,” or “depot grounds,” and the defendant company need not thus resort to expansion of yard limits from “inner” to “outer” yards. It applies as well to adjacent grounds, and, as has been suggested, to any place where the company must inevitably engage in movements and maneuvers that practically force it to move trains or cuts of cars by pushing, instead of pulling with the engine in front, as contemplated by the statute. Then the statute is suspended, so to speak, for that occasion, and the case reverts to the common-law protection. The decisions themselves show this, and, as before said, it is not a matter of locality so much as of conditions presented in the particular business in hand.

The first of the cases is believed to be that of *Railroad Co. v. Robertson* (1872) 9 Heisk. 276, happening here in Memphis, in the premises with which most of you are no doubt familiar, at the yards and depot grounds of the Louisville & Nashville Company. It was the case of an employé killed by an engine backing out tender foremost as he was stepping from one track to another while checking a freight train just arrived in the yard. The court says that “the statute in terms makes no exceptions, but it seems to us unreasonable and impracticable to apply it strictly to the running of engines and cars about the depot grounds or yards, and in relation to the hands who are moving across the track in the discharge of their duty.” Here impracticability is the rule of judgment, as it is in every subsequent case, and there is a constantly growing extension of the rule from this first case to the last.

The case of *Railroad Co. v. Connor* (1872) 2 Baxt. 382, was at Nashville, while an engine was backing from the depot, on one side of the city and river, to the roundhouse, on the other side of the city and river. It killed a stranger. The court sitting in Nashville would not take judicial notice of situations, and, the record not showing the facts, would not consider whether the case came within the *Robertson Case*, *supra*.

In the case of *Haley v. Railroad Co.* (1874) 7 Baxt. 239, at Humbolt, the engine was pushing the cars around the switch or “horn,” with a lookout on the foremost car, but there was no bell rope, and he had no signal connection with the engineer. The man killed was an employé off duty. He was warned off by the lookout, but did not get out of the way, except to step off against the edge of a platform, where he

thought he was safe, and would have been with ordinary cars, but the sleeping cars, being wider, caught and killed him. The jury gave a nominal verdict of five dollars, which was sustained. It was held the statute did not apply, on the authority of the Robertson Case, *supra*. But it was not the locality so much as the fact that the necessary railroad operation made it impracticable to run the engine in front in the usual way provided for by the statute. The locality is given prominence in the opinion certainly, but it is plain that it is only mentioned thus because this condition requiring the trains to run apart from the statute is the natural result of switching trains around a horn or switch. There is no special grace in the spot, but only the development there of an especial habitude of action by the train hands in moving the cars; a situation that may occur elsewhere as well as on that spot.

The case of *Railroad Co. v. Rush* (1885) 15 Lea, 145, 150, is illustrative only, though sometimes cited in this class of cases. A brakeman was sent out to flag a train, instead of which he went to sleep on the track, and was injured by the train he should have flagged. It was held that the statute did not apply, thus establishing another exception judicially ingrafted on the statute. The opinion is instructive for its enumeration of such exceptions as shown by the cases that declare that it was not the intention of the legislature "to extend its provisions to every case which might be embraced in its general language."

There is a previous case of *Cox v. Railroad Co.* (1875), not reported in the regular reports, but found in 2 Leg. Rep. 168, and now 1 Tenn. Cas. 475, where the plaintiff's intestate was killed at night "in the company's depot yard at Paris." There was "a train," consisting of an engine and tender, moving at the rate of six or eight miles an hour, backward and forward alternately, pumping water. He was killed by a backward movement while using the track as a footpath. He was a stranger and a trespasser killed by his own negligence. The engineer was doing everything possible to watch the track and give warning to any he could not see. Held, that the statute did not apply, and that the company was not liable at common law. Here again there was a condition, and a very peculiar one, requiring the engine, or "train," as it is called, to move backward. That condition arose in a depot yard, but it might have arisen at any water tank on the line anywhere just as well; and, in my opinion, the statute would have been just as inapplicable in one place as the other. The opinion is an able one, and gives the reason of the ruling in such language that it furnishes a principle for judicious application elsewhere than in a depot yard. *Cox v. Railroad Co.*, 2 Leg. Rep. 168, 1 Tenn. Cas. 475.

The case of *Patton v. Railroad Co.* (1890) 89 Tenn. 370, 15 S. W. 919, 12 L. R. A. 184, is a very important case in this series. There is no yard, or depot grounds, or side track, or other locality that is confusing. It is out in the open, and on the main line, where one Tipton was killed by detached cars following a regular traveling train from which these cars were broken loose. He was walking on the track, and, stepping aside, let the engine and its attached cars pass. He did not

observe the following of the detached cars, and resumed his walking on the track, and was killed by their noiselessly running him down. There were train hands on the detachment of cars, but there was upon them no "lookout ahead," and no effort to put down the brakes, although the intestate could have been seen by such a lookout. But because there was no engine in the front the statute was held not to apply for the simple reason that the company was not, under the peculiar circumstances of the situation, required to have an engine in front, in order to obey the statute. There was in the case no element of locality to dominate the excusable condition which emancipated the company from the burden of the statute; and we have the principle set out in the beginning of this opinion as the result of all the cases denuded here of all possible misunderstanding. I shall not take the space to quote the language, but the opinion is not obscured by any reaching out for a class of localities within which to justify the ruling, but places the case within a category which comprehends any locality where the peculiar condition arises; or rather it describes a predicament, awkward enough in some cases (as in that under observation) and habitual in others (as in that we are now deciding), where the statute does not apply, or, it may be better to say, for which the legislature has never undertaken to provide,—that predicament, namely, where the company must move its cars, or let them move themselves, without a locomotive ahead, with vigilant lookouts always on duty. As this case says, "The principles of the common law govern in cases not within the purview of the statute." Read in the light of this opinion in the Patton Case, those which seemingly depend so much on localities become harmonious in principle, whatever variations there be in the descriptive character of those localities.

The next case—*Railroad Co. v. Wilson* (1891) 90 Tenn. 271, 16 S. W. 613—has already been considered. It may be added that it is one applying the statute as governing the rights of the parties, and is the one case most urgently relied upon by the learned counsel of the plaintiff in this case. Fortunately, as will be seen presently, the supreme court itself, without overruling it, has undertaken to harmonize it with the other cases we are now citing for our judgment here, by explaining the meagerness of the proof as to kind of operation going with the train at that locality. Robert Acuff, a deaf mute, walking on the main track, was killed by a construction train moving backwards without any unavoidable excuse for not having the engine in front as the statute requires; and the statute was held to apply as in the *Wilson* Case, *supra*; *Railroad Co. v. Acuff* (1892) 92 Tenn. 26, 20 S. W. 348. *Taylor v. Railroad Co.* (1893) 93 Tenn. 305, 27 S. W. 663, was a case of an employé in the yard at Columbia, injured by a backing switch engine, and was within the ruling of the first case,—that of *Robertson*, *supra*,—establishing that the statute did not contemplate legislative regulation for those complicated, irregular, and variable movements of engines and cars going on within the companies' station yards with which the public had no concern, and where only employés were engaged. It illustrates the character of cases where the locality is of itself an indication of the kind of movements and dangers with which the statute does not concern itself. There is no

ambiguity of classification in such places, and no necessity for distinctive predicaments.

We next come to a case that has been much relied on in argument, but which really describes a situation quite apart from any we have here, and comes squarely within the locality cases, if they may be called so, like the one last cited. It was at the depot platform, on a side track, that the injury was done by detached cars making a "running switch." The circuit judge misapplied the *Wilson Case*, *supra*, and the supreme court distinguishes the two. It may be said, in justification of the circuit judge, that the supreme court had not then begun to distinguish and explain the *Wilson Case*, and restrict its broad language, as has been done in subsequent cases. *Railroad Co. v. Pugh* (1895) 95 Tenn. 419, 32 S. W. 311.

The next case in chronological order is useful to our investigation by a kind of reverse application. It was a cow case. But it is none the less important. The cow was killed by a through freight train in the yards, and within a few feet of the depot building. The engine was in front, and the train rushing through the depot yard without intention of stopping, and without the least regard for the statutory observances. The train was on "a regular trip"; was not engaged in switching, though passing through the yards. Here we have a distinct illustration that being in the yard is not the single element of the rule of judgment; nor is being without the yard conclusive on the other hand. Again we cannot take space to quote the opinion, but, as in the *Rush Case*, *supra*, it classifies again the various ingraftments by judicial construction of exceptions, and in one phrase sums up the principle that supports the judgment we are here giving: "Those precautions have been adjudged several times to be inapplicable to certain peculiar and adverse conditions." *Railroad Co. v. House* (1896) 96 Tenn. 552, 555, 35 S. W. 561.

The case of *Railroad Co. v. Dies* (1897) 98 Tenn. 655, 41 S. W. 860, is, like the *Wilson Case*, another bulwark to the argument in favor of the plaintiff, and is, undoubtedly, a strong case in his favor on the right to claim under the statute. The first syllabus, indeed, if it were supported by the case, and the case itself had not been subsequently explained, if not modified, would be conclusive in the plaintiff's favor on this motion. The accident again was one happening in Memphis, on the Iron Mountain road. The engine and tender were running backward, and evidently not in the company's "yards," as understood by the supreme court, and, as we shall further see directly, were not considered by that tribunal as "engaged in switching." The engine was going in an opposite direction to the freight train from which it had just been detached, and on parallel tracks, very near together. The killing of the people happened at a street crossing, which they took without fault on their part, after the freight cars had passed, and just in front of the engine moving in the opposite direction. The locality was claimed to be within the yards, and held not to be, although switch tracks were there, and the place was used for switching. It was a better claim for being a switch yard than that made in this case, evidently. The company was held liable on the principle of the *Wilson Case*, *supra*. The case was put under the rule, and refused a place

within the exceptions. But it is not like this case after all, and, explained as it has been by a subsequent case, it is not averse to the judgment on this motion. In principle it is not like this case, because the running of the engine backwards was not shown to have been, as here, inevitable. For all we know, it could have been just as well run frontwise. Having been ruled, by the decision, out of the yards, it was not entitled to that broad protection afforded by that locality of itself. So, being outside, it was not within the facts permitting the exemption as to outside runnings or movements of cars and engines backwards in other places than the yards. They can do this outside only when they must; not for convenience, but from inevitable necessity, or from the compulsion of the predicament in which they are placed. That was the case we have in hand, and was not so in the Dies Case, or at least it is not shown to be so in the report of the case.

Finally, we have the unreported case of *Railroad Co. v. Clarkson* (1899),¹ in which Mr. Chief Justice Snodgrass takes occasion to explain both the Wilson and the Dies Cases as we have explained them here, and in which it is ruled distinctly that the emancipation from the statute claimed in this case does not depend upon the switching being within the yards, and may take place elsewhere, according to circumstances. The killing took place at Calhoun street, in Memphis, where there were two tracks running across the street,—the main track and a side track leading over to an alley and a switch track of the Compress Company. These had been used for switching purposes, and were being so used on this occasion. An engine had crossed the street on this side track, and was being backed on the main track to the company's yards, very much as in the Wilson Case and the Dies Case, if not identically like those cases. The court felt the necessity for an explanation of those cases, and it was made that in neither of those cases was it shown that the engine was "engaged in switching operations," and in neither case was it intended, says the court, "to charge the exception to the rule of switching, but to maintain it." The court ruled that in that case the company was entitled to show by evidence which the circuit court excluded by its charge that the locality "was a part of its switching arrangements," and that it was "legitimately engaged in switching operations," and the statute did not apply. It is true this was said of streets used for switching arrangements adjacent or near to the yards or depot grounds, and we have held it applies just as well in principle to switching arrangements more remote, perhaps, but still near enough to come within the necessities of the situation. And we go further, and hold that, under the decisions, whenever the company is compelled by the conditions to run trains or cuts of cars backwards without an engine in front, as the statute contemplates, the statute never applies, no matter how remote from a switching yard the exigency may arise. It must be compulsion, and not choice or convenience only. Here there were a main and side track with a turnout switch, or cross over, used to serve an industrial plant with cars for freights and supplies; a condition

¹ No opinion filed.

in which there must be, by the compulsion of the structure and the purposes of its use, the backward movement of engines and cars,—pushing instead of pulling them. The work could be done in no other way; and when going backward, as on this occasion, the statute does not apply. But the common law comes into play for the protection of all concerned whenever the engine is shifting the cars by such a backward movement as was used on this occasion, where three cars were being distributed on this side track for the benefit of the factory, the engine pushing them from the rear of the line of motion, being behind the cars, instead of in front, as the statute would require, if possible to run that way. Ruled accordingly.

MILLER v. UNITED STATES.

(Circuit Court, S. D. New York. April 26, 1900.)

OFFICERS OF UNITED STATES—RIGHT TO SALARY FIXED BY CONGRESS.

One holding an office under the treasury department, who was appointed by the secretary, in connection with such office, a special inspector of foreign vessels, without additional salary, under Act Aug. 7, 1882, which requires such officers to be appointed, and fixes their salary, and who accepted the appointment and performed the duties of the office, is entitled to recover the salary. It is not within the power of the secretary to reduce or change the salary of an officer which congress has specifically prescribed, and an agreement to that effect, being contrary to public policy, will not be enforced or given effect as an estoppel.

Action under the Tucker act, tried by the court without a jury.

The following are the findings of fact:

I.

Claimant, a citizen of the United States, was, on May 19, 1891, appointed an assistant inspector of steam vessels for the district of New York, under section 4414, Rev. St. U. S., with compensation at the rate of \$2,000 per annum. He took and forwarded the oath required by law, and while holding such office of assistant inspector of steam vessels he was appointed special inspector of foreign steam vessels. Said appointment reads as follows:

II.

“Division of Appointments.

“Treasury Department, Office of the Secretary,

“Washington, D. C., May 19, 1891.

“Mr. John Miller, New York City, N. Y.—Sir: Under the provisions of an act of congress approved August 7th, 1882, entitled ‘An act to amend section 4400 of title 52 of the Revised Statutes of the United States, concerning the regulations of steam vessels,’ you are hereby appointed to serve, in connection with your appointment as assistant inspector of steam vessels, as a special inspector of foreign steam vessels, without additional compensation, for the port of New York, N. Y.; the appointment to take effect from date of oath.

“[Signed] Respectfully yours,

Charles Foster, Secretary.”

III.

Thereupon the claimant took the oath therein referred to, which was in the usual form of an oath of office, and transmitted the same to the secretary of the treasury. He was not required to, and he did not, give nor offer to

give the bond prescribed by statute for the office of special inspector of foreign steam vessels. From the time of taking the oath aforesaid until March 1, 1895, the claimant performed whatever duties were required of him as special inspector of foreign steam vessels at said port.

IV.

By letter dated November 20, 1893, from the secretary of the treasury, under the provisions of section 4414 of the Revised Statutes of the United States, the claimant was appointed an assistant inspector of boilers of steam vessels for the district of New York, with compensation at the rate of two thousand dollars (\$2,000) per annum. Subsequently claimant accepted said appointment, and duly qualified by taking the prescribed oath of office, and by forwarding the same to the treasury department. No bond was required. He then and there entered upon the discharge of his duties, and continued to perform the same until the appointment of his successor on October 8, 1894.

V.

On or about November 20, 1893, claimant received from the secretary of the treasury a communication, of which the following is a copy:

"Division of Appointments.

"Treasury Department, Office of the Secretary,

"Washington, D. C., November 20, 1893.

"Mr. John Miller, 73 Henry Street, Brooklyn, N. Y.—Sir: Under the provisions of an act of congress approved August 7, 1882, entitled 'An act to amend section 4400 of title 52 of the Revised Statutes of the United States concerning the regulation of steam vessels,' you are hereby appointed to serve, in connection with your appointment as assistant inspector of boilers of steam vessels, as a special inspector of foreign steam vessels, without additional compensation, for the district of New York; the appointment to take effect from date of oath, which must not be administered before December 1, 1893.

"[Signed] Respectfully yours,

W. E. Curtis, Acting Secretary."

VI.

On or about the 20th day of November, 1893, the claimant took the oath above referred to, which was in the usual form of an oath of office, and transmitted the same to the secretary of the treasury on that date. He was not required to nor did he give or offer to give the bond prescribed by statute for the office of special inspector of foreign steam vessels. From the time of taking the oath of office the claimant performed whatever duties were required of him as special inspector of foreign steam vessels.

VII.

On or about September 8, 1894, claimant received from the secretary of the treasury a communication, of which the following is a copy:

"Division of Appointments.

"Treasury Department, Office of the Secretary,

"Washington, D. C., Sept. 7, 1894.

"Mr. John Miller, Assistant Inspector of Boilers of Steam Vessels, New York, N. Y.—Sir: Your services as assistant inspector of boilers of steam vessels at the port of New York, Second district, are hereby discontinued, to take effect upon the appointment and qualification of your successor.

"[Signed] Respectfully yours,

J. G. Carlisle, Secretary."

VIII.

On or about October 9, 1894, the claimant in like manner received the following communication:

"Division of Appointments.

"Treasury Department, Office of the Secretary,

"Washington, D. C., October 8, 1834.

"Mr. John Miller, Assistant Inspector of Boilers of Steam Vessels, New York, N. Y.—Sir: Referring to department letter of the 7th ultimo, you are hereby informed that, a successor having been appointed, your services as assistant inspector of boilers of steam vessels for the port of New York will not be required from and after the receipt of this communication.

"[Signed] Respectfully yours.

J. G. Carlisle, Secretary."

IX.

The law which created the office of special inspector of steam vessels was repealed March 1, 1895.

X.

The claimant had not been paid any of the salary attached by law to such office, the amounts due therefor being \$2,000, with interest from May 25, 1892; \$2,000, with interest from May 25, 1893; \$2,000, with interest from May 25, 1894; \$1,555, with interest from March, 1895.

Robert D. Benedict, for plaintiff.

Arthur M. King, Asst. U. S. Atty.

LACOMBE, Circuit Judge. I concur in the opinion of the dissentents of the court of claims in *Glavey v. U. S.*, 35 Ct. Cl. 242. The statute under which the appointment was made (22 Stat. 346) reads as follows:

"Sec. 2. That for the purpose of carrying into effect the provisions of this act the secretary of the treasury shall appoint officers to be designated as special inspectors of foreign steam-vessels, at a salary of two thousand dollars per annum each, and there shall be appointed of such officers at the port of New York, six; at the port of Boston, two; at the port of Baltimore, two; at the port of Philadelphia, two; at the port of New Orleans, two; and at the port of San Francisco, two."

It may be that the secretary of the treasury differed from congress as to the wisdom of this statute; that, in his opinion, the required services could be obtained more economically than by the payment of the salaries fixed by congress; that he felt sure that, if he should appoint some subordinate officer of his department to the office of special inspector, notifying him at the same time that he would not be paid the salary, he would find such appointee silently or affirmatively acquiescent, lest by declining he should risk discharge from the office such subordinate already held. Nevertheless, when congress has not only created the office, and directed the secretary to appoint some one to it, but has also fixed the salary at a specific sum, surely the executive officer has no power, however meritorious his motives may be, to overrule the decision of congress, and reduce the salary. Any bargain whereby, in advance of his appointment to an office with a salary fixed by legislative authority, the appointee attempts to agree with the individual making the appointment that he will waive all salary or accept something less than the statutory sum, is contrary to public policy, and should not be tolerated by the courts. It is to be assumed that congress fixes the salary with due regard to the work to be performed, and the grade of man that such salary may secure. It would lead to the grossest abuses if a candi-

date and the executive officer who selects him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary congress has fixed, but will not come for less. And, if public policy prohibit such a bargain in advance, it would seem that a court should be astute not to give effect to such illegal contract by indirection, as by spelling out a waiver or estoppel. Plaintiff may take judgment for the full amount claimed.

ELLIS v. NORTHERN PAC. RY. CO.

(Circuit Court, D. Montana. July 2, 1900.)

No. 593.

1. MASTER AND SERVANT—INJURY TO EMPLOYEE—NEGLIGENCE—PLEADING.

A railroad company is liable for injuries sustained by one of its servants employed as a boiler maker and repairer of ironwork on locomotives, through the breaking of a running board which the employé was directed by the company's foreman to stand upon for the purpose of making repairs to a locomotive, where the company knew it was in an unsafe condition, and failed to inform the servant thereof.

2. SAME—LIABILITY FOR ACTS OF FOREMAN.

The duty of exercising reasonable care in furnishing a servant a reasonably safe place to work being that of the master, a railroad company cannot delegate this duty to a foreman without placing such subordinate in its own position, and binding him to perform the same duties devolving upon the company.

Geo. M. Sinclair and Geo. B. Dygert, for plaintiff.
W. Wallace, Jr., for defendant.

KNOWLES, District Judge. The plaintiff alleges that he was working for the defendant in the capacity of a boiler maker and a repairer of ironwork on locomotives, and that as such it became his duty to assist in the mending and repairing of ironwork in connection with the locomotives of the defendant; that on the 3d day of November, 1894, the plaintiff, in the discharge and performance of his said duties, was directed and ordered by defendant to proceed with the repairs of a certain locomotive of the defendant; that said repairs consisted of repairing and fixing certain stay bolts on the locomotive of the defendant; that, for the purpose of making said repairs, plaintiff was directed by defendant, through its foreman, then and there the superior of plaintiff, and then and there in charge of said work and repairs, to go upon and stand upon that certain wooden structure upon said locomotive known as the "running board"; that the same was at said time, and for a long time prior thereto had been, rotten and decayed, and by reason of said condition was dangerous and unsafe for the purpose of standing or being thereon, and was incapable of sustaining the weight of plaintiff or of any man; that said condition was unknown to plaintiff; that said dangerous condition of said running board was at said time well known to the defendant; that had defendant exercised due or any care or prudence in the inspection and examination of said locomotive or its running board at said time, or

at any time prior thereto, it could have ascertained the dangerous and unsafe condition of said running board, but said defendant wholly neglected its duty in that behalf, willfully, carelessly, and negligently failed and refused to inspect said locomotive and running board, or ascertain the said unsafe and dangerous condition thereof, and wholly failed, neglected, and refused to keep the said running board in repair, or fit for the purpose of the said employment of this plaintiff; that by reason of said want of inspection, examination, and repair, and willful neglect and carelessness, on the part of the defendant, the said running board at the time aforesaid had become and was unsafe and dangerous to be used by the plaintiff for the purpose of repairing said locomotive as aforesaid, or to be used by him as ordered and directed by said defendant as aforesaid; that at all the times therein mentioned the plaintiff was and is a boiler maker, and had no connection with any repair in or about any woodwork; that on the 3d day of November, 1894, plaintiff went upon said locomotive for the purpose of repairing the same, and went upon said running board, and stood upon the same, and said running board, by reason of its rotten, decayed, unsafe, and dangerous condition aforesaid, gave way and broke while plaintiff was standing thereon, by reason of plaintiff's weight, and plaintiff was precipitated to the ground, a distance of some six feet, falling upon a heap of iron castings, and sustained severe hurts, bruises, etc., pain and suffering, to his damage in the sum of \$10,000. The plaintiff also claims certain special damages. Defendant demurred to this complaint, alleging that it did not state facts sufficient to constitute a cause of action.

The principal ground of the demurrer is that the foreman of the shop where the plaintiff was working, according to the complaint, was a fellow servant with the plaintiff. It is claimed, also, that there is no duty owing a machinist in repair shops for the repair of locomotives to furnish him with safe locomotives to work upon, and that he has no right to assume that such a locomotive is all right or sound, or that one part of it should be repaired before another. I know of no rule that exonerates a master from exercising reasonable care in furnishing to a servant in a repair shop a reasonably safe place to work. If he knows that the place where a servant is directed to work is unsafe, I think he should inform the servant of that fact. The duty of exercising reasonable care in furnishing to a servant a reasonably safe place to work is that of the master, and he cannot delegate this duty to a subordinate without placing such subordinate in his own position, and binding him to perform the same duties devolving upon him (the master). McKinney, Fel. Serv. p. 73, § 28. Upon this point the supreme court of the United States, in *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612, used the following language in speaking of the responsibilities of a master:

"One, and perhaps the most important, of these exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose a servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the lat-

ter. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master."

In this case it appears that the running board was not a part of the machinery of the locomotive which the plaintiff was called upon to repair, or the construction of which pertained to his trade or calling. It is alleged that the defendant knew that this running board was defective, and failed to inform plaintiff of that fact. I cannot conceive that this would be considered reasonable care on the part of defendant in furnishing plaintiff with a reasonably safe place in which to work. I therefore hold that the demurrer is not well taken, and it is therefore overruled.

CITY OF LITTLE ROCK et al. v. UNITED STATES ex rel. HOWARD et al.
(Circuit Court of Appeals, Eighth Circuit. July 2, 1900.)

No. 1,421.

1. MANDAMUS—WHEN GRANTED.

The writ of mandamus issues only to compel the discharge of a plain duty, which the parties commanded have lawful authority to do.

2. STATUTES—CONSTRUCTION.

That which is implied is as much a part of a statute, grant, or contract as that which is expressed.

3. CITIES—RIGHTS TO ISSUE WARRANTS.

Under Const. Ark. art. 16, § 10, providing that "the taxes of counties, towns and cities shall only be payable in lawful currency of the United States, or the orders or warrants of said counties, towns and cities respectively," and sections 1002, 1003, 5189, 5130, 5169, Sand. & H. Dig. Ark. 1894, a city of the state of Arkansas has power to issue its warrants in payment of its debts.

4. SAME—PAYMENT OF DEBTS.

In the absence of an express limitation in the constitution or statutes of Arkansas of the power of cities to draw warrants to an authority to draw them only against a fund appropriated to pay them, or against money in the treasury, or against money that will come into the treasury within a year after their issue, municipalities of that state, under its constitution and statutes, making municipal warrants receivable in payment of city taxes, have power to issue their warrants to pay just debts when there is no money in their treasuries to pay them, and no prospect that there will be any within a year of their issue.

5. SAME—PAYMENT OF JUDGMENT.

What public officers are empowered to do for third persons, the law requires them to do. And where a municipality and its officers have the power to pay a judgment against the city by the issue to the owner of the judgment of city warrants which are receivable for city taxes, and have no other way to pay it, it is their duty to issue the warrants, and the writ of mandamus will be granted to compel them to discharge that duty.

6. SAME—MANDAMUS—DISCRETION OF COURT.

Where the owner of a judgment against a city has the right to compel the issue to himself of its warrants in payment thereof, the number of the

warrants that should be issued, and their respective amounts, and the time when they should be sent forth, are matters intrusted to the legal discretion of the trial court, subject always to the proviso that the right of the creditor to the warrants must not be denied or seriously impaired.

7. SAME.

A judgment of mandamus directing a city, which already owes \$60,000, either evidenced by city warrants, or upon which such warrants are due, to issue warrants to a judgment creditor to the amount of \$35,984 in payment of his judgment against it, does not constitute such an abuse of discretion as will warrant a modification or reversal of the judgment.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

The judgment challenged by this writ of error directs the city of Little Rock, its mayor, clerk, and city council, the plaintiffs in error, to issue and deliver to the relator W. B. Worthen, one of the defendants in error, upon payment by him of the legal fees of the mayor and city clerk for issuing them, warrants of that city, in specified sums, to the amount of the principal and interest of a certain judgment against that city which the relator owns, and orders the issue of a peremptory writ of mandamus commanding the plaintiffs in error to comply with these directions. This judgment directing the issue of the mandamus was rendered upon a demurrer to the answer of the city and its officers, which had been interposed to the petition of the relators for the writ. The averments of that petition were that on April 20, 1896, the relators Thomas Howard and John W. Harrison recovered a judgment for \$29,256.31 and costs against the city of Little Rock; that they subsequently assigned that judgment to the relator W. B. Worthen; that no part of that judgment has ever been paid; and that Worthen has demanded of the plaintiffs in error warrants of the city of Little Rock for the amount of his judgment, and they have refused to issue them. The answer of the city and its officers was that the city had never had any power since 1874, under the constitution of the state of Arkansas, to levy taxes in excess of 5 mills on the dollar of the assessed valuation of the property in the city for any debts contracted since that year; that the debt evidenced by Worthen's judgment was contracted since 1874; that the city has annually levied a tax of 5 mills since it was contracted; that the revenue thus raised, together with all its other revenue, has always been, and still is, insufficient to pay the necessary current expenses of the city; that it has not now, and will not have in its treasury during the coming year, any money in excess of that absolutely necessary for its current expenses; that it is utterly without credit, ability, and authority to borrow money to pay its debts; that the issuance of these warrants will seriously embarrass its financial affairs; that it owes \$60,000 that is not evidenced by judgments, and \$75,000 in the form of judgments owned by the relator Worthen; and that he is a banker and broker, and pays a large percentage of the taxes of the city of Little Rock. The court below sustained a demurrer to this answer, and directed the issue of the writ of mandamus.

Morris M. Cohn (Walter J. Terry and John W. Blackwood, on the brief), for plaintiffs in error.

James P. Clarke, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The writ of mandamus issues only to compel the discharge of a plain duty, which the parties commanded have lawful authority to do. Has a city of the state of Arkansas the power, and is it its duty, to issue its warrants to one of its taxpayers in payment of a judgment

which he has against it, when it has no other means of paying him, and when it has not, and will not have during the coming year, any money in its treasury in excess of that absolutely necessary to defray its current expenses, with which to pay either the judgment or the warrants? This is the question which this case presents, and the true answer to it will not be found in the decisions of courts of other states, under dissimilar laws, but in the constitution, statutes, and decisions of the state of Arkansas. The constitution of that state provides (article 16, § 10):

"The taxes of counties, towns and cities shall only be payable in lawful currency of the United States, or the orders or warrants of said counties, towns and cities respectively."

Its statutes provide:

"Sec. 1002. All county warrants and county scrip shall be receivable for any taxes for county purposes, except for interest on the public debt and for sinking fund, and for all debts due the county by whose authority the same were issued; and all warrants, scrip, acceptances or money shall be receivable for any taxes for city purposes, except for interest tax, and for all debts due the municipal corporation by whom the same were issued, without regard to the time or date of issuance of such warrant, scrip, acceptance or money, or the purpose for which they were issued.

"Sec. 1003. Whenever the county court of any county may deem it expedient to call in the outstanding warrants of said county, in order to redeem, cancel, reissue or classify the same, or for any lawful purpose whatever, it shall be the duty of said court to make an order for that purpose, fixing the time for the presentation of said warrants, which shall be at least three months from the date of such order."

"Sec. 5189. Whenever the council of any city or incorporated town in this state may deem it expedient to call in the outstanding warrants of said city or incorporated town in order to redeem, cancel, reissue or classify the same, or for any lawful purpose whatsoever, it shall be the duty of the council of said city or incorporated town to make an order for that purpose fixing the time for the presentation of said warrants, which shall be at least three months from the date of such order."

"Sec. 5130. Cities or incorporated towns, organized or to be organized under the provisions of this act, shall be, and are hereby declared to be bodies politic and corporate, under the name and style of 'The City of ———,' or 'The Incorporated Town of ———,' as the case may be; capable to sue and be sued, to contract and be contracted with, to acquire, hold and possess property, real and personal; to have a common seal, and to change and alter the same at pleasure, and to exercise such other powers and to have such other privileges as are incident to other corporations of like character or degree, not inconsistent with the provisions of this act or the general laws of the state."

"Sec. 5169. Any person owning property and having taxes to pay in any city or town may, upon application to any judge or court having authority to grant injunctions, enjoin the collection of any tax levied in such city or town, without authority of law, and may also enjoin the issue or the payment by such city or town of any warrants, certificates or other form or evidence of indebtedness against such city or town issued or contracted without authority of law." Sand. & H. Dig. Ark. 1894.

The constitution and the statutes which we have cited contain no express grant of power to cities or to counties to issue their warrants in payment of their debts. Nevertheless the existence of that power is a necessary implication from the terms of this constitution and these statutes. And that which is implied is as much a part of a statute, grant, or contract as that which is expressed. *Gelpcke v. City of Dubuque*, 1 Wall. 220, 221, 17 L. Ed. 530; *U. S. v. Babbitt*,

1 Black, 55, 17 L. Ed. 94; *Citizens' Savings & Loan Ass'n v. City of Topeka*, 20 Wall. 655, 660, 22 L. Ed. 455. "A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter." *U. S. v. Freeman*, 3 How. 556, 565, 17 L. Ed. 724; *Stowel v. Zouch*, Plowd. 366. City warrants could not be received in payment of taxes, as this constitution and these statutes declare they shall be, nor would the councils of cities have been empowered to call them in and classify them, unless under this constitution and these laws cities had the power to issue them. Moreover, the grant of authority "to exercise such other powers and to have such other privileges as are incident to other corporations of like character or degree, not inconsistent with the provisions of this act or the general laws of the state," contained in section 5130, is ample to confer this power, because warrants are nothing but orders issued by the mayor and city clerk upon the city treasurer to pay money out of any funds in the treasury which are or may become available for the purpose specified, and the power to issue such warrants or orders is incidental to municipal and quasi municipal corporations whenever it is not prohibited or restricted by constitution or statute. The city of Little Rock has ample power under the constitution and statutes of that state to issue city warrants in payment of its debts.

It is insisted, however, that the judgment directing the issue of the mandamus is erroneous, because the power of the city is limited to authority to issue warrants to pay which there is, or will be during the year succeeding their issue, money in the city treasury, and the answer shows that there is not, and will not be, any such money in the treasury of the city of Little Rock. It is conceded that under the present system of administering the financial affairs of the city of Little Rock, as it is disclosed in the answer, there is not now, and there never will be, any money in the treasury of that city to pay the warrants directed to be issued to the relator, or to pay any of the other debts of that city, and that all the taxes which the city is authorized to levy, and all the revenue it can receive, are and will be needed and used to pay its current expenses. But the proposition that for this reason the city has no power to issue its warrants in payment of its just debts cannot be admitted. No authority has been cited by counsel for the plaintiffs in error which sustains this position. They have called our attention to *Board v. McManus*, 54 Ark. 446, 15 S. W. 897; *Com. v. Lancaster Co. Com'rs*, 6 Bin. 5, 10; *Com. v. Philadelphia Co. Com'rs*, 1 Whart. 1, 2 Whart. 286; *Vincent v. Board* (Colo. App.) 54 Pac. 393; *In re House Roll No. 284* (Neb.) 48 N. W. 275,—and cases of like character, in which the fiscal system under consideration contemplated the payment of the obligations of the various boards and municipalities against which mandamus was sought in money, and in money only. In none of them was the payment of their debts by the receipt of the warrants which evidenced them for taxes contemplated, and in none of them were warrants receivable for taxes. When, under such a system of paying the debts of municipalities in money only, it appeared to those courts that the treasury of the particular board or municipality was, and would con-

tinue to be, empty, so that warrants, if issued, could not be paid, and when they were not receivable for taxes, so that there was no way in which they could be collected, those courts refused to issue the mandamus directing the issuance of the warrants, on the ground that the mandamus would be unavailing, and the warrants would be useless. Even under that system a contrary rule has been adopted by other courts. *Babcock v. Goodrich*, 47 Cal. 488, 508; *State v. Clinton*, 28 La. Ann. 47, 48; *State v. Hoffman*, 35 Ohio St. 435, 438. The mooted question which these authorities consider, however, is not presented by the case before us, and it is not necessary to debate or decide it. The reason why these authorities are neither controlling nor persuasive is that the fiscal system to which they relate contemplated the payment of the debts presented in them in money, and in money only, while the fiscal system embodied in the constitution and statutes of Arkansas expressly provides for the payment of the debts of its municipalities and quasi municipalities in two ways: First, by the appropriation of money to their payment; and, second, by the receipt of the warrants which evidence them in payment and satisfaction of the taxes of the municipalities. "It is a very remarkable thing," says the supreme court of Arkansas in *Worthen v. Roots*, 34 Ark. 356, 367, "that the right to use county warrants in payment of taxes should be crystallized into a constitutional provision, and indicates a strong sense in the convention of the evil and danger to the very framework of our government (which is built upon counties) of allowing the county debts to become utterly valueless in the hands of the citizens, as well as the hardship to the citizen of compelling services which would be, to all practical intents, gratuitous." These remarks apply with equal force to the warrants of cities in the state of Arkansas, for their warrants are receivable for taxes under the same provision of the constitution which treats of the warrants of counties. In the same opinion, at page 370, that court declared:

"It had always been the practice in the state to issue warrants upon funds exhausted, as if they were in the treasury, although the particular fund was required to be specified."

And at page 371, after treating of another issue, and announcing the policy of the state regarding that question, the supreme court said:

"Hand in hand with this is another policy, quite as plainly indicated in the constitution. It is that every citizen having an ascertained debt against the county, or a 'warrant,' as it is termed, shall have the privilege of paying it in for taxes. No discriminations are made in favor of any persons who, standing on the same rights, may have been more industrious or fortunate than others in obtaining these evidences of their claims. It would be, as to these creditors, the same, in effect, to refuse to allow their claims, and deny them warrants, as it would be to refuse to receive their warrants when issued; and either would be repugnant, not only to the spirit of the constitution, but to that of all our legislation for a series of years."

In *Daniel v. Askew*, 36 Ark. 487, 490, the supreme court of that state declared that an earlier statute which evidenced the same policy as those cited in the early part of this opinion provided two modes for the payment of county warrants:

"First, they were made payable out of any money in the county treasury not otherwise appropriated, etc., in the order of their number and date; second,

they were made receivable in payment of all taxes and debts accruing to the county, irrespective of their number and date."

In *U. S. v. Miller Co.*, 4 Dill. 233, Fed. Cas. No. 15,776, the United States circuit court for the district of Arkansas recognized this policy of the state, and declared that the county tax of Miller county was paid each year "in the warrants of the county, leaving at the end of each year large amounts of warrants outstanding."

A careful examination of the constitution, statutes, and decisions of Arkansas discloses these facts: The constitution makes city and county taxes payable in city and county warrants, respectively. The statutes make city and county warrants receivable for city and county taxes, respectively, regardless of their number and date, and provide that the respective cities and counties may call in and classify their outstanding warrants. The decisions of the courts show that it has been the uniform practice in that state to issue warrants upon exhausted funds, and that such warrants are payable in two ways: First, they are receivable for taxes; and, second, they are payable out of any fund properly appropriated for that purpose. Now, there is no express limitation in the constitution or statutes of Arkansas of the power of cities to draw warrants to an authority to draw them only against a fund appropriated to pay them, or against money in the treasury, or against money that will come into the treasury within a year after their issue. In the absence of such a restriction, the conclusion is irresistible that the cities of that state have ample power to draw them upon an empty treasury. They are mere evidences of debt,—mere orders by one department of the government upon another,—and the plain purpose of the legislation of Arkansas was to give to the cities of that state ample power to issue their warrants in satisfaction of any just debt against them. Any other decision would abrogate the provision of the constitution and the statutes which makes warrants receivable for taxes, and would strike down the established fiscal policy of the state. If warrants could only be issued against funds that were already in the municipal treasuries, or that would be in such treasuries within a year after their issue, the constitutional and statutory provisions that they shall be receivable for taxes and that they may be called in and classified would have neither purpose nor effect. If every municipality necessarily provided the money to pay all its warrants within a year of their issue, there would be no occasion to receive them for taxes or to classify them. Taxes would be paid in currency, and warrants in cash. Under the constitution, the statutes, and the decisions of the courts of Arkansas, municipal warrants are receivable in payment of city taxes, and municipalities of that state have ample power to issue their warrants to pay just debts when there is no money in their treasuries to pay them, and no prospect that there will be any within a year of their issue. *Worthen v. Roots*, 34 Ark. 356, 360, 364, 367, 371; *Daniel v. Askew*, 36 Ark. 487, 490; *U. S. v. Miller Co.*, 4 Dill. 233, Fed. Cas. No. 15,776; *Howell v. Hogins*, 37 Ark. 110, 114; *Whitthorne v. Jett*, 39 Ark. 139.

This, then, is the case in hand: The city of Little Rock owed the relator *Worthen*, on his judgment against it, \$35,984. The relator

was entitled to payment of this judgment. The city was unable to pay it in money, but it had the power to pay it in its warrants. The relator was a taxpayer of that city, and annually paid a large percentage of its taxes; and he had the right, under the constitution and laws of his state, to pay these taxes with the warrants of his city. Clearly, the writ of mandamus could not be refused here on the ground upon which the authorities cited by counsel for plaintiffs in error rest,—the ground that its allowance would be futile, and the issue of the warrants unavailing,—because the relator could apply them to the payment of his taxes, and could in that way secure their collection.

But counsel for the plaintiffs in error urge another objection to this mandamus. They argue that, if the city and its officers had the power to issue the warrants, there was no provision of the statute which declared that its officers should exercise that power, and that for this reason it was error for the court below to direct them to do so. A conclusive answer to this contention is found in the opinion of the supreme court in *Rock Island Co. Sup'rs v. U. S.*, 4 Wall. 435, 446, 18 L. Ed. 423, where that court says:

"The conclusion to be deduced from the authorities is that where power is given to public officers in the language of the act before us, or in equivalent language,—whenever the public interest or individual rights call for its exercise,—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless."

The city of Little Rock owed the relator the amount of his judgment. It was the duty of that city to pay it. If there was any lawful way in which the plaintiffs in error could do so, it was their duty to take that way to provide for the payment of this judgment. According to their answer, there was one way, and one way only, in which they could do this, and that was by the issue of the warrants of the city, which the relator could collect by using them in payment of his taxes. He had the right to the payment of his judgment, and under the constitution and laws of the state of Arkansas he had the right to use the warrants of the city in the payment of his taxes. As this was the only way in which the plaintiffs in error could provide for the payment of this judgment, and as they had ample power to provide for it in this way, it was their plain duty to do so, and the court below properly commanded them to discharge that duty. Where a municipality and its officers have the power to pay a judgment against the city by the issue to the owner of the judgment of city warrants which are receivable for city taxes, and have no other way to pay it, it is their duty to issue the warrants, and the writ of mandamus will be granted to compel them to discharge that duty. *Rock Island Co. Sup'rs v. U. S.*, 4 Wall. 435, 446, 18 L. Ed. 423; *City of Galena v. Amy*, 5 Wall. 705, 709, 18 L. Ed. 560.

The court below directed the plaintiffs in error to issue to the relator Worthen, upon payment by him of the lawful fees of the mayor and clerk, 902 warrants, of specified sums, which amounted in the ag-

gregate to \$35,984, the amount due upon his judgment. Complaint is made that the court directed the issue of so many warrants, instead of one for the entire amount, and that it directed the issue of all these warrants forthwith, and it is claimed in argument that their issue will disarrange the financial affairs and disturb the administration of the government of the city. The only allegation to that effect in the answer is this:

"That to issue the warrants prayed for in relator's petition could not possibly result in any advantage to said relator, except it be at the cost and expense of the entire demoralization of the public finances, thus increasing the embarrassment and financial obligations of the city of Little Rock."

So far as this averment was interposed as a defense to the claim of the relator to the ultimate issue of the warrants, it is futile. It often increases the embarrassment of a debtor, whether public or private, to pay just obligations that have been long ignored. But the right of a creditor to the payment of his debt, and to the enforcement of that payment by all the legal remedies which the law of the land has given him, cannot be stricken down or impaired because the enforcement of that right may embarrass the debtor. *City of Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560; *U. S. v. Jefferson Co.*, 5 Dill. 324, Fed. Cas. No. 15,472. So far as this averment of the answer was interposed to invoke the exercise of the discretion of the court relative to the time and manner of the issue of the warrants, it was proper for consideration. The complaints of the action of the court in this regard are inconsistent. They are that it should have directed the issue of one instead of many warrants, and that it should not have directed the issue of warrants for the entire amount of the judgment at the same time. The number of the warrants that should be issued, their respective amounts, and the time when they should be sent forth, were matters intrusted to the legal discretion of the court below. It was undoubtedly the duty of that court so to exercise that discretion that the right of the relator to the warrants should not be denied or impaired, and that no disturbance in the administration of the financial affairs of the city should be caused which was not necessary to the protection and enforcement of the right of the relator. The direction to issue numerous warrants in convenient amounts, instead of one warrant for the entire amount, was a wise and salutary exercise of the discretion of the court. It made the remedy it administered more efficient and helpful to the relator, without loss, injury, or inconvenience to the city or its officers. Nor do we discover any evidence in this record of any abuse of discretion in the direction of the court that the plaintiffs in error should issue warrants to the amount of the judgment forthwith. The answer discloses the fact that the city owes \$60,000 that is not evidenced by judgment, and that is undoubtedly, partly, if not wholly, represented by warrants which the city has voluntarily issued. The holders of those warrants may pay their taxes to the city with their warrants. The relator was as much entitled to pay his taxes with the warrants due him on his judgment as were the holders of warrants already issued by the city to pay theirs with those they held. There was no way by which he could be given the benefit of this right but

by the issue of the warrants. If the city had already issued warrants to the amount of \$60,000, or if it had incurred debts for that amount for which warrants were due, the issue of warrants for \$35,984 more is not likely to derange its financial affairs much more seriously. Moreover, the discretion to determine this question, under the law, is not intrusted to this appellate court. The right to exercise that discretion was vested in the court below. The law imposed upon that court the duty to exercise its discretion upon this question, and to direct the issue of as many warrants as it deemed wise, at such time as it thought fit. It exercised that discretion, sitting in the presence of the parties, in the city against which this writ of mandamus runs. This court is certainly in no better position to determine the question there decided than the court below. In this state of the case, its action in directing warrants to issue forthwith for the entire amount of the judgment ought not to be reversed or modified unless the record clearly discloses a plain abuse of discretion. In our opinion, no such abuse is apparent, and the judgment below is affirmed. *City of East St. Louis v. Amy*, 120 U. S. 600, 604, 7 Sup. Ct. 739, 30 L. Ed. 798.

THAYER, Circuit Judge. The return to the alternative writ, all of the material allegations whereof were confessed by the demurrer, alleged, in substance, that the entire revenues of the city of Little Rock from taxes, licenses, fines, and all other sources do not amount to more than \$123,000 annually; that said income is inadequate to provide for public lighting, fire and police protection, the repair of streets and bridges, the payment of the salaries of city officials, the proper maintenance of hospitals and pest houses, and other ordinary and reasonable current expenses; that the city is without ability or authority to borrow money to pay its outstanding indebtedness, in whole or in part; that the city authorities have for several years past been endeavoring to devise ways and means to settle its outstanding indebtedness and stop the accumulation of interest; that they have heretofore solicited the general assembly of the state of Arkansas to submit to the voters of the state an amendment to the state constitution authorizing cities of the first class, like the city of Little Rock, to issue negotiable bonds, and levy taxes to pay the same, for the purpose of enabling such cities to pay off all outstanding indebtedness; and that they intend to make an application to succeeding general assemblies for the purpose of securing such legislation. The return further alleged that the issuance of the warrants prayed for by the relator would demoralize the public finances, and further embarrass the city in the discharge of its financial obligations; that the total judgment indebtedness of the city was about \$75,000, practically all of which was owned by the relator; that the floating debt of the city, other than its judgment indebtedness, amounted to \$60,000; and that the city authorities had fixed the rate of taxation for municipal purposes for the present year at the full constitutional limit of taxation, to wit, 5 mills on the dollar of assessed valuation. In view of these allegations of the return, which must be accepted as true, I am persuaded that the trial court erred

in directing the immediate issuance of warrants to the full amount of the relator's judgment, inasmuch as they will amount to more than 25 per cent. of the entire city revenue for the present fiscal year, and will absorb that amount of the revenue, if they are used during a single year for the payment of taxes. For the reasons stated in the opinion in chief, I have no doubt that the trial court had the power to compel the city to issue warrants in discharge of the relator's judgment, but it should have been exercised so as not to demoralize or disarrange the municipal finances. The condition of the city finances as disclosed by the return was such, in my judgment, as would have justified the lower court in making an order to the effect that a portion of the judgment be paid with warrants during the present year, and the residue thereof during succeeding years. The federal courts have heretofore exercised such a discretionary power when they have been called upon to make orders compelling a levy of taxes for the payment of judgments against counties and other municipal corporations (*Deuel Co. v. First Nat. Bank of Buchanan Co.*, 30 C. C. A. 30, 86 Fed. 264, 267), and, in my judgment, the facts disclosed by the return warranted its exercise in the present case.

RICE et al. v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1900.)

No. 1,276.

1. INSURANCE—REPRESENTATION—WARRANTY.

A representation in insurance is a statement by the applicant to the insurer regarding a fact material to the proposed insurance, and it must be not only false, but fraudulent, to defeat the policy. A warranty in insurance is a part of the contract, an agreement that the facts stated by the applicant are true, and a condition precedent to a recovery upon it; and its falsity in any particular is fatal to an action upon the policy.

2. EMPLOYER'S INDEMNITY BOND—WARRANTY IN APPLICATION.

A written statement made by employers to the obligor in a bond of indemnity against the dishonest acts of their employé, to the effect that they will invariably apply certain checks to his action, which the parties expressly agree by the statement itself and by the bond shall be the basis of the latter, and a condition precedent to a recovery upon it, is of the nature of a warranty, and not of a representation, and a failure to comply with the promise it contains is fatal to an action upon the bond.

3. SURETY DISCHARGED BY VIOLATION OF CONDITION.

A surety is discharged if a condition known to the obligee, upon which the surety agreed to be bound, is not complied with.

4. CONTRACT—PARTY IN DEFAULT CANNOT RECOVER.

He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform.

5. SAME—MODIFICATION—SUBSTITUTION OF TERMS.

Parties to a mutual agreement have the same power to modify it by contract that they had to make it, and, when they mutually agree to substitute new terms for the original stipulations of their contract, the old terms cease to have effect, and the substituted stipulations take their place, and become binding upon the parties.

6. SAME—WAIVER.

A waiver is the result of an intentional relinquishment of a known right, or of such words or acts as estop the holder of the right from asserting that he did not relinquish it.

7. SAME.

The casual receipt by the obligor in a bond of a single check signed by the agent of the obligees, without the counter signature of their bookkeeper, is not sufficient evidence of a waiver by the obligor of its right to insist upon an agreement by the obligees to invariably require the counter signature of their bookkeeper upon the checks of their agent to warrant the consideration of this question by the jury.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Nebraska.

T. J. Mahoney, for plaintiffs in error.

Myron L. Learned (John L. Kennedy, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The assignment of errors in this case challenges the rulings of the court below in the trial of an action upon a bond of indemnity against loss from certain acts of fraud or dishonesty of an employé of the obligees in the bond. The bond was dated on July 25, 1895, was for a term of one year, and the period of indemnity was subsequently twice extended one year at a time, so that the time covered by the terms of the bond and its renewals was three years from July 25, 1895. The obligor was the defendant in error, the Fidelity & Deposit Company of Maryland, a corporation; the obligees were Rice Bros. & Nixon, a co-partnership composed of William H. Rice, Thomas J. Rice, and George W. Nixon, the plaintiffs in error; and their employé against whose fraudulent or dishonest acts the fidelity company promised indemnity was Walter J. Perry. The plaintiffs pleaded in their complaint that between September 27, 1895, and July 25, 1898, the employé, Perry, had been guilty of numerous acts of fraud and dishonesty which entailed losses upon them, against which the fidelity company had promised indemnity by its bond. The most heinous of these acts consisted in the drawing of funds by Perry from the bank account of his employers, and the misappropriation of the moneys so drawn in various ways. In its answer to this complaint the fidelity company first either denied, or confessed and avoided, the various charges against Perry, and then pleaded as a separate defense that the plaintiffs agreed with it that all checks drawn by Perry on their bank account during the life of the bond and its renewals should be countersigned by their bookkeeper, John W. Gribble, and that they had entirely failed to keep this stipulation of their contract. There was a trial of the issues presented by these pleadings, and a verdict and judgment for the company.

The first complaint which counsel for plaintiffs in error urges against the action of the court below upon the trial is that it received in evidence over their objection a certain written instrument signed by Rice Bros. & Nixon, and dated August 30, 1895, to the effect that the counter signature of John W. Gribble would be invariably re-

quired on all checks drawn by Perry in their behalf, and that the court charged the jury that if they believed that this instrument was made and delivered to the company before the bond was delivered, and that the plaintiffs permitted Perry to draw checks on their behalf without the counter signature of Gribble, these facts constituted a complete defense to the action. The argument of counsel is that these rulings were erroneous because the statement in the written instrument that the checks drawn by Perry should be countersigned by Gribble was a representation, and not a warranty, and hence a failure to comply with it constituted no defense to the action, unless the statement was not only false, but fraudulent and material to the risk, and because the proof was that this instrument was not made or delivered until the bond had been delivered, and there was no evidence to the contrary. For the purpose of the determination of the question presented by this argument, the evidence of the plaintiffs in error will be conceded to be true, and the claims of their counsel relative to the facts of this case will be assumed to be well founded. Under this concession and assumption, these are the facts material to the issues now under discussion:

Before the bond upon which this action is founded was delivered to the obligees, and before it became effective, the company requested them to answer in writing certain questions, and they did so. Two of those questions, together with the contract at the foot of the instrument containing the answers, read in this way:

"10. (a) Will he [the employé, Perry] be authorized to sign checks on your behalf? Ans. Yes.

"(b) Will the counter signature of any other person be invariably required. If so, whose? Ans. No.

"It is agreed that the above answers are to be taken as conditions precedent, and as the basis of the said bond applied for, or any renewal or continuation of the same that may be issued by the Fidelity & Deposit Company of Maryland to the undersigned upon the person above named."

This instrument was dated August 9, 1895, and was signed by the plaintiffs in error. After the bond had been made and delivered, the company again requested answers in writing to the same questions, and in response to that request the plaintiffs in error made the following answers, and signed and delivered to the company the instrument dated August 30, 1895, which is the subject of the controversy in hand. That instrument contained the following questions, answers, and contract:

"10. (a) Will he be authorized to sign checks on your behalf? Ans. Yes.

"(b) Will the counter signature of any other person be invariably required? If so, whose? Ans. Yes. John W. Gribble, bookkeeper.

"This is to certify that the answers herein given to No. 10, 'a' and 'b,' are to be substituted for any other prior statements that have been made by us in relation to the application of Walter J. Perry for a bond in the penalty of ten thousand dollars as manager in our employ, at South Omaha, Neb. No other statements except No. 10, 'a' and 'b,' shall be affected by this certificate. It is agreed that the above answers are to be taken as conditions precedent, and as the basis of the said bond applied for, or any renewal or continuation of the same that may be issued by the Fidelity & Deposit Company of Maryland to the undersigned upon the person above named.

"Dated at Chicago, Ill., this 30th day of August, 1895.

"Signature of employer: Rice Bros. & Nixon,

"By W. H. Rice, Member of Firm."

This instrument was delivered to the defendant in error before any of the acts of fraud and dishonesty on account of which this action was brought had been committed by Perry. The bond contains this recital:

"And whereas, the employer has delivered to the Fidelity & Deposit Company of Maryland, a corporation of the state of Maryland, hereinafter called the 'Company,' a statement in writing relative to the duties, responsibilities, and check to be used upon the employé in said position, and other matters: Now, therefore, in consideration of the sum of one hundred dollars paid as a premium for the period from July 25th, 1895, to July 25th, 1896, at twelve o'clock noon, and upon the faith of the said statement as aforesaid by the employer, it is hereby agreed and declared" that the company will indemnify the obligees on certain conditions named in the bond.

The first contention to be considered upon this state of facts is the claim of counsel that the plaintiffs' statement and agreement contained in the instrument of August 30, 1895, to the effect that the counter signature of Gribble, the bookkeeper, would be invariably required on Perry's checks on their account, and that this statement should be taken as a condition precedent and as the basis of the bond, together with their complete failure to comply with this provision of their contract, constituted no defense to the action, because the statement and agreement were representations, and were not warranties. The terms "representations" and "warranties" are imported into this case from the law of insurance. Under the law upon that subject, they generally and properly describe statements of existing facts, not promises or prophecies regarding future acts. In insurance a representation is a statement by the applicant to the insurer regarding a fact material to the proposed insurance, and it must be not only false, but fraudulent, to defeat the policy. A warranty, in the law of insurance, is a binding agreement that the facts stated by the applicant are true. It is a part of the contract, a condition precedent to a recovery upon it, and its falsity in any particular is fatal to an action upon the policy. *Jeffries v. Insurance Co.*, 22 Wall. 47, 54, 22 L. Ed. 833; *Insurance Co. v. France*, 91 U. S. 510, 512, 23 L. Ed. 401; *Anderson v. Fitzgerald*, 4 H. L. Cas. 483, 487; *Cazenove v. Assurance Co.*, 6 C. B. (N. S.) 437, 450, 451, 6 Jur. (N. S.) 826; *Price v. Insurance Co.*, 17 Minn. 497 (Gil. 473). A careful examination of the statement in the case in hand discloses the fact that it has all the attributes of a warranty, and essential characteristics which clearly distinguish it from a representation. A representation is a mere declaration of a fact, but it is neither a condition precedent nor a part of the contract, while a warranty is both. The statement in issue that the counter signature of Gribble will be invariably required on the checks of Perry upon the account of the plaintiffs is a part of the contract between the parties to this suit, and a condition precedent to a recovery upon it, because the bond recites that it rests upon the faith of this statement, and because the plaintiffs expressly agree in the written instrument of August 30, 1895, that their statement contained therein shall be taken as a condition precedent and as the basis of the bond. This conclusion has not been reached without a careful consideration of the argument of counsel for the plaintiffs in error that the state-

ment in this instrument is a mere declaration of an unexecuted intention, and that the failure to comply with such a declaration is not fatal to a recovery upon a contract induced by it. Neither the statement to which he cites us in 2 Brandt, Sur. § 404, that "a distinction has been taken between a misrepresentation of an existing fact and of an unexecuted intention, and the latter has been held not to be such a fraud as will discharge a surety," nor the authorities cited in the note to that section, have escaped our attention. Those authorities are *Gage v. Lewis*, 68 Ill. 604; *Towle v. Society*, 3 Giff. 42; *Benham v. Assurance Co.*, 7 Welsb., H & G. 744. In *Gage v. Lewis* no question of liability for the breach of a contract or warranty was presented. The answer to the action on the obligation of the surety was that the obligee had induced the surety to sign the obligation by the false and fraudulent representation that he would not again engage in a business of the character which he had just sold, and that immediately after the execution of the obligation he again entered upon such a business. Fraud may not be predicated of a promise or a prophecy, and the court held that this representation was not a fraud, but was, at most, a contract. In *Towle v. Society* the defense pleaded to an action on an employers' insurance policy against the dishonest acts of their employé was that in the application for the policy the employers had stated that the employé's accounts would be "checked weekly by the surveyor of taxes"; that the policy recited that this statement was its basis, and contained a stipulation that any misrepresentation in any declaration in consequence of which the policy was granted by the company would render the policy void; and that in fact the accounts of the employé were not checked weekly by the surveyor of taxes. It turned out upon the trial that the declaration was not made by the employers, but by a third party, and that the statement it contained was made in good faith and was substantially correct. There was no agreement that the declaration was a part of the contract of the parties, or that its truth was a condition precedent to a recovery upon the policy; and the court held that it did not constitute a warranty, but was a mere declaration of a person who was not a party to the contract relative to the course which another party intended to pursue, and that the failure of the latter to follow that course was not a defense to the action. 3 Giff. 55. In *Benham v. Assurance Co.*, an action upon an employers' policy of insurance against the dishonest acts of their employé, the facts were that the employers made and delivered an application, as the basis of the policy, in which they declared that the accounts of the employé would be examined every fortnight by the finance committee, but they were not so examined; and the policy provided that "any fraudulent misstatement or suppression in any declaration in consequence of, and with express reference to, which a policy of guaranty is granted by the company, renders such policy void from the beginning." There was no contract between the parties that the statements in the application should be a part of their agreement, or that its truth should be a condition precedent to a recovery; and the court held that it was not a warranty, but a mere

representation, and that, if it was made in good faith, a mere failure to make it true by their subsequent action would not necessarily defeat the action upon the policy. These cases are apt illustrations of declarations which are not warranties, but they only serve to emphasize the distinction between the representations which they contained and the statement and contract in the case in hand. The crucial distinction between a representation and a warranty is that the one is not, and the other is, a part of the contract between the parties, and that the truth of the one is not, and the truth of the other is, a condition precedent to a recovery upon the policy or bond to which they relate. In the cases cited by the plaintiffs in error which we have been reviewing, there was no agreement of the parties that the declarations which they contained were parts of their contracts, no binding agreement that they should be true, no contract that their truth should constitute a condition precedent to a recovery upon them. In the case at bar the parties expressly agreed in writing that the statement of the employers was a part of their contract; that it should be not only the basis of the bond, but a condition precedent, without compliance with which there could be no recovery upon the obligation. The conclusion is irresistible that under this agreement the declaration in this case was of the nature of a warranty, and not of a representation, and our conclusion is: A written statement made by employers to the obligor in a bond of indemnity against the dishonest acts of their employé to the effect that they will invariably apply certain checks to his action, which the parties expressly agree, by the statement itself and by the bond, shall be the basis of the latter, and a condition precedent to a recovery upon it, is of the nature of a warranty, and not of a representation, and a failure to comply with the promise it contains is fatal to an action upon the bond. *Indemnity Co. v. Wood*, 19 C. C. A. 264, 73 Fed. 81, 84; *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.*, 36 C. C. A. 671, 95 Fed. 111, 113.

There are other propositions of law which are fairly applicable to this contract that lead to the same result. The complaint alleges and the fact was that the plaintiffs made an agreement of employment with Walter J. Perry at the time this bond was made, under which he became liable to them for the losses which they claimed to have sustained through his dishonest and fraudulent acts. The bond of the fidelity company in suit recited this employment, and gave to the plaintiffs further indemnity to the amount of \$10,000 against these losses. The legal effect of these contracts was to create the relation of principal and surety between Perry and the fidelity company. The plaintiffs were necessarily aware of this relation. They agreed in so many words by the instrument of August 30, 1895, that the counter signature of their bookkeeper on the checks of Perry against their account should be a condition of the liability of this surety; and the general rule is that if a condition, known to the obligee, upon which a surety agrees to be bound, is not complied with, the surety is discharged. 2 *Brandt*, Sur. § 403; *Jones v. Keer*, 30 Ga. 93, 95; *Cunningham v. Wrenn*, 23 Ill. 64, 65; *Lynch v. Colegate*, 2 Har. & J. 34, 37; *Holl v. Hadley*, 4 Nev. &

M. 515, 520; *Bonser v. Cox*, 4 Beav. 379, 384; *U. S. v. Hillegas*, 3 Wash. C. C. 70, 76, Fed. Cas. No. 15,366; *Whitcher v. Hall*, 5 Barn. & C. 269; *Combe v. Woolf*, 8 Bing. 156, 161.

Again, the bond and the instrument of August 30, 1895, must be read, construed, and enforced together. The contract of these parties consists of all the stipulations and agreements in both instruments. Both instruments are parts of a single contract. When they are so read, the agreement of these parties is found to contain mutual covenants,—a covenant by the employers that they will invariably require the counter signature of their bookkeeper, Gribble, on all checks of Perry against their account, and a covenant of the fidelity company that it will pay the losses resulting from the dishonest and fraudulent acts of Perry. Now, the plaintiffs have entirely failed to keep their covenant. Consequently they cannot enforce the fulfillment of the covenant of the fidelity company. He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform. *Cattle Co. v. Martindale*, 63 Fed. 84, 89, 11 C. C. A. 33, 38, 27 U. S. App. 277, 284, 285; *Norrington v. Wright*, 115 U. S. 188, 204, 205, 6 Sup. Ct. 12, 29 L. Ed. 366; *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372; *Rolling Mill v. Rhodes*, 121 U. S. 255, 261, 264, 7 Sup. Ct. 882, 30 L. Ed. 920; *Beck & Pauli Lith. Co. v. Colorado Milling & Elevator Co.*, 52 Fed. 700, 3 C. C. A. 248, 10 U. S. App. 465, 470; *King Philip Mills v. Slater*, 12 R. I. 82; *Smith v. Lewis*, 40 Ind. 98; *Hoare v. Rennie*, 5 Hurl. & N. 19; *Pope v. Porter*, 102 N. Y. 366, 371, 7 N. E. 304; *Dwinel v. Howard*, 30 Me. 258; *Robson v. Bohn*, 27 Minn. 333, 344, 7 N. W. 357; *Reybold v. Voorhees*, 30 Pa. St. 116, 121; *Stephenson v. Cady*, 117 Mass. 6, 9; *Branch v. Palmer*, 65 Ga. 210; *Fletcher v. Cole*, 23 Vt. 114, 119.

The result is that there was no error in the charge of the court that the failure of the plaintiffs to require the counter signature of their bookkeeper upon the checks of Perry upon their account was fatal to their action, if the agreement of August 30, 1895, was the basis of the bond.

The second contention of counsel, however, is that this instrument of August 30, 1895, was improperly received in evidence, and that the court erroneously charged that a failure to comply with its terms was a defense to the action if it was delivered and accepted before the bond was executed, because the uncontradicted evidence was that it was not made and delivered until after the execution and delivery of the bond. It is conceded for the purpose of this decision that the evidence is conclusive that the agreement of August 30, 1895, was not made until after the execution and delivery of the bond. But before the instrument of August 30, 1895, was made, the parties to that agreement had made a contract evidenced by the bond and by the prior instrument of August 9, 1895. Their contract was finished, and it was complete. Nevertheless they had not lost their right to contract. They had the same right to abrogate or modify the agreement they had made that they originally had to make it. They had agreed that certain answers in the in-

strument of August 9, 1895, should be taken as conditions precedent, and as the basis of the bond. They had the right by mutual agreement to modify this contract, and to substitute other answers as the conditions precedent and as the basis of the bond. They did this, and, that there might be no doubt or cavil concerning it, they put this contract of modification in writing, and by the instrument of August 30, 1895, expressly agreed that the answers given therein to the questions here under consideration should be substituted for all prior statements made in reference to the bond here in suit. The necessary effect of this subsequent agreement was to modify the original contract, and to substitute the answers in the instrument of August 30, 1895, for those in the instrument of August 9, 1895, as the conditions precedent and the basis of the obligation. Parties to a mutual agreement have the same power to modify it by contract that they have to make it, and, when they mutually agree to substitute new terms for the original stipulations of the contract, the old terms cease to have effect, and the substituted stipulations take their place. The result is that the agreement of August 30, 1895, became a part of the contract of the parties from the date of its delivery, and the failure of the plaintiffs to comply with its terms was fatal to their recovery, notwithstanding the fact that it was not made until after the bond was delivered. The only error of the court below was that it gave a charge too favorable to the plaintiffs. It charged that the defense based on this agreement was available to the defendant only in case the substituted agreement was made before the bond was executed, when it should have instructed the jury that it was available and constituted a complete defense to the action whether it was made before or after the delivery of the bond. This error could not have prejudiced the plaintiffs, and error without prejudice is no ground for reversal. *U. S. v. Shapleigh*, 54 Fed. 126, 4 C. C. A. 237, 12 U. S. App. 26; *U. S. v. Patrick*, 73 Fed. 800, 20 C. C. A. 11, 36 U. S. App. 645; *Ward v. Cochran*, 71 Fed. 127, 18 C. C. A. 1, 36 U. S. App. 307; *Jones v. Allen*, 85 Fed. 523, 29 C. C. A. 318, 56 U. S. App. 529; *Railway Co. v. Price*, 97 Fed. 423, 38 C. C. A. 239; *National Bank of Commerce v. First Nat. Bank*, 61 Fed. 809, 10 C. C. A. 87, 27 U. S. App. 88; *Railroad Co. v. Stoner*, 51 Fed. 649, 2 C. C. A. 437, 10 U. S. App. 209.

Another specification of error is that the trial court improperly struck from the case, and refused to submit to the jury, evidence of a waiver of the defense under consideration. That evidence consisted of proof of the fact that on July 25, 1896, the general agent of the defendant received for it, in payment of the premium on the bond of a third person, a check for \$25 signed by the plaintiffs, by Perry, as their agent, without the counter signature of their bookkeeper, Gribble, deposited it in a bank, and accounted to his principal for its proceeds. The argument is that the receipt of this check was notice to the company that the plaintiffs were permitting Perry to issue checks on their account without the counter signature of their bookkeeper, and that this notice, and the subsequent renewal of the bond on July 17, 1897, constituted some evidence of

a waiver of the requirement of the counter signature, which should have been submitted to the jury. But a waiver is either the result of an intentional relinquishment of a known right, or an estoppel from enforcing it. To constitute a waiver, there must be an intention to relinquish the right, or there must be words or acts calculated to induce the other contracting party to believe, and which deceive him into the belief, that the holder of the right has abandoned it; and the party deceived must have acted on his belief, so that an assertion of the right will inflict upon him a loss he would not have sustained if its holder had not appeared to relinquish it. *Society v. McElroy*, 83 Fed. 631, 640, 28 C. C. A. 365, 374, 49 U. S. App. 548, 564; *Warren v. Crane*, 50 Mich. 301, 15 N. W. 465; *Insurance Co. v. Thomas*, 82 Fed. 406, 408, 409, 27 C. C. A. 42; *Bish. Cont.* § 793. There was nothing in the evidence received which tended to show that the defendant ever intended to relinquish its right. There was nothing in the casual receipt by the general agent of this company of a single check of Perry, without the bookkeeper's counter signature, calculated to induce the plaintiffs to believe that the requirement of the contract in that regard had been abandoned or waived. No evidence was introduced to show that they were induced by that fact to believe, or that they did believe, that any such waiver had been made. The renewal of the bond on July 17, 1897, which they accepted, conclusively shows that they did not suppose it had been waived. That renewal expressly provides, in writing, that it is made subject to all the conditions and covenants of the original bond. A verdict of waiver could not have been sustained upon this evidence, and there was therefore no error in the action of the court in striking the check and the evidence concerning it from the case.

All the specifications of error which relate in any way to the trial of the issue presented by the defense that the plaintiffs failed to require the counter signature of their bookkeeper upon the checks of Perry have now been considered, and the conclusion is not only that there was no error prejudicial to the plaintiffs in the trial of that issue, but that the uncontradicted evidence established that defense, and interposed a complete bar to the plaintiffs' recovery. There are many specifications of error relative to the rulings of the court in the trial of the other issues presented by the pleadings in this case, but it is unnecessary to consider them, because, even if some of these rulings were erroneous, they could not have been prejudicial to the plaintiffs, since the defendant established a complete defense on the ground already considered, and the judgment below was right, whatever the rulings or the result of the trial of the other issues may have been. The judgment below is accordingly affirmed.

VACCARO et al. v. SECURITY BANK OF MEMPHIS et al.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1900.)

No. 795.

1. BANKRUPTCY—ACT OF BANKRUPTCY—GENERAL ASSIGNMENT.

The appointment of a receiver by a court of equity for a partnership after its dissolution by the death of a partner, on the application of the administrator of the deceased partner, although not opposed by the surviving partners, is not "a general assignment for the benefit of creditors" on their part, within the meaning of Bankr. Act 1898, § 3, subd. 4, which makes such assignment an act of bankruptcy. To come within that provision, the action must be voluntary and must constitute a general assignment at common law.

2. SAME—PARTNERSHIP—APPOINTMENT OF RECEIVER.

The failure of the surviving partners of a dissolved partnership to contest the appointment of a receiver for such partnership is not permitting their property to be concealed or removed with intent to hinder, delay, or defraud their creditors, which constitutes an act of bankruptcy, under Bankr. Act 1898, § 3a, subd. 1.

3. SAME—UNLAWFUL PREFERENCE—INSOLVENCY OF PARTNERSHIP.

A partnership is not insolvent, within the meaning of Bankr. Act 1898, so long as the partnership property, together with the property of the individual partners, which is liable for the partnership debts, is sufficient to pay its indebtedness; and this is true although the only partner whose individual estate is sufficient to render the partnership solvent is dead. Hence, in such case, where the estate of the deceased partner is sufficient, after paying his individual debts, to pay the debts of the firm, the transfer of partnership property by the surviving partners in payment of a partnership debt is not an unlawful preference which constitutes an act of bankruptcy.

Appeal from the District Court of the United States for the Western District of Tennessee.

The firm of A. Vaccaro & Co. was composed of three brothers,—A. Vaccaro, B. Vaccaro, and A. B. Vaccaro. A. Vaccaro died August 7, 1899, and the Memphis Trust Company qualified as his administrator. The surviving partners, B. and A. B. Vaccaro, continued in possession of the partnership stock and assets, and were engaged in closing up the business, until August 24, 1899, when, under a proceeding instituted by the administrator of the deceased partner in the chancery court of Shelby county, Tenn., a receiver was appointed for the purpose of liquidating the partnership affairs, who immediately took possession of the firm assets. In this condition of affairs certain creditors of the firm holding provable debts aggregating about \$10,000 filed a petition in bankruptcy against said B. and A. B. Vaccaro as surviving partners of the said partnership of A. Vaccaro & Co., praying that they be declared bankrupts. The petition, as amended by leave of the court, set out a number of alleged acts of bankruptcy, only three of which were relied upon at the final hearing. These acts, as averred, were as follows: (1) That said A. Vaccaro & Co. were insolvent, and that within four months preceding the date of the filing of their petition the "said A. Vaccaro & Co., composed of the members individually as aforesaid, committed an act of bankruptcy, in that they did heretofore, to wit, on the 24th day of August, 1899, make a general assignment for the benefit of their creditors, in this, to wit: That on said 24th day of August, 1899, they did procure, with intent to hinder and delay their creditors, all of their partnership property located at 273 Front street to be transferred to O. B. Polk, as receiver, a copy of which transfer is herewith filed, marked 'Exhibit No. 1.' That said transfer was made with intent to hinder and delay the collection by their creditors of their debts, and consisted in this: that the Memphis Trust Co., as administrator of A. Vaccaro, a member of said partnership, lately deceased, exhibited its bill in the chancery court of Shelby county, Tennessee,

August 24, 1899, against B. Vaccaro and A. B. Vaccaro, wherein it averred substantially that A. Vaccaro, B. Vaccaro, and A. B. Vaccaro, all of whom were brothers, had been engaged as partners in the wholesale liquor business in the city of Memphis under the firm name and style of A. Vaccaro & Co., and that said firm had been dissolved by the death of A. Vaccaro. That upon investigation into the condition of the affairs of said firm, it developed that it was very heavily indebted, and that it had not assets sufficient to pay off its indebtedness. That it owed, in round numbers, between \$123,000 and \$124,000. That its nominal assets were about the same amount, but that really the value of these assets was very much less than their face value, so that same will not yield enough to pay the debts of said firm. That there will be a deficiency of between forty and fifty thousand dollars. That B. Vaccaro and A. B. Vaccaro had comparatively small assets, and that the surplus of their individual estates, after paying their private debts, would not be sufficient to pay their share of the losses and indebtedness of the firm of A. Vaccaro & Co., so that it was more than probable that such losses would fall unequally upon the estate of A. Vaccaro. That the indebtedness of A. Vaccaro & Co. was daily maturing, and the surviving partners who were in charge of the business have not money with which to pay said debts. That said B. Vaccaro and A. B. Vaccaro, the surviving members of said partnership firm, were unable to raise any funds with which to pay them. That they are consequently unable to wind up said partnership, or make arrangements with their creditors as to their debts. That, under the circumstances, it was the duty of complainant in said bill to bring these matters before the chancery court, and apply for the appointment of a receiver to take charge of the assets and properties of said firm of A. Vaccaro & Co., and to collect them and administer them for the benefit of the creditors of said firm under the decrees and orders of the chancery court. Such bill prayed for the appointment of a receiver to take charge of all the partnership assets and properties, and administer the same for the benefit of the creditors of said firm. That said receiver be given orders and directions by said court, and that the creditors of said firm be required to file their claims in said cause for adjustment and settlement. Petitioners aver that, upon the filing of said bill, application was made to J. S. Galloway, judge of the probate court of Shelby county, Tennessee, on said 24th day of August, 1899, for the appointment of such receiver, and that the said J. S. Galloway, the defendants appearing, waiving notice, and consenting to such appointment, did thereupon appoint O. B. Polk receiver as aforesaid. So these petitioners aver and charge that said appointment, effecting a transfer of the assets of A. Vaccaro & Co., was made to hinder and delay the creditors of said firm, and is, in legal effect, a general assignment, and an act of bankruptcy." (2) "That said firm of B. and A. B. Vaccaro, surviving partners, while insolvent, permitted its property, viz. its stock of goods and merchandise, to be removed and concealed with intent to hinder, delay, and defraud its creditors, in this: that on the 24th day of August, 1899, said firm did permit its stock of merchandise to be transferred and removed to O. B. Polk, receiver, hereinbefore set out." (3) "That said firm of A. Vaccaro & Co., by B. Vaccaro and A. B. Vaccaro, surviving partners, while insolvent, within four months next preceding the filing of the petition herein, did, on August 23, 1899, with intent to prefer one A. J. Vaccaro over other creditors of said firm, transfer to said A. J. Vaccaro, who was then a creditor of said firm to the amount of \$400, evidenced by a promissory note, not then due, a large amount of whisky and other liquors, to the value of \$400." The said B. and A. B. Vaccaro answered, and denied that they had made any general assignment within the meaning of the bankrupt act; admitted that they had not contested the bill filed by the administrator of A. Vaccaro; admitted that the firm assets of A. Vaccaro & Co. were insufficient to pay the firm debts, but insisted that the individual assets of the members of the firm, including A. Vaccaro, deceased, were abundantly sufficient, after paying individual debts, to pay all the firm debts not paid by firm assets. They denied that they had procured the said equity bill to be filed, or that they had procured the appointment of a receiver. They insisted that the proceeding was in invitum as to them, and had been started and conducted in the general interest of the estate of A. Vaccaro, and that they had not contested the matter because they saw no object to be gained by such contest. They denied that they

had permitted the firm property to be "removed or concealed" "with intent to hinder, delay, or defraud creditors," within the meaning of the law, and denied the insolvency of the firm of A. Vaccaro & Co. They denied that they had transferred goods to A. J. Vaccaro with intent to prefer him over the other creditors, and again denied that A. Vaccaro & Co. were insolvent within the meaning of the bankrupt act. Much evidence was taken upon the issue thus formed. Upon a final hearing the bankrupt court adjudged the said B. and A. B. Vaccaro to be bankrupts "individually and as partners." From this adjudication both B. and A. B. Vaccaro have perfected this appeal

Josiah Patterson, for appellants.

Thomas M. Scruggs, for appellees.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

1. The great bulk of the evidence found in the transcript of the record relates to the question of the solvency or insolvency of the firm of A. Vaccaro & Co. at the date of the commission of the alleged acts of bankruptcy. The fact of solvency or insolvency is of no moment in respect to the alleged "general assignment" made August 24, 1899. If the appointment of a receiver under the bill of the Memphis Security Company, administrator of A. Vaccaro, was, as charged, "a general assignment," within the meaning of subdivision 4 of section 3 of the bankrupt act of 1898, it was an act of bankruptcy, whether the firm was solvent or insolvent. *West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098. Was the fact that a receiver was appointed in an uncontested suit the making of a general assignment? The situation was this: A. Vaccaro had died, leaving an estate worth at a fair valuation about \$115,000. He owed practically no individual debts. The firm assets, at a fair valuation, amounted to \$55,000, though nominally nearly double that sum. The individual estates of B. and A. B. Vaccaro, after paying individual debts, are valued at \$30,000. The firm indebtedness on August 24, 1899, was, in round figures, \$124,000. Of this firm indebtedness \$53,000 was secured by a mortgage upon realty owned by A. Vaccaro and by pledge of personal securities owned by him individually. It was clear from these facts that the firm assets were wholly insufficient to pay firm debts, and that, after applying such assets, about \$69,000 of firm debts would remain unpaid. It was also clear from the facts stated that the estate of A. Vaccaro would have to bear a much greater part of the burden of the firm debts than its proportion. When the administrator of A. Vaccaro ascertained this situation, it determined in the interest of the estate, and for the purpose of adjusting the equities between the partners, to apply for the appointment of a receiver and the liquidation of the partnership affairs under the orders of the chancery court. A bill was accordingly prepared, which substantially stated the facts as above. The theory upon which the interposition of a court of equity was sought was that the surviving partners had neither the means nor credit to provide for the payment of maturing debts, and that the estate of the deceased partner could not, at so early a stage of administration, be applied in the payment of debts of the firm; that creditors of the firm were,

therefore, likely to resort to coercive suits, which would sacrifice the firm assets as well as the property of the estate pledged for firm debts. It was also plain that the protection of the estate would require an adjustment of equities between the partners, and that as large a sum as possible should be realized from the individual estates of the surviving partners, and applied to the relief of the estate of the deceased partner. The evidence shows that the administrator and its counsel went over the whole situation with the surviving partners, and advised them of a firm purpose to file the bill and obtain a receiver. It is also satisfactorily shown that the surviving partners neither advised, counseled, nor procured the proceeding, and that all they did was to act upon the facts as they existed, and to decline to make opposition, being advised by counsel that a liquidation through a court of equity was the best course for the estate and the best for firm creditors, and that in all events their individual estates would be absorbed in the adjustment of equities between the partners after the payment of their individual debts. There is no evidence of collusion, fraud, or any other evil thing or purpose, and the business wisdom of the course proposed is most manifest. Resistance would have been in vain, for the interests of all were such as to call for the exercise of the powers of a court of equity under the circumstances as stated in the bill and as they actually were. The firm assets were utterly insufficient to pay firm debts. Before individual property could be resorted to by firm creditors, individual debts must be provided for. The unequal value of the individual estates, the fact that property of the deceased partner to the extent of \$53,000 was already pledged for firm debts, involved the necessity for an adjustment of matters between the estate of the deceased partner and the surviving partners. In no other way could the firm assets be protected from seizure by execution and the sacrifice of value sure to follow.

But if the facts be regarded as substantially proving that the Vaccaros consented to the proceeding by agreeing to make no opposition, so that the proceeding could not be regarded as purely one in invitum, we are still of opinion that the appointment of a receiver under such a suit, and for the bona fide purpose of liquidating the affairs of a partnership dissolved by death, was not the making of a general assignment within the meaning of the bankrupt act. A general assignment is the voluntary act of a debtor, whereby he transfers his property to a trustee for the benefit of creditors. Its nature and characteristics were well understood. It is not enough to say that, if the same consequences ensue from the appointment of a receiver, the one act is the equivalent of the other in law. Under section 3 of the bankrupt act very serious consequences attach to the making of a "general assignment." The debtor may be ever so solvent, and the act highly advantageous to his creditors, still it is technically an act of bankruptcy, and some creditors are quite likely to imagine that some advantage will accrue by an adjudication in bankruptcy. We are not disposed to construe the provisions of subdivision 4 of section 3 as including anything as a general assignment unless it is clearly one of those assignments known to the common

law as a general assignment. The mere fact that the consequences which attach to the appointment of a receiver for the purpose of winding up a partnership or a corporation are similar to those which result to creditors from a general assignment is not enough. If the procurement of the appointment of a receiver to wind up the affairs of an insolvent partnership be an act of bankruptcy at all, it must come under some other of the subdivisions of section 3. What we here decide is that it is not a "general assignment" under that section. The conclusion we reach is fully supported by the cases of *In re Empire Metallic Bedstead Co.* (D. C.) 95 Fed. 957, affirmed by the court of appeals for the Second circuit in 39 C. C. A. 372, 98 Fed. 981, and the case of *In re Baker-Ricketson Co.* (D. C.) 97 Fed. 489. It is true that the cases cited involved corporations, and that in the case of the Empire Metallic Bedstead Company the receiver was appointed under a statute of New York providing for the dissolution and winding up of insolvent state corporations. So far as appears, however, the fact that the receiver was appointed under a state law was not regarded as of any moment, and was not the ground of the decision. In the case of the Baker-Ricketson Company no state law is referred to, and the facts are, in respect to the passive conduct of the corporation, substantially identical with those presented by this record.

2. It is next charged that the said surviving partners, "while insolvent, permitted its property, viz. its stock of goods and merchandise, to be removed and concealed with intent to hinder, delay, and defraud its creditors, in this: that on the 24th of August, 1899, said firm did permit its stock of merchandise to be transferred and removed to O. B. Polk, receiver." So far as this is intended to predicate an act of bankruptcy upon any conveyance, transfer, or removal made by the deed of the Vaccaros, it is not made out. They made no conveyance or transfer to the receiver. The first subdivision of section 3 discriminates between a conveyance or transfer made by the debtor and a concealment or removal "permitted" by him. A like discrimination between an act done and an act "suffered or permitted" is shown by subdivision 3 of section 3. If the debtor, while insolvent, "suffer or permit" a creditor to obtain a preference through legal proceedings, or if he "permit" his property to be "concealed or removed" with intent to hinder, delay, or defraud his creditor, he has committed an act of bankruptcy. But it is not declared to be an act of bankruptcy if he "permit" or "suffer" a receiver to be appointed for the general benefit of the creditors of a dissolved and insolvent partnership, and this is the most that can be said to be shown by the evidence in this case. Under the act of 1867 it was held to be an act of bankruptcy to permit the creation of a receivership. *In re Baker-Ricketson Co.* (D. C.) 97 Fed. 489, 491, and cases cited. But, as Judge Lowell observes in the case last cited, this ruling was based upon section 39 of that act, which made it an act of bankruptcy to "procure or suffer his property to be taken on legal process with intent to defeat or delay the operation of this act." Under that provision it was held that the appointment of a receiver was legal process. But this provision is not found in the act of 1898,

and the language of section 3, subd. 1, is by no means the equivalent of that section. A like question arose in *Re Baker-Ricketson Co.*, cited above, and upon full consideration Judge Lowell held that the "failure to resist a bill for a receivership is not a conveyance or transfer of property by the debtor." Neither has the clause touching a concealment or removal by permission any clear bearing upon the matter of the appointment of a receiver. It would be an abuse of language and a confusion of ideas to hold that the passive conduct of the Vaccaros in respect to the bill seeking a receiver was a concealment or removal with intent to hinder, defraud, or delay creditors.

3. The next and last alleged act of bankruptcy is predicated upon the payment of a debt of \$400, before maturity, to one A. J. Vaccaro, in goods sold and delivered as a payment on August 23, 1900, by the surviving partners. The first requisite necessary to constitute this transaction an unlawful preference is that it shall be shown that the debtor firm which made the payment was insolvent within the meaning of the bankrupt act of 1898. The act itself defines insolvency to be that condition of a debtor where "the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." The debt preferred was a debt of the firm of A. Vaccaro & Co. The property transferred in settlement was a part of the partnership assets, and the transfer was made by the surviving partners rightfully in possession thereof, and lawfully entitled to close up the partnership affairs. If, therefore, the partnership which owed and paid the debt to A. J. Vaccaro was not insolvent at the time of the payment, it was not an unlawful preference, the element of insolvency being essential to constitute the transaction an unlawful one. If we are to take into consideration only the joint assets of A. Vaccaro & Co., the firm was insolvent. If we can only add to the partnership assets the individual property of B. and A. B. Vaccaro, the surviving partners, after providing for the payment of their individual debts and exemptions, there was a condition of insolvency. But if we add to the partnership assets the individual property of all the members of the firm, including the deceased partner, after deducting individual debts, and exemptions, and the dower of the widow of the deceased partner, the firm was not insolvent. Each member of the firm was liable in solido for the firm debts. It is true that in equity the individual debts of a partner are entitled to be first paid out of individual property, and firm debts out of partnership property; but in each case the surplus after providing for the preferred debt is applicable to the payment of debts of the other class. This, too, is the order of payment prescribed by section 5 of the bankrupt act of 1898. The creditors of the firm of A. Vaccaro & Co. could, therefore, appropriate to the payment of their debts the entire joint assets and the surplus of the individual estates of each member of the firm after deducting exemptions, dower, etc. There is much in the present act which tends strongly to sustain the contention that a part-

nership is to be regarded as a persona or legal entity capable of committing an act of bankruptcy in its character as a firm, and of being declared bankrupt as such, although no ground might exist for an adjudication against one or more of its members. Thus the word "person," as used in the act, includes a partnership. So a "partnership" may be adjudged a bankrupt during its active life or after dissolution, and before its business is settled. Again, the act declares that the court, having jurisdiction of one of the partners, may have jurisdiction of all, "and of the administration of partnership and individual property." In *Re Meyer*, 39 C. C. A. 368, 98 Fed. 976, the court of appeals for the second circuit sustained an adjudication of bankruptcy against a firm as such where one of the members of the firm was dead, and where only one of two surviving partners was adjudged a bankrupt, and further held that the adjudication drew to it the administration of both the partnership assets and individual estates of the members. There is much analogy between the provisions of section 5 of the act of 1898 and the Massachusetts insolvency law of 1838, as interpreted by the Massachusetts decisions. *Phillips v. Parker*, 2 Cush. 175; *Thompson v. Thompson*, 4 Cush. 127; *Dearborn v. Keith*, 5 Cush. 224; *Hanson v. Paige*, 3 Gray, 239.

The question as to whether a partnership is to be regarded as such an entity or persona as to justify an adjudication of bankruptcy against it as such, and irrespective of any adjudication of bankruptcy against its individual members, is one not free from difficulties, many of which are suggested by the learned opinion of Judge Hammond in this case. This question need not now be decided, for we are of opinion that there can be no adjudication of the bankruptcy of the firm of A. Vaccaro & Co., or of B. Vaccaro and A. B. Vaccaro as partners, unless it is shown that the partnership and the individuals which composed the firm are insolvent. Apart from any consequences arising out of the death of A. Vaccaro, it cannot be doubted but that the insolvency of the firm and of every member would have to be averred and shown before the firm could be adjudicated bankrupt. This was the settled ruling under the Massachusetts insolvency law of 1838, upon which much of the bankrupt act of 1898 seems to have been modeled. *Hanson v. Paige*, 3 Gray, 239. The reason for the requirement is that every member of a partnership is liable in solido for all of the firm debts, regardless of any agreement between the partners. The fact that the individual debts of the members of the firm are to be first paid out of individual assets does not affect the question of individual liability. There is a sense in which a firm may be said to be insolvent where the joint property is insufficient to pay the joint debts. But if, in fact, there is a partner whose individual estate is ample to pay the firm debts, as well as his own, the firm is not insolvent under a law which defines insolvency as a condition where the property of the debtor at a fair valuation is insufficient to pay his debts. This was the rule upon which Judge Brown of the Southern district of New York proceeded in *Re Blair* (C. C.) 99 Fed. 76, when he dismissed the petition of creditors of a partnership for an adjudication of bankruptcy against the firm upon an allegation that the firm was insolvent, but which did not aver that

the individual partners were insolvent. Upon this subject the learned judge said:

"The petition must, however, further show whether any of the individual partners are solvent. As it stands, it is ambiguous in this regard. It avers that the 'partnership is insolvent'; but other statements seem to intimate that by that averment it is intended only to state that the joint assets are not sufficient to pay the joint obligations. No doubt a firm is sometimes said to be insolvent when only a deficiency of joint assets is meant. But, as each partner is liable in solido for the debts of the company, so that they are debts of each individual member as much and as truly as they are debts of the firm, a partnership cannot, with strictness, be said to be insolvent while any one of the partners is able to pay all the firm's liabilities. *Lowell, Bankr. 359; Hanson v. Paige, 3 Gray, 239, 242; In re Bennet, 2 Low. 400, 3 Fed. Cas. 209.* By the express provision of section 5, moreover, the firm assets cannot be administered in bankruptcy if one of the partners is not adjudged bankrupt, unless by his consent. *Bank v. Meyer (D. C.) 92 Fed. 896; In re Meyer, 39 C. C. A. 368, 98 Fed. 976.* It is therefore required by rule 1 of this court that the petition shall state whether any partner not joining in the petition is solvent or insolvent. Form 2, moreover, prescribed by the supreme court (18 Sup. Ct. xviii.), requires for an adjudication of 'the firm' as bankrupts a statement in the petition that 'the partners owe debts which they are unable to pay in full.' This necessarily includes the individual responsibility of each, as well as their joint responsibility; and that form evidently contemplates that an adjudication of the firm imports an adjudication of all its members as well."

Does the fact that the firm has been dissolved by the death of A. Vaccaro change the necessity for such an averment and proof? It is said that the bankrupt court cannot administer the individual estate of the deceased partner. But quite as much, and more, might be said in respect to the individual estate of a partner not adjudged a bankrupt, for in such a case the solvent partner would not only administer his own estate, but be entitled, under section 5, to settle up the estate of the partnership, accounting in the end for the interest of the bankrupt partner. We are unable to see that the death of one of the partners should in any wise affect the question of the insolvency of the partnership. If the estate of the deceased is solvent,—that is, able to pay its own debts and the debts of the partnership,—the partnership cannot be said to be insolvent. In considering this question we are to bear in mind that the term "insolvency" as used in the act of 1898 and as used in the act of 1867 has not the same meaning. Under the act of 1867 it did not mean an absolute inability to pay one's debts by the application of one's property upon a settlement of all one's affairs, but an inability to pay debts in ordinary course of business. Insolvency is not dependent upon whether the property liable to the creditors is in the hands of a living surviving partner or in the hands of the administrator of a dead one. The supreme test is whether the aggregate of the debtor's property at a fair valuation is sufficient to pay the debtor's debts. The debtor here was the partnership as such and the partners individually. If collectively there was property subject to partnership debts, the partnership was not insolvent. Whether a part of that property was in the hands of an administrator is a matter of no moment. It is no answer to say that the administrator should have come forward, and paid the firm debts, and looked to firm assets and the individual estates of the surviving partners for reimbursement.

That might be a sufficient answer under the act of 1867, or under the Massachusetts insolvency law, where the failure to pay debts in due course of business was an act of bankruptcy. In *Thompson v. Thompson*, 4 Cush. 127, the observations as to the duty of the solvent partner to pay the firm debts were based upon the definition of insolvency under the Massachusetts act of 1838. The decided and clear weight of the evidence is that the aggregate of the property of the firm and of the individual estates of A. Vaccaro, B. Vaccaro, and A. B. Vaccaro, who composed the partnership, after deducting exemptions, dower of the widow of A. Vaccaro, and making provisions for the individual debts of each, was, at "a fair valuation, sufficient in amount to pay all the debts of the partnership." A. Vaccaro & Co. were, therefore, not insolvent on August 23 or 24, 1900, within the definition of the bankrupt act, and the transfer of firm property to A. J. Vaccaro was not with intent to prefer him over other creditors, and was not an act of bankruptcy. It follows that the adjudication of bankruptcy must be reversed, and the petition dismissed, with costs.

In re ADLER.

(District Court, W. D. Tennessee. June 29, 1900.)

BANKRUPTCY—REFUSAL TO CONFIRM COMPOSITION—APPEAL.

Under Bankr. Act 1898, § 25, allowing appeals in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals, "from a judgment granting or denying a discharge," no appeal lies from a refusal of the court of bankruptcy to confirm a composition offered by a bankrupt to his creditors, since no certificate or decree of discharge is either granted or denied in proceedings for the confirmation of a composition, and such appeal is contrary to the general scheme of the act.

B. M. Jackson, for bankrupt.

Thomas M. Scruggs, for opposing creditors.

HAMMOND, J. The bankrupt having offered a composition to his creditors, his application for a confirmation was refused by the court upon the specifications of a creditor in opposition thereto. Thereupon he prayed an appeal.

Composition, as a feature of a system of bankruptcy, was unknown to our American legislation until the act of 1874, c. 390, § 17 (18 Stat. 182). Historically, it will be found to have been doubted whether such a feature was within the constitutional grant of power to establish a uniform system of bankruptcy; the subject being so distinctively apart from that of bankruptcy, as generally understood at the time of our constitution. See *In re Reiman*, 11 N. B. R. 21, Fed. Cas. No. 11,673; *Id.*, 13 N. B. R. 128, Fed. Cas. No. 11,675; *Loveland*, Bankr. 549, § 242. So far as I am advised, there has been no authoritative judicial determination of that constitutional question; but the very absence of a provision for composition, and the reluctance of congress to put it into our system, show how separated the provisions for it are from the general scheme of the bankruptcy statute, and how necessary it is, in construing the act of congress, to keep the independence of the two in mind. They have no relation to each other.

The constitutional grant, *ex necessitate*, must be the foundation of either; and the bankruptcy structures of the act must be, by like necessity, a co-existent framework, within which or superposed on which the composition structure must rest; but this for reasons of constitutional integrity, and for no other reason whatever. This dependence is purely structural, and otherwise composition with creditors, authorized by a bankruptcy statute, or imposed forcibly by it upon unwilling creditors, is as independent of a system of bankruptcy as composition at common law would be. Indeed, congress takes advantage of the bankruptcy statute to permit, encourage, or compel a common-law composition. The word "discharge" has no technical, common, or appropriate meaning in the law of common or voluntary composition; nor would it have in an ordinary statute, by a legislature with plenary power to pass it, authorizing creditors to get together and adopt a composition on such terms as the statute might prescribe, voluntary or compulsory. The word "release" would exactly describe the transaction, technically and in common parlance. Or, less technically, but with equal common significance of meaning and acceptance of understanding, the word "satisfy" or "acquit" would define that which was done. And it may be conceded that the word "discharge" would somewhat synonymously express the transaction. Yet, when that word is used in a statute authorizing a debtor to "compound" his debts by an agreement, voluntary or enforced, with his creditors, which statute at the same time establishes "a system of bankruptcy," it borrows, not unnaturally, a reflected light by association with a technical term of similar import and identical form familiar to all bankruptcy statutes; one having a definite and distinctive meaning in the law of bankruptcy, however, which it has and can have nowhere else; quite as distinctive, indeed, as the most limited term used in the law of real property; one peculiarly technical in its meaning when used in bankruptcy statutes; and one likely to confuse the thought when used elsewhere in relation to analogous effects, but altogether dissimilar conditions of legal right, as well as legislative phraseology. This borrowed light of association must be discarded for a proper understanding of the use of the word "discharge" in the "composition" sections of the bankruptcy statute of 1898. The bankrupt is effectually discharged from all his debts by either process, undeniably,—by agreement with his creditors, voluntary or partly voluntary and partly compulsory, called a "composition," or, without any agreement, by the compulsory grant of a discharge in bankruptcy. But, except in this ultimate effect, there is not one element even of similarity in the two processes,—neither in the form nor in the substance. The dictionaries define "composition" as a compact or agreement, the settlement or adjustment of a matter of controversy; and they quote from Shakespeare, pertinently to our present inquiry:

"Thus we are agreed;
I crave our composition may be written
And sealed between us."

It is this compact or agreement which the debtor must plead, if sued, as a release of his debt. This is manifest, because he has noth-

ing else to plead. If the composition be confirmed, the statute commands that the bankruptcy proceedings shall be dismissed; if not confirmed, the estate shall be administered in bankruptcy. Bankr. Act 1898, § 12e. This shows that the composition is separate from the bankruptcy by the act itself, except as a mere foundation for it. There is no decree of discharge or other direction by the court in that behalf,—none whatever. Form No. 62, prescribed by the supreme court (18 Sup. Ct. xlvii.), is only that: "It is therefore hereby ordered that the said composition be and is hereby confirmed." Form No. 63 (18 Sup. Ct. xlviii.) only directs the distribution of the confirmation fund. Not one word in either as to a discharge of the debtor. Nor in form No. 61 (18 Sup. Ct. xlvii.), which is the application for confirmation of composition, nor in form No. 60 (18 Sup. Ct. xli.), which is the bankrupt's petition for a meeting of creditors to consider the acceptance of the proposed composition. It is strange, if the idea is sound that these proceedings are equivalent to a discharge, or are to be considered as the granting or denying a discharge, that the supreme court did not insert apt words in the order giving effect to it as a discharge, and in all these forms adapt them to that end. Now, if any creditor forced by the composition to accept less than his claim should reply to the plea of payment and satisfaction that he had been forced by the act of congress to take the less sum; that it was not within the power of congress to so compel him; that the bankruptcy statute, in respect of its provisions for composition, was not within the grant in that behalf, being as to such composition clauses only an artificial hook on which to hang the exercise of a power entirely outside of any system of bankruptcy, as such,—he would raise the constitutional question already suggested, which caused congress to hesitate about inserting such features in a bankruptcy statute. The distinction insisted on here is therefore not unimportant, and the statute should be construed with regard to it. On the other hand, the bankruptcy proceedings carry with and within themselves the primary and technical idea of "a discharge," which is to be "granted" or "denied," as expressed in the provisions of the statute for appeals, which are to be as in equity cases, and which are carefully and with manifest purpose limited to three fundamental subjects in bankruptcy,—bankruptcy, as such, and not having the remotest reference to the outside and outlandish subject of composition by agreement or compact. Act 1898, § 25a. It may be that this agreement is reached by a partly enforced assent of recalcitrant creditors, but none the less it is a compact, and in law there is an implied assent thereto by all of them.

This discharge in bankruptcy is as old as the original conception of the system, or nearly so, because it did not obtain in the very earliest of the English statutes, although it has become in the American legislation quite the chiefest concern or motive for the statutes that have been passed. Hil. Bankr. p. 227, § 1, et seq. In the old books the bankrupt is called after his discharge "a certificated bankrupt"; referring to that "certificate" signed by the commissioners and "allowed" by the lord chancellor, which afforded him his protection from arrest, or which he might plead in bar, or which the lord chancellor might also refuse. Id. p. 228, § 2, et seq., and notes; Id. p. 244, §

16; *Id.* p. 245, §§ 18, 19. It was here in these old English statutes, and the practice under them, that the discharge became technically understood everywhere to mean precisely that thing which is allowed or refused or granted or denied, namely, the certificate, or the decree of discharge itself, duly certified, in the modern statutes and practice. It is the same in all our American statutes and practice, only, with that habit of condensation which comes of frequent and familiar use, instead of saying he is a certificated bankrupt, or that he has been granted or denied his certificate of discharge, or that he pleads his certificate of discharge, we say that he is discharged in bankruptcy, that he pleads his discharge, that he has been granted a discharge, or that his discharge was denied or refused, as occasion may require. The force of this may be seen by comparing the statutes. But the thing that is meant by all these modern expressions, whether we find them in the statutes or elsewhere, is that which was originally meant, namely, that decree and the certificate of it which, *ipsissimis verbis*, he pleads in his defense, and which he carries or keeps with him for such uses, as evidence of his release, and which is in itself his discharge. There is nothing like this in the machinery of the composition. There the release is purely a matter of contract, the discharge being nothing more or less than the legal effect of the contract or composition, which is not granted by the court, but only confirmed; neither is it denied, but only not approved or not confirmed. It derives no legal effect from the action of the court; takes from the court's action no quality or element of a grant from it or from the statute, but only the completion of its validity by the court's approval. Subsection "c" of section 14 is only declaratory of the legal effect at common law of the compact between the bankrupt and his creditors that he will give and they will take a stipulated sum in payment or satisfaction of their debts; each for himself agreeing to this, voluntarily or involuntarily. Here are the words:

"The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge." Act 1898, § 14c.

The provision is wholly superfluous. The legal effect of the contract and its confirmation by the court would have been the same if the subsection had been left out altogether. Neither does the definition of the word "discharge," as given in section 1, subd. 12, alter this manifest construction of section 14c, if that definition be written therein. It says:

"'Discharge' shall mean the release of a bankrupt from all his debts which are provable in bankruptcy, except such as are excepted by this act." Act 1898, § 1, subd. 12.

The debts comprehended in a composition are not "provable in bankruptcy," literally speaking, because after the confirmation the bankruptcy proceedings are dismissed, but evidently this phrase is intended to include or describe all the debts which might have been proven in regular proceedings, whether they have been so proven or not; and the scheme of composition undoubtedly comprehends a release of all that character of debts, whether they had taken part in the composition or not, for by section 12 of the act only those creditors

are required to "accept in writing" whose claims "have been allowed," which means, of course, that they must have been already proved in bankruptcy before the proceeding for confirmation begins. These must accept in writing, and that writing binds them to the release; and, as to all others, they are in law presumed to have assented to the release by default, so to speak,—by neglecting to prove and have their claims allowed. This gives full effect to the use of the word "discharge" in section 14c, by the application of the definition in section 1, subd. 12. Act 1898, § 12b; Id. § 14c; Id. § 1, subd. 12. Any expansion by the use of this definition in interpreting the word "discharge" in section 25, regulating appeals, would be incongruous and violate that limitation of all the definitions themselves which is contained in section 1a, which says:

"The words and phrases used in this act and in the proceedings pursuant hereto shall, unless inconsistent with the context, be construed as follows," etc. Act 1898, § 1a; Id. § 25a.

It would be inconsistent with the context to so interject the confirmation of a composition into section 25, regulating appeals, for the obvious reason that no certificate or decree of discharge is either granted or denied by the statute or by the court, in any form whatever, during the proceedings in pursuance thereof in the matter of confirming or refusing to confirm the composition, nor does the scheme contemplate any, as it so plainly does in the course of proceedings in bankruptcy. Read section 14a; also, section 14b; also, section 15; also, sections 16, 17; also, sections 64c, 64f; also, sections 21f, 21g. And the inconsistency of context will abundantly appear from the bare statute when these sections are compared and contrasted, they being too long for quotation here.

But the construction put upon all these sections by the supreme court in prescribing the general orders in bankruptcy and the officials forms promulgated is conclusive on this point, and brings out more boldly the incongruity which would result, and the inconsistency of the context produced, by bringing a composition order within the purview of section 25 as to appeals. A mere reading of these orders and forms supports the construction of the act hereinbefore made. Read general order No. 31 (18 Sup. Ct. ix.), requiring a petition for discharge; also, form No. 57 (18 Sup. Ct. xlv.), prescribing the form of that petition; also, the notice on it to creditors; also, general order No. 32 (18 Sup. Ct. ix.), directing the opposing creditor to enter his appearance and file his specification; also, form No. 58 (18 Sup. Ct. xlv.), prescribing the form of specification in opposition to a discharge; also, form No. 59 (18 Sup. Ct. xlv.), prescribing the form of the discharge; again, general order No. 32, prescribing the same rule precisely for opposing a composition and filing the specification; then form No. 60, for a petition for a meeting of creditors to consider composition; then form No. 61, of an application for its confirmation; then form No. 62, of an order confirming it; then form No. 63, of the order of distribution of the composition fund. Not one word of any discharge by a decree of the court upon the composition either to be granted or to be denied; not one syllable indicating that the court is to declare the legal effect of the compact of composition by decreeing

a discharge, or in any way treating the proceeding as one for that purpose. This legal effect is left to the common-law effect, and to that which it is declared by the statute that the compact shall have. If the court had supposed that a discharge was to be granted or denied, some apt words would have been used in these forms of the decree, just as they were used in the immediately preceding forms for the order granting the ordinary discharge so plainly referred to in section 25, regulating appeals. The two are so distinct in every form of treatment that the notion of an appeal for the composition proceedings becomes plausible only in the borrowed light of association heretofore referred to in this opinion. That light produces the confusion on the subject. This demanded appeal is contrary to the general scheme of the statute in the matter of regulating appeals, and that general superintendence and revision of all proceedings provided for by section 24 of the act. Particularly does this appear when we mark the distinction between the act of 1898 and that of 1867, as may be seen by perusing the notes of decisions instructively collated in the ninth edition of *Bump on Bankruptcy*, coming down within a year of the repeal of the old act, and also the digest of all the cases, found in the *Digest of the Federal Cases*, under that title. By the old act the circuit courts, which sat at the elbow, so to speak, of the courts of bankruptcy, had jurisdiction by appeal or writ of error in cases at law or in equity arising under the act, where the debt or damages was more than \$500; that is to say, of suits by or against the assignee in cases of persons claiming an adverse interest or owing debts to the bankrupt,—the suits of which the circuit court, indeed, had concurrent original jurisdiction, and precisely those suits of which the supreme court and the circuit courts of appeal now have jurisdiction by appeal or writ of error under section 24a of the act of 1898. Besides these, the circuit courts had jurisdiction by appeal of only the allowance or rejection of the claims of creditors during the bankruptcy proceedings. *Rev. St. § 4980; Bump, Bankr. (9th Ed.) 353, 354.* This last was the only appeal allowed in any strictly bankruptcy proceeding; the others being only suits at law or in equity by or against outside parties, and between them and the assignee. This last and sole appeal from anything done in the bankruptcy proceedings is by the act of 1898 continued as an appeal. Section 25a, cl. 3.

But under the act of 1867, sitting at the elbow of the bankruptcy courts, as before said, the circuit courts had the most absolute, comprehensive, and plenary supervision of everything done in the bankruptcy court, by a "general superintendence," exercised by petition of review and revision. *Rev. St. § 4986; Bump, Bankr. 361.* This included everything, whether error of law or fact, and under it the circuit courts were courts of bankruptcy as much as the districts courts. *Id.* When the amendment of 1874 interjected the reluctant jurisdiction of composition, tacked on to bankruptcy proceedings, it was ruled that composition proceedings could be reviewed, of course in law or fact, by the circuit court, under this general power of superintendence. *In re South Boston Iron Co., 4 Cliff. 343, Fed. Cas. No. 13,183; Bump, Bankr. 675, and notes.* So might any other case or question arising in the district court sitting as a court of bankruptcy,

whether of law or fact. But the act of 1898 changes this very materially, and for the manifest purpose of limiting the jurisdiction so that the supreme court and the courts of appeals shall not be overwhelmed with the burden of determining every disputed question of law or fact arising in the courts of bankruptcy. Sitting as they do far away from the several districts, and proceeding as they do, it would overcrowd them to confer the same general superintendence as that conferred on the circuit courts by the act of 1867. Therefore by sections 24a and 25a, the same jurisdiction by appeal or writ of error is given over the suits by and against assignees and adverse parties outside the proceedings in bankruptcy, and by appeal over the allowance and rejection of the claims of creditors. There is also an extension of the right of appeal to the adjudication or refusal to adjudicate the debtor a bankrupt, and the granting or denying him his discharge. These appeals are plenary as to errors of law or fact, as in a court of equity. Act 1898, §§ 24, 25. But, when it comes to the superintending jurisdiction, it is confined to matters involving errors of law, and all questions of error of fact are excluded, for the reasons already stated. Act 1898, § 24b. The appeal demanded in this case is purely to review a disputed question of fact,—whether it was to the best interest of the creditors to accept the offered compromise, namely. The bankrupt has, within the purview of the law, no interest in this question. The proceeding by composition proceeds solely on the theory of promoting the interest of the creditors, and not that of the bankrupt. It is a controversy really between creditors, and not with him, and that is the controversy the bankrupt seeks to carry into the court of appeals. And, unless he has some ulterior motive, like that of protecting the alleged fraudulent vendees under the disguise of this appeal, for example, he has no concern in the question. His discharge is not involved; for, if the composition be not approved by the court, he may be discharged, nevertheless, in the regular way, and just as certainly released of his debts. It is true that, if the composition be confirmed, he has, by operation of the agreement in writing required to accomplish it, a release from his debts, and he does not need a discharge in the regular way; nor can he get it, for the bankruptcy proceedings are to be dismissed. Act 1898, § 12a. But this is only incidental, or at most a secondary, result, and the composition is not projected for that purpose or in that interest. So, again, it may be for the best interest of the bankrupt and those who hold disputed titles from him that the bankruptcy proceedings should be dismissed and the composition approved; but, again, this is only incidental, and not at all an object to be promoted by or with which the bankruptcy statute is concerned. Neither he nor they have a right to demand this benefit to them, nor the benefit of a release by this method to him; the theory of the statute being that this is all a matter solely pertaining to the creditors and their interest. And yet by this proposed appeal he and they are demanding the incidental benefits not within the care of the statute,—all in his name, and upon the strained construction that by the nonapproval of his offer his discharge is denied. This cannot be the purpose of the appeal provided for by section 25a, cl. 3. He might as well claim that the refusal

of his creditors to approve his offer of a composition is a denial of his discharge. It so operates just as much as the disapproval of the court. It requires the combined action of court and creditors in the process. As well might any other disputed question of fact be carried to the court of appeals, among the vast interests involved in the proceedings in bankruptcy. All he has a right to demand is his discharge in the regular way, and, if that be denied him, he may appeal under this section; but he cannot have two appeals under it,—one on the disapproval of the composition, and the other on the denial of his certificate of discharge. If the appeal on this controversy is permissible, it should be taken by the parties to the controversy, namely, the assenting creditors as against the opposing creditors, who are to determine whether there ought to be a composition or proceedings in the ordinary way. The court has determined that it is better for the creditors that they shall proceed in the regular way. If there be an appeal, it is theirs, but the statute has not given the bankrupt an appeal from that decision, neither by direction nor indirection. The bankrupt has not lost anything which he has a right to claim, and has no grievance to be redressed by appeal. Having gone into voluntary bankruptcy, he has only the right to proceed in the regular way. He may offer to proceed in another way, but he has not at all been given by the statute any right to demand that the case shall be dismissed and a composition substituted, because, forsooth, if a composition be adopted he would be released of his debts. That important right has not been indicated by apt language, but is claimed as an inference only upon a right to offer. If it be not adopted, he may still be released. Therefore his discharge has not been affected by the failure of his offer of composition. Not having a right to demand a composition, he has not the right to an appeal if it fail. In other words, it is optional, wholly, with the creditors and the court whether he shall be discharged by a composition. He has only a bare right to offer. This seems to me the plain meaning of the statute.

There is one case under the act of 1867 which is almost a precedent for this ruling on the construction of the statute. That act provided that corporations might have the benefit of the statute, "but no allowance or 'discharge' shall be granted to any corporation or joint stock company, or to any person or officer thereof." Rev. St. § 5122; Bump, Bankr. 676, 776. On exactly the same argument used here in support of the demand for appeal, it was urged there that, inasmuch as a corporation could not be allowed a discharge under the above-quoted clause, it could not have the benefit of the composition amendment of 1874, because that amendment provided that a ratification should operate as a satisfaction of the debts, and this was, in effect, a discharge, and therefore inhibited as above quoted. Mr. District Judge Brown, since and now a justice of the supreme court, held that this was unsound, saying, "The word 'discharge,' used in section 5122, evidently applies to a discharge by order of the court upon a petition of the debtor." *In re Weber Furniture Co.*, 13 N. B. R. 529, Fed. Cas. No. 17,330; Act 1867 (18 Stat. 182); Bump, Bankr. (9th Ed.) 675, 676, and notes. In *Purvine's Case* it was decided that questions of fact are concluded in the bankruptcy court. *In re Purvine*, 37 C. C.

A. 446, 96 Fed. 192. Whether it be to the interest of the creditors to confirm a composition is purely a question of fact. The scope of the scheme for appeals and for superintendence and revision, and the distinctions between the acts of 1867 and 1898, are instructively considered in *Re Abraham*, 35 C. C. A. 592, 93 Fed. 767, 781, et seq; *Re Richards*, 37 C. C. A. 634, 96 Fed. 935; *Re Rouse, Hazard & Co.*, 91 Fed. 96, 98.

Finally, it is a fair test of the right to the appeal demanded to suggest whether, if the offered composition had been confirmed by the court, the opposing creditor could have appealed on the ground that the bankrupt had been granted a discharge, upon the same argument that is made here in favor of the bankrupt's demand because he has been denied a discharge. This must be answered in the affirmative, or neither has such right of appeal. If either has the right, then we have the result that the question of fact whether it is to the best interest of the creditors to accept or reject the composition may always be transferred by appeal to the circuit court of appeals, because the question of the bankrupt's release under the composition from his debts is ultimately involved. So, too, all questions of fact arising under section 13a, upon a proceeding to set aside the composition, or under section 15a, upon a proceeding to revoke a discharge, may be appealed by either side on the same argument that the question of discharge is ultimately involved. See *In re Rudnick* (D. C.) 93 Fed. 787. Or, broader still, every controversy about any fact affecting the discharge (like those arising, for example, under section 29, upon a criminal indictment of the bankrupt for having fraudulently concealed his property, or having made a false oath, or appropriated, embezzled, or spent unlawfully any of the property belonging to his bankrupt estate) may be likewise appealed, because, by section 14b, the conviction of the bankrupt would directly involve the denial of his discharge, and his acquittal would indirectly involve the granting of his discharge. Indeed, there is no end to this elasticity of construction claimed for section 25a, cl. 3, and no protection for the appellate courts against shoveling into them almost every contention of fact arising in the bankruptcy proceedings, since almost any of them may be shown, in a sense, to affect the question of granting or denying a discharge. If a motion be made to compel a bankrupt to amend his schedules on the ground that he has fraudulently concealed some article of his property, which he denies, and the charge of concealment be decided either way, it affects the question of his discharge. If not *res adjudicata*, of itself, of his right to a discharge, an adverse determination would, in effect, be a denial of the discharge, to use the language of the argument here considered. Appeal denied.

UNITED STATES v. 288 PACKAGES OF MERRY WORLD TOBACCO.

(District Court, D. West Virginia. June 28, 1900.)

INTERNAL REVENUE—CONSTITUTIONALITY OF STATUTE—PRESCRIBING CONTENTS OF PACKAGES OF TOBACCO.

Act July 24, 1897, § 10, cl. 3, amendatory of Rev. St. § 3394, and providing that "none of the packages of smoking tobacco and fine cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with, them, any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal revenue laws," is constitutional and valid, and the placing of coupons in packages of smoking tobacco, which, when returned in certain numbers, entitle the holders to premiums, is a violation of such statute, which subjects the manufacturer to the fine and forfeiture provided by Rev. St. § 3456.

Information on behalf of the United States for the forfeiture of certain packages of smoking tobacco for violation of the internal revenue laws.

Joseph H. Gaines, Dist. Atty. (Charles J. Faulkner, special counsel), for the United States.

John De Witt Warner and Henry M. Russell, for defendant.

JACKSON, District Judge. The United States filed an information on the 17th day of October, 1898, in this district, against 288 packages of Merry World Smoking Tobacco. The information charges that these packages contained, in violation of law, what is known as the "Merry World Tobacco Coupon," offering premiums to the holders of these coupons, the amount of which was to be determined upon the number of coupons returned to the manufacturer. It is alleged that the placing of any article, other than that authorized by the statute of the United States, in such packages, was a violation of the tenth section of the act of July 24, 1897, amending section 3394, Rev. St. U. S. It is admitted that each package of tobacco contained one of these coupons, and it is here stipulated that all informalities and omissions in the pleadings are waived by counsel of the parties to this proceeding. This information is founded upon the third clause of section 10, Act July 24, 1897, amending section 3394, Rev. St., which declares that "none of the packages of smoking tobacco and fine cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with, them, any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal revenue laws." It is unnecessary at this time to review the history of the legislation of congress relating to the various acts passed known as the "Internal Revenue Laws." Congress, in its wisdom, saw fit to resort to this mode of taxation for the purpose of raising revenue to defray the expenses of the government. It must be conceded at the threshold of the discussion that to congress alone belonged the power to enact laws for raising revenue for the support and maintenance of the government. Section 8 of article 1 of the

constitution expressly declares that congress shall have power to lay and collect taxes. This is an express grant which confers this power upon congress alone, and such power is independent of the co-ordinate branches of the government. If, then, under the constitution, congress alone possesses this power, it follows that it alone possesses the power to provide the manner, the form, and the means by which taxes are to be levied, provided that congress does not exceed the grant of power conferred under the constitution.

Assuming this position to be correct, the first question for consideration is, is the statute upon which this proceeding is founded within the legitimate sphere of the legislative power of congress? Questions of kindred character, involving the questions now under consideration, have been so often reviewed and passed upon by the supreme court of the United States that it would seem to be almost a work of supererogation upon the part of this court, at this late day, to enter the domain of discussion of the question involved in this case, for the reason that, in the opinion of this court, the judicial path has been made so clear by numerous decisions, commencing with the decision of that great jurist Chief Justice Marshall in the case of *Fletcher v. Peck*, 6 Cranch, 128, 3 L. Ed. 175. He announces the doctrine in that case that, when the question for consideration before the court was "whether a law be void for its repugnancy to the constitution, it is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. * * * The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

In the case of *McCulloch v. Maryland*, 4 Wheat. 423, 4 L. Ed. 5, Judge Marshall, in considering the constitutionality of an act of congress, states the law to be:

"Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such power."

In the same opinion he says:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

It would seem, therefore, that all means which are necessary to be exercised for the legitimate purpose of levying taxes and collecting the same may be employed to that end. In the case of *U. S. v. Fisher*, 2 Cranch, 396, 2 L. Ed. 317, the learned chief justice announced the doctrine that "any means which are in fact conducive to the exercise of a power granted by the constitution," or (as he stated in the case of *McCulloch v. Maryland*) "any means calculated to produce the end that congress had in view, were legitimate and constitutional." This same doctrine was affirmed in the *Legal Tender Cases*, 12 Wall. 531, 20 L. Ed. 306, Justice Strong delivering the opinion of the court; and in the case of *Bank v. Fenno*, 8 Wall. 548, 19 L. Ed. 487, in which

Chief Justice Chase, who in his day was one of the ablest constitutional lawyers in the country, speaking for the supreme court, announced the doctrine "that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not in the courts, but to the people, by whom its members are elected." It would seem to be a well-settled principle of constitutional law—in fact, I may say it is now elementary—that, where there is not an express grant in the constitution, yet, in the absence of a grant of power applied to a specific case, there is always an implied power, which is incidental and auxiliary to the constitution, to execute and carry out its provisions, as in this case the constitution confers the power upon congress to lay and collect taxes, but leaves it to the wisdom of congress to prescribe the mode, manner, and means of levying and collecting the same. What, then, is the object of the statute under consideration? It is apparent that its only purpose is to protect and secure the government in raising its revenues upon the particular subject of taxation specified in it. In the language of Chief Justice Marshall: "Is the end legitimate, and are the means adopted and used adapted to carrying out the purpose and object of congress in passing the bill?" As was well said by the court in the case of *Hepburn v. Griswold*, 8 Wall. 615, 19 L. Ed. 523:

"It is finally settled, so far as judicial decisions can settle anything, that the words, 'all laws necessary and proper for carrying into execution powers expressly granted or vested,' have in the constitution a sense equivalent to the words, 'laws not absolutely necessary, indeed, but appropriate—plainly adapted—to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the constitution; laws really calculated to effect the objects intrusted to the government.'"

If the principle just announced be correct, we are at a loss to see how an act of congress can be held to be unconstitutional which has a legitimate object, and which is plainly appropriate to secure the collection of taxes provided for in the act. The act in itself is merely an incidental and auxiliary power, which is found in the constitution, and is necessary, as it seems to us, to execute the express grant of power upon which this statute is founded. To declare this act of congress unconstitutional would have a far-reaching effect, and would cripple the powers of the government in the collection of revenues for its maintenance and support. I cannot reach the conclusion, in the language of Chief Justice Marshall, that the means employed by congress were not "adapted to the end." I do reach the conclusion, therefore, that the act in itself is constitutional, and that congress had the power, under an express grant in the constitution, to adopt such means as would secure the end it had in view.

Having disposed of the constitutional question, I will now consider what was the purpose of congress in declaring what packages of smoking tobacco should contain. There could be but two reasons for the inhibition and restriction contained in the statute: First, it was the intention of congress to secure her revenue; and, second, to protect the purchaser of manufactured chewing and smoking tobacco from fraud. The statute under consideration expressly forbids the manu-

facturer to place any article or thing whatsoever of a foreign nature in the package, for the reason that, the tax being on the weight of the package, it is essential that it does not contain foreign matter. The manner of packing the tobacco, the size of the package, and what it should contain, have been fixed by the statute and the rules and regulations prescribed by the commissioner of internal revenue. This statute, and these rules and regulations prescribed by the commissioner, were not for a vain purpose. If the statute is not prohibited by the constitution, and effects the object and purpose that congress had in view, can the restriction operate an injustice to any one? I think not. Congress alone decided for itself how the packages of tobacco should be put up, and what each package should contain. I am at a loss to conjecture what cause of complaint can be made by the manufacturer when by statute the size of the box and its contents are fixed. All the manufacturer has to do is to comply with the law, and not place any other article or thing whatsoever in the box, unauthorized by the statute. It was not intended that the boxes should be so packed as to enable the manufacturer to establish a gift enterprise. When the government determines to levy a tax upon any thing or article liable to taxation, it necessarily has a purpose. Its first object is to exercise its powers of taxation, and its second object is to prevent fraud upon the revenue, and to protect the purchasers of the manufactured article and the public from fraud. Most stringent statutes have been enacted for the protection of the government in the collection of its revenue from distilled and alcoholic liquors, and from oleomargarine, and in every case that has come under my observation the courts have uniformly sustained them as both necessary and just. I cannot adopt the view of counsel for the defendant in this case. If their contention should be sustained, it would embarrass the government in the collection of her revenue, and tend to throw the administration of the great internal revenue system of this country into almost endless confusion.

As I have reached the conclusion that congress had the power to tax the subjects made under consideration, it follows that in the exercise of this right it may prescribe the manner or mode of enforcing the collection of the revenue, and, as in this case, fix the amount of taxation upon the article assessed, as well as to prescribe the manner of packing, the size of the box, and the weight of its contents. I reach the conclusion that the insertion in a package of tobacco of any other substance or thing than the tobacco itself, be it ever so small in size or light in weight, is a violation of the statute, and renders the party violating it responsible for such violation.

In this connection it is claimed that there is no statute that imposes a penalty for the violation of section 10. It is a quasi criminal statute, inhibiting and restraining manufacturers of tobacco from inserting any material other than tobacco in the package. It is claimed that there is no special provision in the act of 1897 which punishes a party for the violation of section 10. Congress sometimes omits, in the haste of legislation, to fix a penalty for the violation of some of its statutes; but in this case it is unnecessary to rely upon the provisions of the act of 1897. There is a general act of the Revised

Statutes (section 3456) which, in my judgment, provided the remedy for a violation of this statute.

Other questions have been presented to the court for its consideration, but, in the view the court takes of this case, it is unnecessary to notice them. For the reasons assigned, the court is of opinion that the defendants have violated section 10, and that the punishment is imposed by section 3456.

UNITED STATES v. DAVIS.

(Circuit Court, W. D. Tennessee. May 22, 1900.)

1. NEW TRIAL—JURY—PEREMPTORY CHALLENGES—TIME FOR MAKING—STATE STATUTE.

Under Mill. & V. Tenn. Code, § 6050, providing that, "in impaneling a jury for the trial of any felony, the court shall not swear any of the jurors until the whole number are selected for a jury," the state, on the trial of an indictment for criminal conspiracy, under which defendant may be punished capitally, is entitled to peremptorily challenge a juror who has been passed and accepted by both sides after their examination of him on his voir dire, and the jury has been completed, but not sworn.

2. SAME—COMMON-LAW RULE.

The rule at common law being that the right to peremptory challenge is open until the jury is sworn to try the case, the state is entitled, on the trial of an indictment for a felony in the federal courts, independent of any statute, to challenge a juror peremptorily after he has been passed and accepted by both sides, and the jury completed, but not sworn.

3. SAME—CHALLENGE FOR CAUSE—PARTIALITY OF JUROR.

After a juror has been accepted by both sides, and has taken his seat in the box, he may, upon announcing himself as feeling disqualified to act impartially, before being sworn, be directed by the court to stand aside.

4. SAME—CHALLENGES—PRACTICE IN FEDERAL COURTS.

The federal courts are not bound to follow the practice of the state courts in respect to the allowance of challenges to the jury in criminal cases, the primary consideration being, by whatever mode of challenging adopted, to secure to the accused all of his rights of challenging.

5. SAME—TIME—PREJUDICE.

Where defendant in a criminal case has the right of 14 peremptory challenges to the jury remaining to him, he cannot complain of the state being allowed, before the jury is sworn, to peremptorily challenge a juror who has been once passed and accepted by both parties.

6. SAME—SEPARATION—PREJUDICE.

Where the separation of the jury is made a ground for new trial by defendant, he must show prejudice by something more than the bare fact of separation, unless the circumstances of the separation are of themselves sufficient to indicate prejudice.

7. SAME—BURDEN OF PROOF.

Allowing a juror, under the eye of an officer having the jury in charge, to go into the lavatories and closets, to go to a drug and other stores, to ask the marshal for supplies, and to speak to men in the court room in the hearing of the marshal, is not such a separation of the juror as creates a presumption of prejudice, and imposes upon the state the burden of proving that no prejudice resulted.

8. SAME—UNSWORN BAILIFF.

The omission to have the bailiffs placed in charge of the jury specially sworn, on the trial of a felony, is not a ground for new trial in the federal courts, although it is so under the practice of the courts of the state where the trial is had.

9. SAME—TAKING NOTES OF TESTIMONY—SUPPRESSION BY COURT.

The refusal of the court, on the trial of one for a felony, to permit certain of the jurors to take notes of the testimony, and requiring them to surrender notes previously taken by them until after the trial, is not ground for a new trial.

10. SAME—CHALLENGE FOR CAUSE—PREJUDICE.

Where the jury, on the trial of a felony, was sworn when 14 of defendant's peremptory challenges were unused, defendant is not entitled to a new trial because a challenge for cause by the state was sustained to two jurors, to whom a former officer of the court had spoken in excuse of defendant's crime, and with expressions of friendship.

11. INDICTMENT—DUPLICITY—CONSPIRACY—MURDER.

Under Rev. St. U. S. § 5508, providing for the punishment of conspiracy to injure or intimidate citizens in the exercise of their civil rights, an indictment charging one with having conspired to injure, oppress, threaten, and intimidate a United States marshal and his posse, and to deprive them of their constitutional right to arrest him on legal process, and resulting in the killing of the deputy marshal, is not objectionable as charging defendant with both conspiracy and murder.

12. CONSPIRACY—ACQUITTAL OF RESULTING CRIME—PUNISHMENT.

Although one charged with conspiracy to intimidate citizens in the exercise of their civil rights, in violation of Rev. St. U. S. § 5508, and with murder as the result of such conspiracy, be acquitted of the murder, he may yet be punished for the conspiracy, if that charge is established.

George Randolph, Dist. Atty., and Frank Smith, Asst. Dist. Atty., for the United States.

D. A. McDougall, for defendant.

HAMMOND, J. The defendant, being on trial for a criminal conspiracy in the accomplishment of which a deputy marshal of the United States had been killed, was entitled to 20, and the government to 5, peremptory challenges. Rev. St. §§ 819, 5508, 5509; Mill. & V. Code Tenn. § 5352.

Juror No. 6, having been accepted by both sides, took his seat in the box, but, upon hearing an argument as to a challenge for cause, himself announced that he felt disqualified to act impartially, and upon a further examination on his voir dire was set aside, without objection by either party.

The district attorney had peremptorily challenged two of the venire as they were called and examined on their voir dire, and the defendant six, when the box became full. But before the jury had been sworn the district attorney asked to challenge peremptorily juror 9, who had been passed and accepted by both sides after their examination of him on his voir dire, to which objection was made by the defendant. By the Tennessee Code, it is required that, in "impaneling a jury for the trial of any felony, the court shall not swear any of the jurors until the whole number are selected for a jury." Mill. & V. Code Tenn. § 6050; Thomp. & S. Code, § 5215. Always, in this court, in all cases, civil and criminal, it has been the custom to swear the jury en bloc, as also it has been in the state courts. At common law, however, as will be seen from the citations in the authorities hereinafter mentioned, the practice was to swear each juror separately as he was called, qualified, passed, and accepted by the parties. After he had touched the book, by authority of the court, it was too late to challenge him for either cause or favor, or peremptorily; though as to cause or

favor this rigid rule of the common law was relaxed, if not in England, in some of our states, and such challenges were allowed even after the juror had been sworn, particularly if the cause or favor could have been made the ground of a new trial. The rule was quite universal that until sworn every juror was subject to challenge, peremptory or other, and the confusion on the subject comes from statutory changes or local usage brought about by departure from the common-law rule, such as that taken by the Tennessee statute above quoted. The plain object of that statute is to prolong, in felony cases, the privilege of challenge by peremptory objection. It is confined to felony cases, and assumes, possibly, that in other cases the old common-law mode of swearing each juror as he came to the book and box obtained. However this may have been in 1817, when this provision was first enacted, through its influence or otherwise the state practice, followed by us, has become almost universal to swear the jury as a whole in all cases, civil and criminal. Inquiry among the lawyers confirms this statement of the general practice. The result of such a practice would naturally extend the time of peremptory challenge, as of challenge for cause, until the jury in a body had been sworn to try the case. I am unable to see that this statute could have had any other purpose than to prolong the right of challenge, imperatively, in felony cases, and by adoption in other cases, through the natural tendency to conform the practice in all cases to this statutory command in the given cases.

Before further examining the state practice in this regard, it may be well enough to remark that in the case of *Brewer v. Jacobs*, 22 Fed. 217, 231, 244, this court had occasion to examine the practice as to impaneling juries, both at common law and in this court. See, also, *Clough v. U. S. (C. C.)* 55 Fed. 921, 927. That practice was followed in this case, with that modification which becomes natural, if not necessary, in treason or capital cases, because of the statutory requirement that the defendant shall have a list of the jurors and witnesses furnished him not less than three and two entire days, respectively, before he is tried. Rev. St. § 1033. Such a list was furnished in this case, since the defendant may be punished capitally, as if on indictment for murder, and therefore, although the regular venire had been qualified generally, and juries for the term impaneled, as described in the last-cited cases, and had been trying many cases, as each was called, yet, when this case was called, the venire, as it appeared by the furnished list, was recalled as if there had been nothing done. Each juror on the list, being sworn to answer such questions as should be asked him touching his qualifications, was examined by the court touching his statutory qualifications, and then turned over to the parties for examination upon the voir dire, by their counsel. Thus, the box became full, as before stated. The jurors in question had been "accepted"; that is to say, each had passed successfully the scrutiny of examination, and had been told by both sides to take a seat in the box, which he had done, neither being challenged by either side for cause or peremptorily. Neither had either been sworn to try the case, nor had any of their fellows already seated in the box. Perhaps either side might have reserved all peremptory challenges until the full 12 men had been thus "impaneled" or offered to them as a qualified jury.

Abbott, Jury Tr. § 18, p. 22, citing *Bridge Co. v. Pearl*, 80 Ill. 251, 254; *Taylor v. Railroad Co.*, 45 Cal. 323; *People v. Bodine*, 1 Denio, 281; *Hunter v. Parsons*, 22 Mich. 96; *Adams v. Olive*, 48 Ala. 551; *Spencer v. De France*, 3 G. Greene, 216; *U. S. v. Daubner* (D. C.) 17 Fed. 793, 797; 4 Bl. Comm. 353.

Other authorities seem contrary to this, and perhaps the law upon the point has not been authoritatively settled either way, so that it may be certainly ruled. *Thomp. & M. Jur.* § 266 (2), citing *Brandreth's Case*, 32 Howell, State Tr. 773, and other cases on that side of the conflict; but also still other cases, too numerous for citation here, in accord with those first cited above, in favor of the right of reservation until the full jury is tendered. The author seems to favor this view, also, but the cases cited are not now accessible for our critical examination. The existence of the conflict accounts for the act of 1817 in Tennessee, and explains it. We have adopted the view that the time of all challenge is prolonged, in felony cases, at least; and while this indictment for conspiracy may not be, technically, a felony, it is beyond question that it is of that gravity that demands the same construction in its favor.

Returning for a moment to the relation of the actual practice in this case, it may be said that, in accordance with the custom here, and in the state practice as well, neither side pursued the better practice, if it were open to him, of reserving peremptory challenges for a full jury, qualified on voir dire, and ready to be sworn; but each exercised the right of peremptory challenge at once, as soon as the juror appeared and qualified, or as soon as any challenge lodged for cause was overruled by the court. Ordinarily, in common cases, one of the two juries impaneled at the beginning of the term is in the box when the case, civil or criminal, is called, and is thereby tendered to the parties. Either side examines for cause, and, the challenges being settled, quite always, as a fact, a full jury is in the box when the right of peremptory challenge is exercised. But in cases like this, where the jurors are called up, one by one, for examination and tender, we have fallen into the habit of overlooking the value of reservation, and the peremptory challenge follows an adverse ruling on a challenge for cause, or is promptly made without any preliminary examination whatever, as is often the case. If all the peremptory challenges are exhausted in the process, of course there can be no more, and this is so often the situation that, perhaps, we get the idea that it is too late after the juror has taken his seat, although he has not been sworn. Our Code has also, in state practice in civil cases, given an option of drawing the jury. *Thomp. & S. Code*, § 4026. If we followed the strict common-law practice, and did not mix the two, statutory and common law, as we do, it would, indeed, be too late; because before the juror had taken his seat, if there were no challenge for cause or peremptory, he would have "touched the book," and been sworn already to try the case on its merits, each separately, and not en bloc, as we always swear them. *Thomp. & M. Jur.* §§ 269, 269 (6). This particularity of our habits of practice is given because it lights up the obscurity and confusion of right in the premises as it is developed by the authorities. *Id.* §§ 265, 270.

At common law the district attorney's peremptory challenge was not too late. Until the juror had taken the book to be sworn to try the case, the right was open. That is clear from the decisions of the supreme court of the United States hereafter to be cited. Under the Tennessee statute above cited, in my judgment, it is especially preserved until the whole 12 are in the box ready to be sworn, the statute having no other reason whatever for its existence. It is true that by the ancient law the king had no peremptory challenge, and for this very reason he was not required to challenge for cause until the 12 men had all been gathered together by the exercise of the defendant's right of challenge for cause and peremptorily. The defendant could challenge as many as three full juries peremptorily, and the king was at that disadvantage. But by statute and modern usage, except as to difference in number, the prosecution and the defense stand on an equal footing as to challenges, and there is no longer any element of disfavor to the state's right of peremptory challenge, as far as it goes in number. The insistence, therefore, by learned counsel, that the Tennessee statute must not be construed to give the government an advantage of challenging after "acceptance," is untenable. Before we come to the Tennessee cases requiring consideration here, it may be remarked that all the authorities, and none more than those to be cited from the supreme court of the United States, insist that the main purpose of all these statutes is to favor the defendant's right of peremptory challenge, and that his protection in that right is the chief concern of the courts. Now, turn this case around, and let us suppose that a defendant were asking to do just what the district attorney asked here; could that requirement of liberal protection for him be realized without construing the statute as we construe it? Certainly not. Why, then, should not the same construction follow in favor of the government, all the ancient disfavor of the king in that regard being abolished by the statute? To preserve the benefit of the statute for the defendants, we must construe it as we do; and the conformity with the common law as to time, prolonged until the juror in question be actually "touching the book," strengthens that construction in his favor. The prosecution has the same right as to time within which a peremptory challenge may be made. This is equal and exact justice for both sides.

There would remain no doubt of this ruling but for the decision of the supreme court of Tennessee in the case of *McLean v. State*, 1 Tenn. Cas. 478, 482, where, under almost precisely the circumstances of this case, the defendant asked to challenge a juror peremptorily after he had been "accepted" and in the box two days, but before being sworn. First, it may be remarked that this case has never been officially reported, and we do not know how far the supreme court of the state may regard that fact as affecting its authority. Often courts do not desire such cases to be considered as binding precedents, and until the question is again mooted in that tribunal we may not be advised as to its authority. Next, it is very remarkable that the act of 1817 (Thomp. & S. Code, § 5215; Mill. & V. Code, § 6050), above quoted, was not noticed, and seemingly was entirely overlooked. Its pertinency is absolutely unquestionable, and, as before remarked, to my mind is conclusive in favor of the right of peremptory challenge under

the circumstances; indeed, also, to my mind, it is plain that, except to secure that precise right, the statute had no other reason for existence, as we have endeavored to show. The opinion does cite a later statute, one seemingly having its origin in the Code of 1858, though it was prior to that time a right of the defendant to have furnished him a list of the jurors according to the statute. 11 Hen. IV. c. 9; Bennett v. State, Mart. & Y. 133, 135; Thomp. & S. Code, § 5212; Mill. & V. Code, § 6047; Shannon's Ann. Code, § 7181. And it makes this statute the foundation of its reasoning and the ground of the decision. That statute enacts the substance of the English statute above cited, and declares the then existing practice, no doubt, as follows: "The defendant is entitled to a list of the jurors summoned, to be furnished him a reasonable time before the formation of the jury is commenced." This is almost identical with our United States statute on the same subject, substantially taken, perhaps, from the same old English statute, and first enacted by Act April 30, 1790, c. 9, § 29 (1 Stat. 118; Rev. St. § 1033). If the Tennessee statute furnishes a good ground for holding that the right here in question does not exist, there is no answer to the learned counsel for the defendant that the federal statute furnishes the same ground. But I do not think it does, and for the reasons already stated; mainly because the opinion and the reasoning overlook the state statute of 1817 (Mill. & V. Code, § 6050), first above quoted, and the conflict of authority that produced it. The opinion does say as follows:

"It is insisted the defendant had the right of peremptory challenge at any time before the jury was sworn to try the case, and a number of cases holding the doctrine have been cited. While we concede the courts so holding are tribunals of high authority, we cannot concur with them on this question."

The argument then proceeds to point out the inconveniences, "under our system," of allowing the challenge, and cites the one statute, overlooking the other, also a part of the same system, which, if my judgment is not at fault, was enacted in 1817 for the very purpose of adopting the ruling of these discarded cases from other courts. The argument ab inconvenienti would not have been allowed to prevail over the command of another section of the Code, if its importance had been called to the attention of the court. The opinion cites no cases whatever, and, the reporter not having furnished us with those cited by counsel, we are left in the dark as to the extent or scope of the authorities from which the dissent was expressed.

In *McClure v. State*, 1 Yerg. 206, 213, 219, it is said by Whyte, J., that "the proper time for challenging is between the appearing and the swearing of jurors,"—citing the common-law books (1 Chit. Cr. Law, 545; 2 Hawk. P. C. c. 43, § 1; 1 Inst. 158a; and *Case of Langham*, Hob. 235); and by Catron, J.:

"The ancient and well-settled English authorities are that you cannot challenge the juror after he has been sworn, unless it be for cause arising afterwards. We adopted the right of trial by jury as we found it," etc. "Nothing is better settled for centuries in England than that after a juror is once sworn he cannot be challenged for any pre-existing cause."

—Citing 1 Inst. 158a; 3 Vin. Abr. E. 11, p. 764; 1 Yel. 24; 2 Hawk. P. C. c. 43.

As will be seen by examining the authorities, it was just as well settled that until he "took the book" to be sworn the right of chal-

lenge was open. Abb. Tr. Ev. § 15, p. 21; Thomp. & M. Jur. § 269 (6-8). The McLean Case, *supra*, changes this by substituting, as an innovation, the so-called "acceptance" or "election" as the moment of closure for the challenges, upon the argument of *ab inconveniente*, already noticed; thus curtailing the time, instead of prolonging it, as it would be under Thomp. & S. Code, § 5215 (Mill. & V. Code, § 6050).

The case of Gillespie v. State, 8 Yerg. 507, reiterates the ruling of McClure v. Same, *supra*; and is followed again in Ward v. Same, 1 Humph. 253; and yet again in Calhoun v. Same, 4 Humph. 477; also in Jarnagin v. Same, 10 Yerg. 529. In the case of Garner v. State, 5 Yerg. 160, where a juror had fallen sick after the trial began, the act of 1817 was much considered in its relation to peremptory challenges, and the case is instructive, though the matter of time of challenge was not in hand. But the case shows all through it, by frequent expressions, that the practice was well understood to be that the right of peremptory challenge, as well as that for cause, could be exercised at any time before the juror was sworn; and that each juror was not sworn, as at common law, separately, and as he appeared and qualified, but afterwards, when the jury was full. Nor is there any hint that his "election" or "acceptance" terminated the right of challenge if he had not been sworn, but sat in the box awaiting a full jury for that ceremony, as one of the sections of the act of 1817 required, and as the Code already quoted requires to-day. Judge Whyte, quoting Baron Wood in Rex v. Edwards, 4 Taunt. 309, 3 Camp. 207, says he directed that the new jury be sworn, and that the prisoner "was directed by the judge to challenge each of them, if he would, as they came to the book to be sworn"; showing that the utmost limit of the right was not passed until that moment. Should the fact that we do not now swear the jury separately upon the book, but all together, with uplifted hand, when the jury is completed, alter this rule?

The suggestion was not made that it does by any of the opinions in the last-cited case, which so learnedly detail all essentials of the practice of impaneling juries in criminal cases, as known in Tennessee at that date and under the act of 1817.

In the case of Hines v. State, 8 Humph. 597, the court speaks of a juror having been "accepted" by the attorney general, and "elected" by the defendant,—the very situation of both the jurors involved in this objection,—but it was ruled that the court might for any good cause discharge a juror that had been "selected," and select another, "until the jury shall have been sworn in the case." And so it was ruled in Lewis v. Same, 3 Head, 127, where precisely the same argument was made by counsel as here, that "after the panel was made up, by the election of the prisoners from the list of jurors presented to them, the jury was in law impaneled, and was as much the jury for the trial of the cause before being sworn as afterwards." The court says: "The discretionary power of the court to reject a juror, before being sworn, even in a capital case, for sufficient cause, cannot at this day be questioned." This was not a peremptory challenge, it is true, but it shows how open the jury is, until it is sworn, to challenge and change. The defendants then, as here, had not exhausted their challenges, and there could be no injury to him.

The case, however, directly applies to juror No. 6, in this case, whose discharge is now objected to on motion for new trial, and sustains the discharge. There does not seem to be a sound reason for any distinction between a challenge for cause and a peremptory challenge, so far as they relate to the time when either may be lodged. One is as much a right as the other, and neither is, properly speaking, an indulgence.

In *Murphy v. State*, 9 Lea, 374, also, a juror was challenged for cause by the state after he had been "selected," and even after he had been precipitately and prematurely sworn by the clerk, the swearing having been done so hastily that the counsel had not time to get in the objection he was endeavoring to make. The case shows the general rule. Again, it was not a peremptory challenge; but, again I repeat, it does not seem a material distinction, or any principle that should control a different judgment in either case.

Still another case is *Taylor v. State*, 11 Lea, 708, 718, where the juror had been "selected" two days, and before being sworn was thus discharged on challenge by the state for cause. The court said there could not be a serious question of the right, and the only matter for consideration was whether the court should have broken up the jury, and summoned a new jury, which was held not to be necessary.

In *Boyd v. State*, 14 Lea, 161, 165, after six jurors had been "elected," one of them, on his relationship to the parties being mentioned as a ground of challenge, stated that he should feel embarrassed, and he was discharged, although he was not technically disqualified. The discretionary power of the court was fully recognized. And Judge Story's remarks in *U. S. v. Cornell*, 2 Mason, 91, Fed. Cas. No. 14,868, are quoted and approved, that, "even if a juror was set aside for insufficient cause, I do not know that it is a matter of error, if the trial has been by a jury duly sworn and impaneled, and above all exceptions. Neither the prisoner nor the government in such a case has suffered injury." The statement by the juror of self-challenge in that case, as in this, was given weight by the court in exercising its discretion. They may challenge themselves. *Thomp. & M. Jur.* § 263. In *Fletcher v. State*, 6 Humph. 249, 256, a juror, on his own application, was permitted to stand aside for physical distress without the express consent of the prisoner, and it was held that the court had the power, and there was no error. This power is now conferred by statute, under the often-cited act of 1817, regulating the practice (*Thomp. & S. Code*, § 4028; *Mill. & V. Code*, § 4804).

And here, it may be said, in view of the objection taken in this case as a ground for a new trial, that one of the jurors on the list furnished the defendant was excused by the court on account of sickness before the case was called for trial, that if the court may excuse for that cause, under the statute, after the juror has been sworn, without breaking up the panel and beginning over again, it may also do so before the venire is called. It is a matter of necessity oftentimes, and the statute was passed, as these decisions all show, in the face of some dissenting opinions, to settle the conflict of practice, and avoid the necessity of beginning all over again after a panel was broken by sickness. The text-books are to the same effect. *Abb. Tr. Ev. c.* 2, § 21, p. 23; *Thomp. & M. Jur.* §§ 116, 159, 242, 259 (2), 259 (1),

note 4, 261. In the case of *Lowrance v. State*, 4 Yerg. (Tenn.) 145, this point is very nearly decided, if not exactly. The panel nominated by the county court was one short, having only 25 instead of 26,—a shortage that came, not by excusing one for sickness, but by inadvertence or mistake. It was held to be no ground for new trial, because, under the act of 1817, as at common law, the court could summon talesmen. Was the jury composed of good and lawful men, said the court, is the only concern, and “we deem it idle to refine in a court of error in reference to details of practice in the court below”; which is substantially the same thing said by Judge Story in the *Cornell Case*, above quoted. It is the right to reject undesirable jurors, and not to select particular persons out of the list, which is protected. *Thomp. & M. Jur.* § 159; *U. S. v. White*, 4 Mason, 158, Fed. Cas. No. 16,682; *U. S. v. Marchant*, 12 Wheat. 480, 482, 6 L. Ed. 700. The case of *Ellis v. State*, 92 Tenn. 85, 99, 20 S. W. 500, the last of the Tennessee cases to be cited, is where two of the jurors were discharged after they had been “accepted” for cause, and the cause sustained; evidently because they had not yet been sworn.

For my part, in judicial procedure, I am always anxious to conform the federal to the state practice where it is possible, not only for convenience, but because, also, courts and lawyers naturally fall into a habit of conformity such that unless distinctions are especially familiar, and more than technical, no attention is paid to them, or they pass sub silentio. The conformity act applies only to civil cases, indeed, but it promotes the habit in other cases as well, particularly in those mere details where refinement was deprecated by Mr. Justice Catron, when the great desideratum of impartial trial jury had been attained in fact. Therefore, when confronted with the case of *McLean v. State*, supra, it became a matter of concern that our long-fixed practice to the contrary in this regard had been challenged. This investigation develops that in this state that case stands alone in its ruling on this point, substituting the time when the juror is “accepted” or “elected” or “passed” as the foreclosure of the right of peremptory challenge for the time when he has been sworn, which was the foreclosure period at common law and under the act of 1817 in this state, passed as to one section for the very purpose of securing the longest and latest time. *Mill. & V. Code*, § 6050; *Thomp. & S. Code*, § 5215; *Thomp. & M. Jur.* §§ 265, 266 (2).

But the final and all-sufficient answer to the objection is that, whatever the state practice in this regard, it is not binding on the federal courts. *Thomp. & M. Jur.* § 164; *U. S. v. Shackleford*, 18 How. 588, 15 L. Ed. 495; *U. S. v. Marchant*, 12 Wheat. 480, 6 L. Ed. 700; *U. S. v. Coppersmith (C. C.)* 4 Fed. 198, 199; *U. S. v. Richardson (C. C.)* 28 Fed. 61, 69; *Lewis v. U. S.*, 146 U. S. 370, 376, 379, 13 Sup. Ct. 136, 36 L. Ed. 1011; *Pointer v. U. S.*, 151 U. S. 396, 405 (2), 412, 14 Sup. Ct. 410, 38 L. Ed. 208; *St. Clair v. U. S.*, 154 U. S. 134, 147, 14 Sup. Ct. 1002, 38 L. Ed. 936; *Logan v. U. S.*, 144 U. S. 263, 299, 12 Sup. Ct. 617, 36 L. Ed. 429.

The practice in this case was not precisely that described by the supreme court in either of the above-cited cases, but was that of the common law, as modified by the Tennessee statute before cited, and

such as obtains in the state courts as described by the cases cited. The names on the venire were not put in a box and drawn out by a child under 10 years of age, as required by the Tennessee Code (Mill. & V. Code, § 6048; Thomp. & S. Code, § 5213), because that has never been the practice in this court since the venire itself has been drawn from a box in its original selection. The jurors are invariably called in the order in which they were originally drawn from the box, which is probably a substantial compliance with the above statute of the state. At all events, the same purpose is accomplished.

In the cases cited, the Arkansas practice of challenging is not given, but Mr. Justice Shiras in the *Lewis Case* quotes from the English cases, that the uniform practice has been that the juryman is presented to the prisoner and his counsel, that they may have a view of his person. Then the officer of the court looked first to the prisoner's counsel, to know whether they wished to challenge him. He then turned to the counsel for the crown, to know whether they challenged him; and, if neither made any objection, the oath was administered. And before any juryman was "brought to the book" the whole panel was called over in his hearing, that the prisoner might take notice who attended. Neither does the *Pointer Case* show what the Arkansas practice was, but both cases say that it was not binding on the federal courts, and that it was not followed in either case. Mr. Justice Harlan again quotes the common-law authorities, and on the point as to the time of challenge cites Chief Justice Tindal in *Reg. v. Frost*, 9 Car. & P. 129, 137, saying that "the rule is that challenges must be made as the jurors come to the book, and before they are sworn. The moment the oath is begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer of the court to do so. If the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby." It is no doubt because of this strictness that the Tennessee statute was passed deferring the swearing of the jury until after the whole had been passed on their *voir dire*. The court decides that this is not necessarily the only mode, and that both cases say that the primary consideration always is that the accused shall not be embarrassed or prejudiced or injured by any mode adopted, the purpose being to secure all his rights of challenging the jurors. This being done, and no injury shown to him, if an impartial jury is secured the end of all practice is attained. He cannot demand that the prosecution shall challenge first, for at common law the prisoner challenged first; but in this case, following the state practice, the government was called on first, according to our uniform habit.

In the *St. Clair Case* the court had a general rule adopting the state practice, except that it in terms required, as at common law, that each juror should be finally sworn to try the case when he was called in his order, and, being examined on his *voir dire*, there was no challenge by either party. This closed, as at common law, all question of further time to challenge. But Mr. Justice Harlan again says it is open to the federal courts to adopt any system that does not prevent or embarrass the full and unrestricted exercise of the accused of his right of peremptory challenge, and is not inconsistent with any settled principle of the criminal law. That is the test. The practice

we follow is fully sustained by these cases beyond all question. It enlarges the defendant's right to the longest possible time for its exercise under the Tennessee statute, and the government has, necessarily, the same time, for our federal statute makes no distinction except as to the number of the challenges. Rev. St. § 819.

Another sufficient ground for overruling the objection is that the defendant, having had at the time of swearing the jury 14 of his peremptory challenges left, could not have been injured, since his right is that of rejecting undesirable jurors, and not that of selecting those he most prefers. The foregoing cases decided this. See, also, *Hayes v. Missouri*, 120 U. S. 68, 71, 7 Sup. Ct. 350, 30 L. Ed. 578; *Hopt v. Utah*, 120 U. S. 430, 436, 7 Sup. Ct. 614, 30 L. Ed. 708; *Spies v. Illinois*, 123 U. S. 131, 168, 8 Sup. Ct. 21, 31 L. Ed. 80; *Alexander v. U. S.*, 138 U. S. 353, 11 Sup. Ct. 350, 35 L. Ed. 954.

This ruling sufficiently disposes of several of the other grounds of motion for a new trial. It was conceded to counsel for the defendant that the rule in Tennessee is very strict; that every separation of the jury is *prima facie* an injury to the defendant, and throws the burden on the state of explaining by proof that no injury took place in fact. *Hines v. State*, 8 Humph. 597; *Odle v. Same*, 6 Baxt. 161; *King v. Same*, 91 Tenn. 617, 625, 20 S. W. 169. But, even in Tennessee, unimportant and casual separations, where it is apparent that there was no opportunity for tampering with the jury, afford no ground for a new trial. *Stone v. Same*, 4 Humph. 37; *Jarnagin v. Same*, 10 Yerg. 529; *Luster v. Same*, 11 Humph. 170; *Rowe v. Same*, Id. 492; *State v. Turner*, 6 Baxt. 205; *King v. State*, 91 Tenn. 625, 20 S. W. 169; *Cartwright v. Same*, 12 Lea, 625. The supreme court, so far as the court is advised, has not decided any case determining the rule as to separation. The chief justice, in *Mattox v. U. S.*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917, refers incidentally to the various rules as to the effect of the mere fact of separation, but it was not decided; for in that case the injury to the defendant clearly appeared, a newspaper article being read to them by the bailiff. Nor have I found the subject much considered in other federal courts. There is a statute in Connecticut as rigid as the ancient common law forbidding a separation, even in civil cases, which the courts enforced when objection was taken, although counsel claimed it was a dead letter in actual practice. The court in a civil case regarded the separation in fact as fatal in itself, and so enforced the statute. But it would not have been binding in a criminal case, as has been shown. *Lester v. Stanley*, 3 Day, 287, Fed. Cas. No. 8,277; *Howard v. Cobb*, 3 Day, 309, Fed. Cas. No. 6,755. But in *Burrill v. Phillips*, 1 Gall. 360, Fed. Cas. No. 2,200, in Rhode Island, Mr. Justice Story held, on argument, that it was discretionary with the court, and that the verdict would not be set aside if the conduct "be free from unfavorable presumption." And counsel convinced him on ancient common-law authorities that if the jury misbehave their verdict would not be set aside of course, although the jury would be fined; but, if the misbehavior be aided by the party in whose favor the verdict would be given, then it would be set aside; and he cites *St. John v. Abbot*, Barnes, Notes Cas. 441, as conclusive on the point. The report of the case cites the old common-law books to that effect also. In *U. S. v. Gillies*,

Pet. C. C. 159, Fed. Cas. No. 15,206, a quasi criminal case of forfeiture, **Mr. Justice** Washington, on a writ of error from the district court, curtly cut off counsel making the objection by saying "that, if there was any such irregularity in the conduct of the jury as ought to have set aside their verdict, it was in the discretion of the court below to act as was proper on the occasion, and that the decision of that court upon this point is not examinable by this court upon a writ of error or otherwise." In **U. S. v. Gibert**, 2 Sumn. 19, Fed. Cas. No. 15,204, **Mr. Justice** Story again, on motion for new trial, considers the subject of misbehavior of the jury in reading newspapers and drinking ardent spirits. The officers in charge permitted them to read nothing concerning the trial, and there appeared no reason to believe that it had the slightest influence. It was a great irregularity for the officers to permit it, and punishable. But "the court must clearly see that it is an irregularity that goes to the merits of the trial, or justly leads to a suspicion of improper influence or effect on the conduct or acts of the jurors." Also, as to the drinking, there was permission and consent of parties to necessary stimulants, and one of the jurors went to the bar and got a drink. There was no evidence of prejudice to the prisoner. A new trial was refused for such irregularities. In **U. S. v. McKee**, 3 Cent. Law J. 258, Fed. Cas. No. 15,683, an article in a newspaper prejudicial to defendant, and intended for the jury, was printed. If read by the jury, it would have been a good ground for a new trial. But the court had prohibited the jury from reading about the case. Two copies were bought by jurors, but there was no evidence that the article had been read, and in the absence of such proof it would be assumed that the jury had obeyed instructions.

Perhaps the reason why so few cases are found in the federal reports is that it is only recently that writs of error have been allowed in criminal cases. Besides, the universal custom in federal practice is not to shut up a jury except in capital cases, or those of such grave character that the court, in the exercise of its discretion, directs it to be done. Indeed, the learned district attorney argues that, the jury having acquitted the defendant of the murder or other homicides imbedded in this indictment, the conspiracy of which he was convicted not having been declared a felony by the statute, there was no occasion to keep the jury together in the mere misdemeanor which it was. **U. S. v. Coppersmith** (C. C.) 4 Fed. 198. But the quick answer to this is that they were kept together as a fact by direction of the court, and the rule of judgment should be the same.

Turning to the general authorities, it is clear that at common law, as modified by modern practice, the strict rule of Tennessee that any separation is fatal, unless explained to have been innocuous, does not obtain, but the rule is that the defendant must show that he has been prejudiced, by setting out something more than the bare fact of separation, unless the circumstances of the particular separation indicate of themselves a suspicion of prejudice having been done. The last above cited cases all proceed on this rule in the federal courts, and they are supported by cases elsewhere. **Thomp. & M. Jur.** § 313, and cases cited; **Rex v. Kinnear**, 2 Barn. & Ald. 462; **Rex v. Woolf**, 1 Chit. 401; **Thomp. & M. Jur.** § 328, where the conflicting rule is considered.

But under either of these rules the district attorney has answered the requirement, even the strictest rule, as in Tennessee, and shown that no prejudice resulted. Every separation complained of is, from the nature of it, a necessary one, and the officer had the juror under his eye. Even in the matter of going into the lavatories and closets, the facts show that the juror was as much under surveillance as possible; and so as to the going to the drug and other stores, and to the marshal to ask for other supplies, and speaking to men in the court room during recess, but in the hearing of the marshal himself, though he was not in charge of the jury, and all such like occurrences. None of them was serious in its appearance on the facts shown. The learned counsel for the defendant argues, for example, that when a juror was talking to a sales clerk in a store, if the officer is not able to say just what the conversation was in words, or the clerk is not examined by the district attorney to tell what the words used were, the law presumes prejudice; or, going to a closet, if the officer is not able to say that no one came in to talk to a juror, prejudice is presumed, and so on,—requiring the district attorney to meet every trivial possibility of improper influence with plenary proof that none was had. The Tennessee rule requires no such strictness as this, and the common-law rule of ancient times, of keeping the jury without indulgence at all, would be preferable to such a burden, impracticable, if not impossible. Absolute isolation is not the rule of the common law anywhere. The legal right is to have a reasonable guaranty against improper influence, and the jurors may, under an officer, attend to their necessities. He need not indecently watch them, nor irksomely hamper them by disagreeable eavesdropping, when they are engaged in a presumably or apparently harmless intercourse with those who are serving their necessities. His attendance is sufficient when it is effective to prevent opportunity for tampering with the jurors, although there may remain a possibility of furtive influence. Such a possibility it is impossible to provide against, unless a juror is confined like a felon in a cell, with a death watch set over him, and even then the possibilities are not extinct. The law requires no such strictness in any case. *Thomp. & M. Jur.* § 320, and cases cited. The conclusion on this point is that there was no separation in fact, except those casual, unimportant, and trivial occurrences inseparable from a trial, and not within the rule; that such as did occur were shown to be harmless to defendant; and that, while it is not a matter of error or exception available in the appellate court, under our practice, in my judgment, the exception will be allowed and signed, that any doubt in that behalf may be settled by the appellate court.

The objection that the bailiffs placed in charge of the jury were not especially sworn would be fatal under the Tennessee practice, and this, also, was conceded to defendant's counsel. *Spain v. State*, 8 Baxt. 514; *Johnson v. Same*, Id. 450; *Clark v. Same*, Id. 591; *Maynard v. Same*, 9 Baxt. 225; *Duncan v. Same*, 3 Tenn. Cas. 596; *Wallace v. Same*, 2 Tenn. Cas. 616; *Buxton v. Same*, 89 Tenn. 216, 14 S. W. 480; *Lancaster v. Same*, 91 Tenn. 267, 286, 18 S. W. 777; *Lea v. Same*, 94 Tenn. 495, 497, 29 S. W. 900; *Thomp. & M. Jur.* §§ 322, 327. But, like the other, this practice is not binding on the federal courts. We have the direct authority of the supreme court

that, while it is more regular to administer the formal and special oath to the officer put in charge of the jury, it is not absolutely necessary, if the bailiff has been duly sworn. *U. S. v. Ball*, 163 U. S. 662, 674, 16 Sup. Ct. 1192, 41 L. Ed. 300; *Thomp. & M. Jur.* § 326. In this case the court directed the bailiff to be sworn, meaning the special oath, and reply was made that he had been sworn, the officers meaning the regular official oath, and it passed at that without objection by the defendant or suggestion from any source. But the court gave full instructions to the officers and the jury, and admonished the jury at the adjournment of every sitting against talking about the case, or allowing themselves to be talked to by others, according to the invariable practice of this court in all cases.

There is no force in the objection as to the action of the court in suppressing the taking of notes by jurors. The court had noticed for several days that two of the jurors persistently and diligently took notes of all the testimony and of all the occurrences of the trial, and another juror occasionally took notes of the evidence. The attention of counsel was called to it, with the result that the jurors were directed to discontinue the practice, and were required, after explanation of the reason of it, to seal up the notes they had taken, and deliver the envelopes to the marshal for safe custody, these being returned sealed as they were by themselves to the jurors after the trial. There was an exception by the defendant to a juror's taking notes by permission of the court in *Agnew v. U. S.*, 165 U. S. 36, 45, 17 Sup. Ct. 235, 41 L. Ed. 624; but nothing came of it, because the record did not show that any notes were taken in fact. But the practice is an improper one. *Thomp. & M. Jur.* § 390. It gives the juror taking notes an undue influence in discussing the case when he appeals to his notes to settle conflicts of memory. Without corrupt purpose, his notes may be inaccurate, or meager or careless, and loosely deficient, partial, and altogether incomplete. With a corrupt purpose, they may be false in fact, entered for the purpose of misleading or deceiving his fellows when he comes to appeal to them. There is no protection against such dangers except to forbid the practice. It is allowed by statute in some states, which would imply that without a statute it is not permissible. *Id.* § 402. It is perhaps a matter within the discretion of the court, like others of that character.

The defendant lodged exceptions to every action of the court on a challenge for cause allowed by the court, and to every challenge for cause disallowed, and the rulings are assigned as ground of motion for new trial. The jury was sworn with 14 of the 20 peremptory challenges unused, which is conclusive that he could have set aside any juror as to whom a cause for challenge had been disallowed, not satisfactory to him. He had no right of selection of those where the challenge for cause was improperly allowed. Therefore no injury was done, as by the nonuser of his peremptory challenges he has demonstrated that the jury was impartial. There can be no ground for new trial in this, as the cases already cited from the supreme court itself abundantly show. *Thomp. & M. Jur.* § 271; *Henry v. State*, 4 Humph. 270; *Hines v. Same*, 8 Humph. 597. But the challenges were proper under any circumstances. Two of the jurors stated that a former

United States marshal had met them on their way to the court, and told them that he would have been tempted to do as the defendant did, under the same provocation, and expressing his friendship for defendant. These jurors said they were unaffected by the incident, and could try the defendant impartially. The court was quite willing to believe this, but thought better to stand them aside, and sustained the challenge, as it did to another juror to whom a deputy marshal in attendance on the court, engaged in summoning the talesmen, had spoken deprecatingly of the defendant's case, although it made no unfavorable impression on the juror's mind. In the last-mentioned instance, if the defendant's challenge for cause had been disallowed, and his peremptory challenges had been already exhausted, there would have been a very plausible ground for a new trial, but not otherwise. Altogether it is the duty of the court to see that an impartial jury is sworn, and there are many circumstances and appearances that control the rulings on challenges which it is difficult to define or express, and so it is only where there is manifest injury to defendant's right of free challenge for himself to the full extent allowed by the law. All doubts should be resolved in his favor where he challenges for cause, if they be reasonably supported by the circumstances pertaining to the disputed juror. And the prosecution should be similarly protected against well-founded suspicion of partiality in favor of the defendant. No fixed rules of judgment are possible, and the court must be left to some elasticity of discretion, without arbitrariness of action, however. The jury in this case was an impartial jury, beyond doubt, and the action complained of by defendant cannot be ground for new trial, where the verdict is sustained by the evidence, as this surely is.

The last ground of the motion for new trial necessary to notice is that based on the alleged defect in the indictment. It has been fully disposed of in the progress of the trial, and the instructions to the jury explained the peculiarities of this indictment and of this prosecution. To put the objection in the language of counsel, the defendant has been put on trial for murder, and the conspiracy for which he has been convicted is not within the law of murder or homicide. The conclusive answer is that under Rev. St. §§ 5508, 5509, the defendant has not been tried for murder or homicide of any grade, notwithstanding the appearances of things. He has been tried for a conspiracy, accurately defined in the statute and the indictment, not to murder the deputy marshal whom he killed, but to deprive him, and the marshal whom he wounded in the combat between the conspirators and the marshal's posse, of their constitutional right to arrest him on legal process, or, to use the language of the statute, of the free exercise or enjoyment of a right or privilege they had in respect of his arrest on process under the constitution and laws of the United States. He is charged by the indictment in all its counts with having so conspired to "injure, oppress, threaten, and intimidate" these citizens in the exercise or for having exercised that privilege or right so guaranteed them.

He has not been charged and tried "for two separate and distinct offenses at the same time," nor for two independent offenses in the same indictment. In the Pointer and other cases, *supra*, the su-

preme court of the United States has considered the joinder of two offenses in the same indictment under our statutes (Rev. St. § 1024), and permitted two separate murders, or rather the one murder on the same occasion of two men, if it may be so expressed, to be joined in one indictment; the test being that the joinder must not embarrass the defendant in his defense. But that question does not arise in this case, since the defendant has been indicted for only the one offense of conspiracy, resulting, so the indictment charges, in its execution in the murder of one Garner, a deputy marshal, and that is the only offense in the paucity of existing legislation of which he could be charged in this jurisdiction. We have no jurisdiction, as yet, of the murder of United States officials while in the discharge of their duty, nor of conspiracies to murder them, but we have of that conspiracy charged in the indictment and above described in the language of the statute. And we may, by the same statute, if murder results, punish the conspiracy, successfully effected, by the same punishment that the state inflicts for the murder. That is all. We do not accuse, try, and punish the murderer, but we do accuse, try, and punish the conspirator with that punishment wherewithal the state would punish the murderer if the state saw fit to prosecute for the murder, which it has never done in this case,—to its shame be it said.

The court concedes that it would have been better if this indictment had contained a count charging only an effective conspiracy, disassociated with the resulting murder of the deputy marshal, and relying for conviction only on the injury, the oppression, the threatening, and intimidation which resulted in the deprivation of the essential privilege of the officers, as citizens; which were, all of them, found not only in the murder of Garner, the deputy, but in the serious wounding of Brown, the marshal himself, and in driving off the whole of the posse by force of arms and bloody battle, and, moreover, in the successful defeat of the service of the process by arrest. But this is not necessary, and the conviction can be sustained on the indictment as drawn, although the prosecution has failed, in the opinion of the jury, to establish murder, as one of the results of the effected conspiracy. The conspiracy is, none the less, established by the killing, the wounding of one not killed, the intimidation of the others, the very use itself of violence, and the successful accomplishment of the purpose not to be arrested. The technical, statutory conspiracy is properly charged and abundantly proved, although no "other felony or misdemeanor" has been committed by the laws of the state. Rev. St. § 5509. Independently of the laws of the state, the federal offense has been committed, and the conviction was proper, whether any other crime resulted or not.

It is useful to explain that this indictment was found soon after the outrage on the officers and their constitutional privilege was done; but the defendant, when arrested finally, was put on trial for the original offense of illicit distilling, and, being convicted, has been serving a four-years term of imprisonment for that offense. The motion for a new trial having been overruled, the defendant was, on motion of the district attorney, sentenced to the full penalty of the statute. Rev. St. §§ 5508, 5509.

JACOBY et al. v. S. JACOBY & CO.

(Circuit Court, S. D. New York. July 3, 1900.)

1. CONTRACT FOR PAYMENT OF MONEY—MATURITY—DEMAND.

In connection with an agreement by which the complainants were to manufacture cigars and furnish the material therefor to the defendant for three years, the accounts to be settled monthly, the complainants loaned to the defendant about \$10,000 to take up its discounted notes. As security for this loan, defendant sold and transferred to complainants all of its fixtures, labels, brands, trade-marks, and merchandise in the cigar business. It was agreed that, as complainants used the defendant's labels for the manufactured cigars, they should pay or credit the defendant therefor, and the amount should be applied towards the payment of the loan. No time was declared for the maturity of the loan. About 2½ years after the loan, plaintiffs made demand for the balance due thereon, and, payment not being made, they sold the collateral at public auction. *Held*, that the loan was not made for 3 years, but was payable on demand; nor were the labels to be the entire reliance of plaintiffs for payment during the life of the contract, so that the right to ultimate payment was postponed until its termination.

2. PLEDGES—SALE—NOTICE.

Written notice that the property pledged by defendant would be sold by plaintiffs at half past 12 o'clock the next day was deposited in the mail box of the president of the defendant company about the close of business hours the day before the sale, but not received by him until 10 o'clock the next day, and advertisement of the sale was made in an evening newspaper of the same day, and in a morning paper of the day of the sale. *Held*, that the notice was insufficient to give title to the purchaser at the sale, since it gave defendant no opportunity to redeem the property, or save its equity.

Clarence J. Shearn, for complainants.
Morris S. Wise, for defendant.

SHIPMAN, Circuit Judge. The complainants, Morris Jacoby and Charles Jacoby, citizens of the state and city of New York, and partners by the name of Morris Jacoby & Co., are manufacturers of cigars. The defendant, S. Jacoby & Co., is a corporation of the state of West Virginia, and is in the business of selling cigars in the city of New York. Gustave T. Jacoby was its president, and his wife and nephew owned all the stock except two shares. On January 28, 1896, the defendant, through Gustave Jacoby, its president, entered into a written contract with the complainants, by which the latter agreed to manufacture cigars for the defendant for the term of three years, and the defendant agreed to buy its cigars exclusively of the complainants, and, if its net profits should amount to 10 per cent. on the amount of goods which it sold, the contract was to continue for the further term of three years from January 28, 1899. Monthly merchandise accounts were to be made, and settled by cash payments, notes, or bills receivable. The complainants agreed to loan and did loan the defendant money to take up six notes, amounting in all to \$10,022.70, and the defendant sold and transferred to them all fixtures, labels, brands, trade-marks, signs, and merchandise of every kind as collateral security for the payment of this loan. It was agreed that, as the complainants used the defendant's labels for the manufactured cigars, they should pay or credit the defendant

therefor, and the moneys so paid or credited should be applied to the payment of the loan. At the end of the term the defendant was to pay to the complainants all sums of money which it should owe them. On January 6, 1898, a supplemental agreement was entered into by the parties, whereby all the property pledged by the preceding agreement as collateral security should be also collateral security for all debts due or to become due by the defendant to the complainants, and, if this indebtedness should, at the end of the year 1898, be reduced \$2,500 or more, then the two agreements were to be continued to January 1, 1900. After January 28, 1896, Charles Jacoby became, in accordance with the agreement, a director, secretary, and treasurer of the defendant, to serve without salary; and one Simpson, who was connected with the complainants' business, became a director. On August 17, 1898, the loan account had been reduced by money paid for labels and by credits for labels to \$5,178.77, and on that day the complainants made a written demand for payment, to which no reply was returned. The defendant's whole indebtedness had increased after January, 1896, and its solvency at this time depended upon the collectible character of certain of its bills receivable. On the afternoon of August 29, 1898, the sale at auction of the trade-marks, brands, and labels pledged as security for the loan account on the following day at half past 12 o'clock was advertised in the Mail and Express, and was also advertised in the Journal of Commerce on the morning of August 30th. Written notice of this sale was put into the mail box of the president of the defendant at his business office about 4 o'clock in the afternoon of August 29th, and was received by him about 10 o'clock on the following morning. The sale took place, the trade-marks, brands, and labels were bid in for \$200 by one Hopkins, a newspaper employé, who was not present, who was a mere conduit in the transaction, and transferred his title to the property so purchased to the complainants. Among these trade-marks were the "Metropolitan," "Puck," and "La Flor de Nectar," which the complainants began immediately to use, and still use, as trade-marks for cigars manufactured and sold by them; but the defendant also still continues to use them in its own business. The complainants think that they are worth over \$10,000. The bill was brought to restrain the defendant from the use of these trade-marks, and from the use or sale of any labels or other materials or articles relating thereto.

The question in the case is whether the complainants obtained any title to the trade-marks by virtue of the auction sale of August 30, 1898. The first point made by the defendant is that on the day of sale the loan account was not due. It is agreed that the sale of the collateral was made upon that account alone, and the supplementary agreement is, therefore, not of material importance. It is manifest that the contract does not specify when the loan, as a whole, is to become due, and it is also true that in such case the time of payment for money loaned is upon demand; but it is claimed that the contract shows that the parties intended that the loan account should be a running account for three years, payable in part or in whole, from time to time, by the labels, as they were continuously used by the complainants in the manufacture of cigars for the defendant, and that any residue was to be payable at the termination of the contract. When

Gustave Jacoby approached Morris Jacoby & Co. on the subject of the contract of 1896, the defendant manifestly needed pecuniary help, and a new manufacturer of its cigars. The contract was carefully drawn except in regard to the maturity of the loan, and the intent of the parties is to be gathered from the object of the contract, and its terms in other respects. It was an agreement by which the complainants were to manufacture and furnish material to the defendant for three years, for which accounts were to be rendered and settled monthly; and they were also to loan it about \$10,000 to take discounted notes; and, as the defendant was to furnish and sell to them labels for use upon the cigar boxes, they were to apply the amount of the money due for the labels upon the loan account. All the debts due to the complainants for loans or for merchandise were to be paid at the end or sooner termination of the three-years contract. Meanwhile one of the complainants was to have constant watch, charge, and control of the defendant's finances, and all its book accounts and bills receivable were to be turned over to them as security for the payment of all the debts owing them by the defendant. Care was taken that the complainants should have everything which the defendant could give by way of security. Both the circumstances and the contract show that S. Jacoby & Co. could not have been in good credit, and that the complainants were entering into business relations which required watchfulness. They were to loan over \$10,000 to take up notes which had been discounted, and they were to credit, in whole or in part, upon this debt, the value of the labels as they used them; but I see no adequate reason to suppose that a credit was given for three years, or that the labels were to be their entire reliance for payment during the life of the contract, and that the ultimate payment was to be postponed until its termination. It would require more clearness of statement than exists in the contract for the conclusion that a loan of money, which, as a rule, is, in the absence of agreement, payable on demand, was turned into a loan which could not mature until the expiration of three years.

The next and important point which the defendant urges is that the sale was void on account of the inadequate personal notice which was given of it to the defendant. When the contract is silent in regard to the mode of procedure in the event of a public sale of the pledged property by the pledgee, the rule is that "the pledgee must make demand for the payment of the loan, and, in default of payment, give a reasonable personal notice to the pledgor of the intention to make such sale, specifying its time and place." *Stewart v. Drake*, 46 N. Y. 449; *Markham v. Jaudon*, 41 N. Y. 235. The necessity of a reasonable notice, and of fairness on the part of the pledgee, is insisted upon because the pledgee has a right to redeem the property if he can, and because he should have an opportunity to enable the property to bring its fair value. The notice is not a mere formal and technical proceeding, but is for the purpose of giving actual notice to the pledgor, to enable him to save his property. 2 Kent, Comm. 582; *Stearns v. Marsh*, 4 Denio, 227; *Wheeler v. Newbould*, 16 N. Y. 392; *Bryan v. Baldwin*, 52 N. Y. 232. The courts have established no specific rule in regard to the amount of time which shall be considered reasonable. In *Willoughby v. Comstock*, 3 Hill, 389, two days' notice

was considered sufficient. In *Stewart v. Drake*, supra, a notice on the afternoon of Thursday to sell stocks, which the broker and pledgee had bought in "upon a margin," at half past 12 on the Saturday following was held, as between the parties living in the same city, to be a reasonable notice. This was a notice of about two days. The notice in the case at bar was put into the mail box of the president of the defendant at his business office at about 4 o'clock in the afternoon of August 29th—about the close of business hours—to sell at half past 12 o'clock on the next day, which was half of the time held to be reasonable in the *Stewart Case*. It was received the next morning about 10 o'clock. At the sale, the auctioneer, one of the lawyers of the complainants, and the lawyer of the defendant, and Gustave Jacoby only were present. At the time of said sale, the defendant, by written protest, publicly read, protested against the sale upon divers grounds; one being the unreasonable notice which had been given of the date. The defendant's dissatisfaction and reasons for it were fully stated. *Willoughby v. Comstock*, supra. If a notice is to be of value or possible benefit to the party notified, the notice in this case was unreasonable. It gave the defendant no opportunity to redeem or save its equity in the property. The bill is dismissed, with costs.

POWELL et al. v. LEICESTER MILLS CO. et al.
(Circuit Court, E. D. Pennsylvania. July 18, 1900.)

1. PATENTS—INFRINGEMENT—KNITTING MACHINES.

The Powell patent, No. 510,934, for improvements in web-holder actuating mechanism for automatic knitting machines, claims 1 and 2, construed, and *held* not infringed by mechanism, designed to accomplish the same result, made in accordance with the Bennor patent, No. 557,641.

2. SAME—SCOPE OF PATENT.

It is not open to a patentee to claim either the effect or function of the mechanism designed by him, so as to cover any or every device for accomplishing the same result; but, to constitute an infringement, such device must operate in substantially the same way as, and be a known equivalent for, the mechanism of the patent.

3. SAME—PRESUMPTION OF NONINFRINGEMENT—ISSUANCE OF PATENT.

Where a patent has been issued for the alleged infringing device used by a defendant, he is entitled to the benefit of the presumption arising from such fact, that his device does not infringe the prior patent.

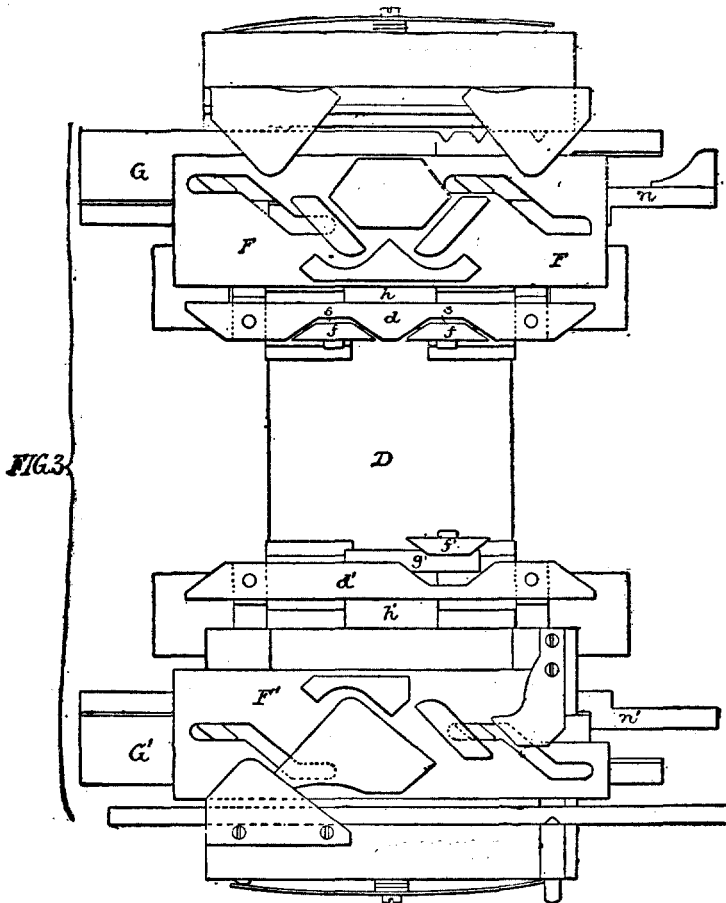
In Equity. Suit for infringement of a patent. On final hearing.

Howson & Howson, for complainants.

Hector T. Fenton, Joseph De F. Junkin, and John G. Johnson, for respondents.

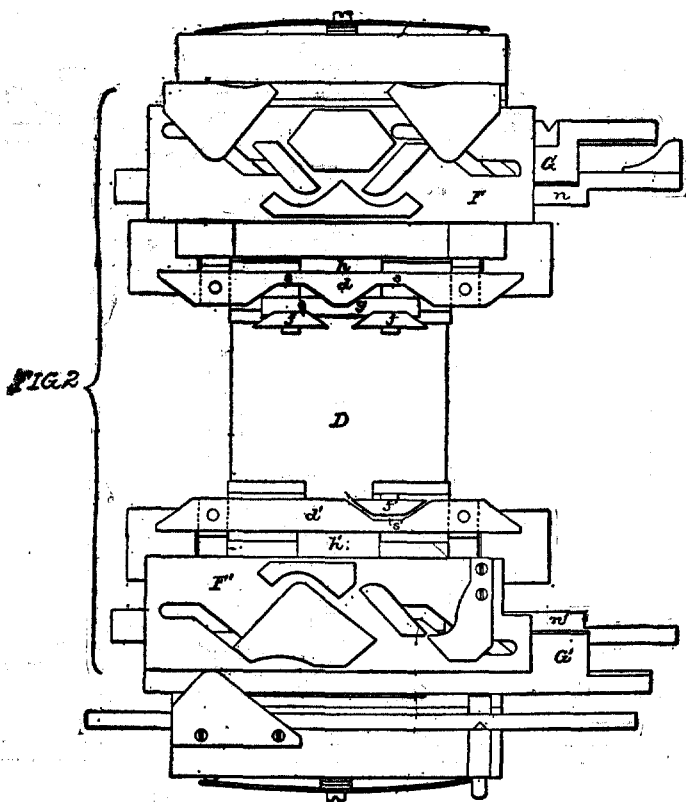
GRAY, Circuit Judge. Complainants bring suit for alleged infringement by defendants of claims 1 and 2 of letters patent of the United States No. 510,934, December 19, 1893, for "improvements in web-holder actuating mechanism for automatic knitting machines." The alleged infringing machines used by defendants were made for and supplied to them by the Macon Knitting Company and Joseph Bennor, intervening defendants, and Complainants' Exhibit Defendants' Machine is one of said machines. The patent relates to improvements in that class of straight knitting machines in which the needles are arranged in two straight rows opposed to one an-

other; said needles being supported and guided upon a bed which is of the shape of an ordinary barn roof, the needles working (i. e. being successively moved up and down by means of traveling cams, one for each row of needles) in grooves whose direction is that of the rafters of the roof. The knitting is done along a line corresponding to the ridgepole, and there is a gap or slit at the ridge, through which the web of fabric goes down as fast as it is knit. In "regular" or "tubular" knitting (as, for example, in making the



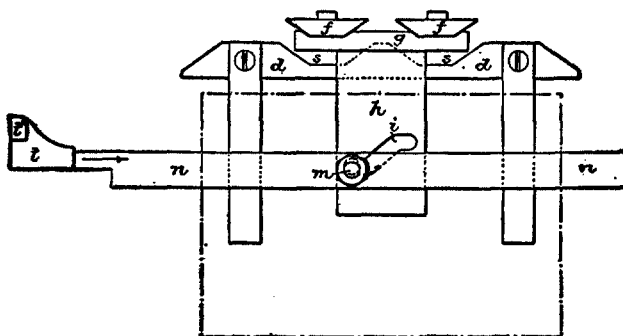
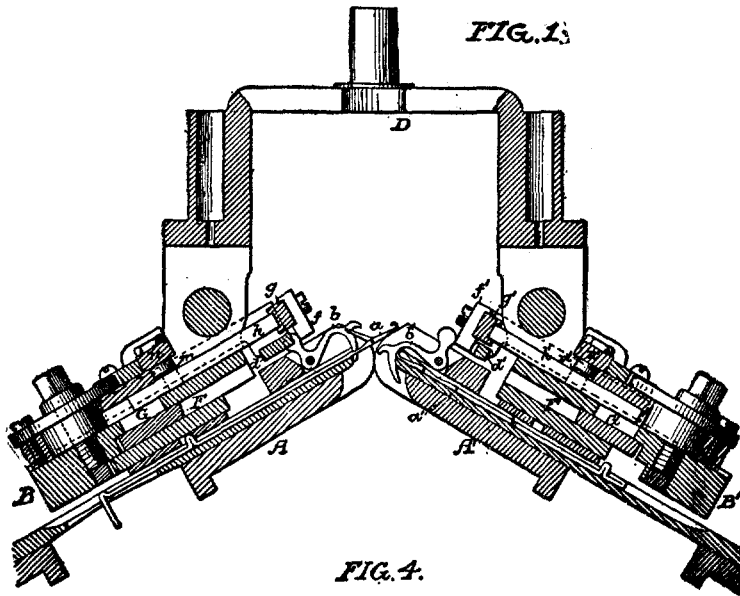
foot or leg of a stocking) one row of needles is actuated to knit while the yarn carrier (i. e. the device which brings the yarn within reach of the hooks of the needles) and needle-actuating cams travel in a straight line in one direction, and the opposite row of needles is actuated to knit while the yarn carrier and cams are traveling in a straight line in the reverse direction, so that in this "regular" operation of the machine each of the two sets of needles is alternately active and idle. But, in the operation of such a machine to produce a stocking, the first step is the "setting-up" course, in which the

needles of both rows are simultaneously actuated to seize the yarn, and hold it in a zigzag line within their hooks. This delivery of the yarn to both sets of needles is accomplished by so adjusting the needle-actuating cams that during that one movement of said cams, from end to end of the machine, the needles of both rows are thrust forward to receive the yarn, and drawn back to hold it; the needles in this step of the operation being advanced to a less extent than in regular or tubular knitting. This setting-up operation, requiring the thrusting forward of the needles of both of the two opposite sets, makes it necessary to arrange the needles of each row op-



posite, not the needles, but the spaces between the needles of the opposite row. This is a distinguishing characteristic of the class of machines to which the invention of the patent relates, and is that upon which depends the capacity of such machines to knit a tube closed at one end, so as, for example, to produce automatically, at one continuous operation, a stocking with closed toe and heel. Thus, in making a stocking, one of these machines operates (1) to produce a single setting-up or starting course by the simultaneous operation of both sets of needles; (2) to make the toe and the heel by the operation of one set only of the needles knitting during the travel

of the cam carriage or knitting head in both directions; and (3) to make the foot and leg by alternate operations, first of one and then of the other set of needles, each set knitting in one direction only. These operations, and the change from one to the other, are effected automatically by needle-actuating cams, and the shifting of said cams from one position to another by means of slide bars (G, G', in the patent), which slide bars are themselves shifted by contact with



suitable stops on the machine just before the sliding heads reach their limit of movement in either direction.

The web or fabric, as it is being formed, is held down while the needles are thrust forward to receive new loops by means of pivoted hooks or fingers called "web holders" or "sinkingers," one to each needle. These web holders or sinkers (b, b', in the patent. See Fig. 1, drawing) are successively raised by means of a traveling cam

which acts to raise each web holder just after the needle beside it has passed through its loop to receive yarn for another loop, and they are then successively lowered by means of cams or springs. It is to the web-holder or sinker mechanism that the patent in suit particularly relates, as the title, "Improvements in Web-Holder Actuating Mechanism," indicates.

In the specification of the patent in suit, the patentee, one of the complainants in this case, states his invention as follows:

"My invention consists of a certain improvement in knitting machines of the class represented in patent No. 440,389, dated November 11, 1890, my present improvement consisting of a modified means of operating the web holders, all as fully set forth and specifically claimed hereinafter."

The patent No. 440,389, referred to, was issued to Joseph Bennor, assignor, and one of the intervening defendants in this case. It is very comprehensive, and embodies the principal mechanisms upon which have been ingrafted the improvements of the patent in suit, as stated in the specification of the patentee, just quoted, as also the improvements claimed by Bennor, the patentee himself, in a subsequent patent, in accordance with which the alleged infringing machine is constructed. The specifications of the patent state that in the prior art, as illustrated by the machine of patent 440,389, November 11, 1890, "these web holders operated continuously, so that both sets of web holders were actuated when but one set of needles was in operation at a time. This was objectionable, not only because of the wear of the parts, but mainly because it prevented the setting of the web holders of one head directly opposite the needles of the other head, because of the interference of one with the other in their movements, and thus necessitated the making of the machine of coarse gauge." It is for the infringement of the patent, as covering a device to remedy this, that this suit is brought; the complainant averring that prior to the invention of the patent in suit no knitting machines of this class were capable of producing fine-gauge work. The machine of the patent in suit is claimed to have accomplished this, by the inventor having conceived the idea of placing the sinkers or web holders out of operative position on the inactive side of the machine, so that they should not come in contact with the advancing needles of the active side, and his having devised a mechanism to accomplish this result. As the needles on the active side of the machine could not, by this arrangement, come in contact with the sinkers of the inactive side, which were thus kept lowered, there was no necessity to provide space between the needles for the play of such opposite sinkers, and the needles could therefore be placed closer together, for the production of finer work.

Claims 1 and 2 of the patent in suit—the only ones involved in the controversy here—are as follows:

"(1) In a machine having two opposite sets of needles, working alternately for the production of tubular web, and movable web holders for each set of needles, the combination of said needles and web holders, with cams for operating the latter, and with means for throwing said cams into and out of operative position, whereby each set of web holders may be caused to work only

when its own set of needles is in action, substantially as specified. (2) In a machine having two opposite sets of needles, working alternately for the production of tubular web, and simultaneously for the production of a setting-up course, and movable web holders for each set of needles, the combination of said needles and web holders, with cams for actuating the latter, and means for throwing one set of cams into action during one movement of the head, and the other set into action during the opposite movement of the head, and means for throwing both sets of cams out of action simultaneously during the one movement of the head, devoted to the formation of the setting-up course, substantially as specified."

To the charges of infringement made by the bill, the defendants, while setting up in their answer the usual defense, in their proofs rely only upon the single one of noninfringement, and to this alone, in the contentions of their brief, confine themselves. Does the sinker-operating mechanism of defendants' machine, as displayed in the exhibit before the court, and admitted to have been used with others of like character by the defendants, constitute an infringement of the rights secured to complainants by patent 510,934? The consideration of this single but broad question will make necessary a determination by the court of the proper construction to be given to claims 1 and 2, above quoted, and of the extent of the monopoly granted by the patent in suit. It must be borne in mind at every stage of the discussion that the patent in suit is not for a knitting machine, or for any invention of a primary character opening up or occupying a new field in industrial art. Knitting machines of this class were well known in the prior art, and had been developed by successive inventions until the principle involved was well understood and embodied in mechanisms in general character like those largely used to-day in the knitting industry. Among the inventors who have contributed to this development was Joseph Bendor, one of the defendants. The testimony abundantly establishes his important relation to the art, and also the fact that for a number of years he was in the employ of the complainants, and while there invented, used, and had patented a knitting machine, the patent for which is No. 440,389. It is also in testimony that under this patent the complainants manufactured many machines, and it was professedly for a "certain improvement" of the machine represented in this patent that the patent in suit was granted; the patentee stating, as above quoted:

"My invention consists of a certain improvement in knitting machines of class represented in patent No. 440,389, dated November 11, 1890, my present improvement consisting of a modified means of operating the web holders, all as fully set forth and specifically claimed hereafter."

The general character of this improvement has already been sufficiently stated for our purposes. The first claim of the patent, which is for a "combination of said needles and web holders, with cams for operating the latter, and with means for throwing said cams into and out of operative position," does not particularly describe the "cams" or the "means" for throwing the cams into and out of operative position, and for this reason is claimed by complainants to be entitled to a very broad construction; that is to say, that the invention is broader than as described in the specifications. The device described in the patent and drawings consists

of a sliding T head, in which one of the cams, marked f, f, is placed, reciprocating with a corresponding cam, marked d, d, rigidly fixed on the carriage, with recesses, marked s, s, into which the projections, f, f, of the sliding cam are retracted when the sinkers are intended to be kept out of operation. When this sliding T head, on which is the cam, f, f, is pushed forward, both cams then operate to bring the sinkers into action by engaging their butts between the reciprocating cams. It is this device of a T head, moving transversely to the motion of the carriage, and according as it is pushed out or retracted into the recesses, s, s, actuating or holding down alternately the web holders or sinkers, that is the subject of invention, as described and illustrated in the specifications and drawings of the patent. This was the specific mode in which the patentee of the patent in suit improved the generic knitting mechanism, in order to make it a closer-gauged machine. Prior to his invention, as described in the patent in suit, he had adopted another mode of accomplishing the same result; i. e. of throwing the sinkers out of operation on the inactive side of the machine, and thus out of range of the needles of the opposite side. This was done by having the long, grooved cam bar on the machine of 440,389 altered, by applying mechanism whereby the said grooved cam bar on the inactive needle side shall have a lost motion laterally, so that its cams would not be brought into contact with the butts of the sinkers which for the time being happened to be opposite the section of projected needles on the opposite side of the machine. This device was the subject of patent 523,867, which, though applied for before, was not issued until after the patent in suit. This, then, was another and distinct mode of accomplishing the same result by an improvement on the generic machine; i. e. making possible a closer adjustment of the needles, and a consequently closer gauge in the fabric produced. The desirability of removing the sinkers on the inactive side from possibility of contact with the needles on the active side of the machine must have been obvious to any one skilled in the machine-knitting art, and any efficient device for the accomplishment thereof was entitled to the protection of the patent laws. The device just referred to was the subject of a separate patent, and is not claimed to be covered by the invention of the patent in suit. Though one of the defendants, Bennor, invented and patented in 440,389, and also in 485,317, the underlying and essential principle and mechanism, the complainant was not precluded from claiming his improvement thereon. But he may not on that account claim a monopoly of the function or result of his improvement, and prevent any other person (much less, Bennor himself) from improving his own machine by devising other and different mechanisms to produce like results.

This brings us to the question whether defendants' machine, as produced and admitted in evidence, is an infringement of the device of the patent in suit. This alleged infringing machine was the subject of a patent (being No. 557,641, to one of the defendants, Joseph Bennor), application for which was filed September 1, 1892. In the invention so patented the patentee has undoubtedly devised an improvement of the generic machine for accomplishing substan

tially the same result as the device of the patent in suit. By it the sinkers on the inactive side are not actuated by the sinker cam, because it is lifted out of contact with their butts during the period of inactivity, and they are held down in their inactive position by springs, one of which is attached to each sinker. This function of holding down the sinkers during the inactive period is performed in the patent in suit by the outer edge of the movable cam being brought flush with the upper edges of the immovable cam, d, when the former is retracted into the recesses, s, s, of the latter. A straight surface is thus pressed against the butts of the sinkers as the carriage passes, and holds them in line and out of operation. Before the date of the patent in suit, and in the machines as devised by Bennor, there was mechanism for throwing out of actuating position the needle cam when the needles on either side were desired to be inactive. The defendants' machine, as devised and patented by Bennor in patent 557,641, presents a mechanism by which both the needle cam and the sinker cam are simultaneously, and by the same movement of the actuating bar, lifted out of operative position on the side desired to be inactive. This is done by uniting the parts of the carriage holding the needle bed and operating cams, and the sinker-operating cams, so that, as a unitary structure and part of the carriage, it can be hinged at the lower side of the barn-roof incline, so as to give a swinging motion to the whole, through a small arc, when raised at its outer or higher side by the automatic device for so doing. This raising or swinging of the part of the carriage holding the needle cams and the sinker cams necessarily places the sinker cams out of range of and contact with the sinker butts whenever the needles on that side are inactive, as the needle cam is thrown out of operative position by the same movement. The sinker cam is rigid relatively to the swinging part of the carriage, having no transverse movement, as in the case of the patent in suit, and the sinkers are held in depressed position by the springs already mentioned; no reciprocating cam bar, d, being used for that purpose, as in the device of the patent in suit. This is plainly a different mode of accomplishing the object of keeping the sinkers inactive when the needles on the same side are so, from that set forth in complainants' patent; and, unless the claim of that patent is broad enough to cover it, it does not invade the field of monopoly secured to complainants. The complainants contend that their invention, as set forth in claim 1 of the patent, is broad enough to so cover defendants' device; that, whatever the means may be by which the sinker cams are made inoperative during the inactivity of the needles on the same side, they are included in the monopoly secured by the patent in suit. The claim relied on for this contention is claim 1, and is as follows:

"(1) In a machine having two opposite sets of needles, working alternately for the production of tubular web, and movable web holders for each set of needles, the combination of said needles and web holders, with cams for operating the latter, and with means for throwing said cams into and out of operative position, whereby each set of web holders may be caused to work only when its own set of needles is in action, substantially as specified."

Plainly, this claim, in order to be understood, must be read together with the specific mechanism described in the specifications of the patent. It is impossible to identify the invention claimed, otherwise. The words "substantially as specified," while not referred to in order to narrow the claim, must be held in this case as serving to connect the general language used with such parts of the specifications as will serve for identification, and to translate what is vague in the claim into what is concrete and comprehensible. The first half of the claim refers entirely to the primary machine invented by Bennor, one of the defendants, and contains nearly all the mechanism of complainants' machine; the only addition made thereto by complainants being the cam bar, d, and the making movable the T head holding the cams, f, f, which were stationary in the original machine. Unless this mechanism or device be the invention described and claimed by the patent in suit, then we must concede to complainants either that the alternating "operative and inoperative positions" of the sinker-raising cam, however produced, is their invention, or that the mere motion or movement of the sinker-raising cam into or out of operative position is such invention. But for such a claim there is no warrant in this case or at all. It is not open to the patentee, in reason or in law, to claim either the effect or function of the mechanism designed by him to produce such effect or perform such function. In the case of the patent in suit, as well as in the alleged infringing machine of the defendants, the effect or end result, which must be taken to have been in the inventor's mind, is the inoperative position of the sinker cam and sinkers on the inactive side of the machine. It is true that this position was an end sought to be brought about, not for its own sake, but as a condition precedent to a closer placing of the needles, which closer placing was, in its turn, a necessary condition to the producing of a fine-gauge fabric; but it is not required that we should seek an absolutely ultimate end, if that were possible, but only the natural and immediate result of the mechanism in question. In the case before us, this was, as we have said, the nonoperative position of the sinker cam and sinkers, during the period when the needles were inoperative on that side. This was the obvious desideratum in the machines as already constructed, and, as a matter of fact, was recognized as such by Joseph Bennor as early as December, 1891, and set forth in his letter of that date to the complainants in this suit. It is necessary, therefore, that we should so read the latter half of the first claim of the patent, which alone refers to any improvement in the primary machine, in connection with the specifications, as to enable us to identify the mechanism invented and claimed by the complainants. Doing so, we find that in a machine in all of its main features similar to the old machine devised by Bennor, and long in use, the complainant Powell has made movable the T head, carrying the open cam bar, of the old machine, so that it shall slide backwards and forwards transversely to the line of movement of the carriage in which it is placed, and be made to reciprocate with the cams of a cam bar, d, d, rigidly fixed to the carriage. This movement backwards and forwards is so devised that, when actuated by appropriate cam mechanism, the sinker-cam T head can be so retracted into the recesses, s, s, of the cam bar, d,

that the sinkers, during the inactivity of the needles on that side, will be depressed and held in that position by the cam bar, d, co-acting with the cam bar, f, f, until, when the needles become again active, the T head cam bar is thrust forward into such position as to allow the cams to engage the butts of the sinkers, and so operate the same in connection with the needles.

Complainants say in their brief, "The soul of the invention—the happy thought—was the idea of making what had previously been, for all operative purposes, a fixed cam, a shifting cam." But the thing sought or the result aimed at was an efficient shifting or moving out of operative contact of the sinker cam and the butts of the sinkers during the inactivity of the needles on that side. The happy thought of the patent was the device or mechanism there set forth, to accomplish such shifting or movement. The patent was for the device, and not for the movement, as it could not lawfully be. It is this efficient device of a transversely sliding T head, carrying a cam co-acting with a fixed cam, that is the invention claimed and described in the patent in suit; and the result or effect of such device, when actuated at the times required, is to move out and keep out of operative position the sinker cams. It is this particular device for producing the result, and not the result or effect itself, that is patented. "It is for the discovery or invention of some practicable method or means of producing a beneficial result or effect that a patent is granted, and not for the result or effect itself." *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683. In *Le Roy v. Tatham*, 14 How. 156, 14 L. Ed. 367, the court say: "A patent is not good for an effect, or the result of a certain process, as that would prohibit all other persons from making the same thing by any means whatsoever." Complainants cannot be permitted, by the use in their contention of the word "shifting," as applied to the movement of the cam out of operative position, to so broaden the scope of the invention as to cover any or every other device for effecting that movement, and so, practically, to obtain more than the patentee invented, and more than the patent can give. Even if it were allowable to claim, under this use of the word "shifting," the intermittent movement of the sinker cam out of operative position, irrespective of the mechanism by which such movement or motion is effected, it is to be observed that the claims do not use the word, and nothing elsewhere in the patent justifies the claim of such an invention or the monopoly of such a thought. The defendants' means or method of producing this effect is different altogether from the device of the patent in suit. Instead of a transversely sliding bar or T head, the T head on which the sinker-raising cams are fixed is rigid, and has no motion relatively to the carriage. It is true that the effect or result of automatically placing the cam in alternately operative and inoperative positions, according as the needles on that side are active or inactive, is accomplished, as it is also accomplished by the device of the patent in suit. This, however, is done by raising or swinging through a small arc the upper end of the carriage on which the needle bed and sinker cams are fixed, so as to move out of operative position simultaneously the needle cam and sinker cam of one side. There is no sliding of a T head backward and forward into and out of the recip-

roccating recesses of the fixed cam bar, d. While the invention of complainants is a meritorious one, it occupies no such position in the art as to give it claim to anything more than a fair and unstrained application of the doctrine of equivalents. The thing to be done, or the effect aimed at, was, at a certain period of the knitting operation, to get the sinker cam bar out of operative position. One means of doing so was the transverse sliding motion of the T head, and that was the means of the patent in suit. Another means was that of "dragging" the long cam bar of the primary machine, so as to prevent its operating the section of sinkers opposite a section of active needles; and that was the method of complainants' first applied for, but later issued, patent No. 523,867. While another means of getting the sinker cam out of position to operate the sinkers at the times required was to raise the end of the carriage, in which both sinkers and needles were operated, and thus lift, instead of slide, the sinker cam out of operative contact with the needles. This latter differs from both the other means, in that it depends upon a lifting or swinging motion, and not upon the sliding motion, keeps the T head in a fixed position, relative to the carriage, instead of a shifting one, and does away with the cam bar, d, of the patent in suit, which, co-acting with the movable cam bar when retracted into its recesses, serves to hold the sinkers in their depressed position. In the defendants' machine this holding down of the sinkers in their depressed or normal condition is accomplished by springs, against the resiliency of which they are raised by the sinker-raising cam. It is difficult to see how any doctrine of equivalents can apply to a device so simple and of such narrow scope as that of the patent in suit, or be invoked, as here, without claiming for the patentee more than he had invented, and more than he had a right to claim. Unless a means of accomplishing the result aimed at, as different from that described in the patent in suit as that of the defendants' machine, is considered an essentially independent and nonequivalent device, the complainants could prevent the employment of any means by Bennor, the patentee of the primary machine, to improve his machine for the end and purpose in view, as well as all other persons. Such a result would be injurious to the further progress of the art in question and to the public. The patent laws were not designed to produce such results, and should not be so construed. The defendants' device cannot be read out of the patent of complainants. "The specification of the patent particularly pointing out an invention to which the claim and every element thereof is presumably referable, there being no other invention particularly pointed out to which the claim can refer, we are justified in concluding that the disclosure of the specification and the subject-matter of the claim are the same, and together constitute a compliance with the statutory mandate, that the patentee 'shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery.'" *Computing Scale Co. v. Keystone Store-Service Co.* (C. C.) 88 Fed. 788.

The claim and the specifications being thus read together, we think no one can properly identify the device of the patent in suit in the defendants' machine. The defendants' machine has no cam bar, d, nor any mechanical equivalent therefor. It has no shifting

or movable T head, holding cams that co-act with the cams of the cam bar, d, moving out transversely to the line of motion of the carriage. On the contrary, defendants' machine has the short, open, raising cam, mounted on the carriage, and working in combination with springs attached to the sinkers, which is characteristic of the construction called for and described in defendants' own prior patent, 485,317, and it has no movement relative to the carriage at all. The only movement upon which defendants rely to get this open cam out of operative position is that imparted to it by the lifting of the carriage itself. We can discover no equivalency of mechanism here. The equivalency contended for by complainants is in reality an equivalency of result and function. Complainants cannot claim any and every mechanism which will result in not vibrating the sinkers on the inactive side. That is a function or effect. No more can they be heard to claim any and every mechanism which will move the sinker cams out of their normal position in which they would otherwise vibrate the sinkers. That is a function. In *Miller v. Manufacturing Co.*, 151 U. S. 203, 14 Sup. Ct. 310, 38 L. Ed. 121, the supreme court say, "Merely because two things operate to perform the same function or accomplish the same result, they are not necessarily the same." In *Clough v. Barker*, 106 U. S. 166, 1 Sup. Ct. 188, 27 L. Ed. 134, the court held that the compared device, in order to be an equivalent, must "perform the same office in substantially the same way as, and be a known equivalent for," the patented device. The cam bar, d, in the patent in suit, could not possibly be substituted for, or perform the office of, the springs in the defendants' machine.

It is not denied that the defendant's machine is specifically described in his patent 557,641, and also in his companion patent of the same date, 557,639, and is there described as an improvement upon defendant's prior machine, for which patents 485,316 and 485,317 were issued. Among the improvements stated is one relating to "a construction of the cam carriage, the knitting cams, and the means for controlling the same." The second patent named states that it relates, *inter alia*, to "a novel construction and arrangement of sinker mechanism." These patents were granted to defendant two years and four months after the date of the patent in suit. The grant is to be presumed to have been made after a full examination by official examiners, with the prior state of the art fully in view, especially as the same is shown by previously granted patents. There can be no reason why the presumption of validity and noninterference with any prior patent should not obtain as strongly in defendant's favor as it does in favor of the patent in suit. In considering the weight of the testimony, as to all points bearing on the question of infringement, this presumption must be kept in view. The cases cited by counsel for the defendants in this regard fully sustain this proposition. In *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683, the supreme court say:

"In cases where the evidence is nicely balanced, it [the defendant's patent] may have weight with the jury in making up their decision as to the plaintiff's rights; and, if so, it is not easy to perceive why the defendant, who uses a

patented machine, should not have the benefit of a like presumption in his favor, arising from a like investigation of the originality of his invention, and the judgment of the proper officers, that his invention is new, and not an infringement of the patent granted to the plaintiff."

Boyd v. Tool Co., 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973; American Nicholson Pavement Co. v. City of Elizabeth, 4 Fish. Pat. Cas. 189, Fed. Cas. No. 312; Kohler v. George Worthington Co. (C. C.) 77 Fed. 844; Ney Mfg. Co. v. Superior Drill Co. (C. C.) 56 Fed. 152; St. Louis Car-Coupler Co. v. National Malleable Castings Co., 31 C. C. A. 265, 87 Fed. 885; Illinois Steel Co. v. Kilmer Mfg. Co. (C. C.) 70 Fed. 1012.

In the case last cited, the court said, comparing the complainant's with the defendant's machine:

"It was contended that these differences in construction and operation were immaterial, and that defendant's devices were equivalent to those of complainant. * * * The mill of the defendant was built under [his] patent. The grant of this later patent for a machine designed to accomplish the same result as that of the patent in suit raises a presumption that there is a substantial difference between them, and that the later is not an infringement of the earlier patent."

The charge here is that defendants have intentionally infringed; i. e. committed a tort. The burden of establishing this charge is upon the complainants, and, for the reasons above stated, that burden is materially increased by the fact in the cause that for the alleged infringing mechanism one of the defendants has had issued to him from the patent office a patent. The presumption arising therefrom in favor of defendants has not, in the opinion of the court, been overcome by complainants, nor the general burden of proof sustained by them of satisfactorily showing an infringement by defendants as charged.

It will not be necessary to resort to separate and independent discussion of the alleged infringement of claim 2. What has been said in regard to the scope of claim 1, and its lack of identity, when read in connection with the specifications, with the device of defendants' machine for accomplishing the same result, must throw claim 2 of the patent in suit entirely out of relation to defendants' machine. That is to say, claim 2 of the patent in suit refers to "means for throwing both sets of cams out of action simultaneously, during the one movement of the head devoted to the formation of the setting-up course," in combination with the device of claim 1; the additional element being merely the "special stop," which operates to throw both sets of cams out of action at the same time, instead of alternately. It is quite obvious that claim 2 is for a true combination of the element of claim 1 with this new element (the special stop). If, therefore, defendants' machine does not contain the element of claim 1, it is impossible for that element to be present as an element of the so-called combination of claim 2, and hence does not infringe that claim. It is the opinion of the court that the complainants' case is without equity, and that the bill should be dismissed, with costs.

CONSOLIDATED STORE-SERVICE CO. v. SIEGEL-COOPER CO. et al.

(Circuit Court, S. D. New York. June 25, 1900.)

1. PATENTS—INFRINGEMENT—STORE-SERVICE APPARATUS.

The Osgood patent, No. 357,851, for an improvement in cash-car apparatus, the device described consisting of a car rigidly suspended by two wheel hangers from a horizontal wire, along which it is moved by a push of the hand, discloses patentable invention, was not anticipated, and is valid, although entitled to a narrow construction. Claim 1, as so construed, is not infringed by a carrier having a single wheel, although it has underneath guides at either end to prevent oscillation, which is accomplished in the device of the patent by the second wheel; nor by a device in which the wire track is inclined so that the car runs thereon by gravity.

2. SAME—INVENTION—BUFFER FOR CASH CAR.

The Osgood patent, No. 293,192, for an improvement in cash-car apparatus, claim 2, covers an arresting stop or spring buffer adapted to receive and hold the car, which, as described in the specification, consists merely of a forked wire or spring so placed that the car enters between the ends of the arms, and is arrested and held thereby; and is an obvious mechanical expedient destitute of invention.

In Equity. Suit for infringement of patents. On final hearing.

Frederick P. Fish, for complainant.

Albert H. Walker, for defendants.

SHIPMAN, Circuit Judge. This bill in equity was brought to restrain the alleged infringement of claim 1 of letters patent No. 357,851, dated February 15, 1887, issued to Edwin P. Osgood, called hereinafter "Patent No. 1," and of claim 2 of letters patent No. 293,192, dated February 5, 1884, and issued to Byron A. Osgood and Edwin P. Osgood, and called hereinafter "Patent No. 2." Each of these patents was for an improvement in cash-car apparatus used in sales rooms. Patent No. 1 was for a single wire made taut at the ends without intermediate supports, and practically horizontal, with a car suspended beneath the wire upon two wheels running on the wire, one behind the other, by means of hangers, which form a frame for the wheels. The two wheels prevent oscillation, and, as the car is fixed to the hangers, it moves as a rigid body, and regularity of movement is preserved. The car is pushed in either direction between the sale station and the cashier's desk by a single impulse given by the hand.

Claim 1 is as follows:

"In a cash-car apparatus, a wire stretched horizontally between fixed supports at each end, and in the described relation to the cashier's desk, in combination with a freely moving car held below the wire on wheel hangers, to which it is rigidly connected, the wheels thereof being fitted to run one behind the other on the wire, whereby the car is held rigidly against oscillation longitudinally of the way; the whole moving structure being thus adapted to be impelled as a solid body from one end of the way to the other in either direction by the momentum imparted by a single impulse or push, substantially as described."

The system was a decided improvement upon previous devices. It was a single, horizontal taut wire, without intermediate standards or supports, and without machinery for the propulsion of the car, which was secured against oscillation by the double wheels rigidly secured

to the hangers, and propelled to and fro by a single push of the hand. The invention had not been anticipated, and was patentable. The Forsyth patent, No. 3,428, for a sliding door provided at its upper edge or top with rollers traversing a suspended bar or rail, has no bearing upon the art of cash-service apparatus. The Chesebrough patent, No. 99,406, for means of rapid transit across rivers by inclined cables from the tops of towers on the opposite sides of the river, and a car running down the inclined cable by gravity; the David Brown patent, No. 165,473, which describes a wire rail suspended between two standards, a car suspended from the rail, and moved backward and forward by an endless rope passing over grooved pulleys; the White patent, No. 221,488, for a double inclined way upon which cars descend by gravity; the Hayden patent, No. 241,008, which was for a modification of the White patent, just mentioned, and was also intended to be for inclined tracks upon which the cars moved by gravity, and was neither designed, adapted, nor used for a horizontal wire upon which cars were to be moved by a single push of the hand; and the White patent, No. 229,783, for means for driving the cars along the rods by propelling devices like cords or belts,—do not anticipate, because each was for a carrier moved upon a different principle from that of the Osgood invention. In regard to the patentability of patent No. 1, I concur with Judge Baker, of the district of Indiana, who said in the case of the present complainant against Herzog (C. C.) 100 Fed. 299:

"No one before Osgood had conceived the idea that a store-service apparatus consisting of a tautly-stretched wire way, with a car or carrier rigidly attached to wheel hangers having grooved wheels, placed one behind the other on the way, was capable of a successful operation by an impulse or push. This conception was novel in the art, and as an operative mechanism it was first embodied in the Osgood patent."

The apparatus used by the defendants is of two kinds,—one for a cash railway, and the other for a package railway. The wires upon which the cash carriers run are not perfectly horizontal, for the lengths vary from about 20 feet to about 200 feet, and the down grades from the cashier's station to the sales station vary from about 1 foot in 12 feet to about 1 foot in 100 feet. Whether the wires which are of greatest inclination are or are not practically horizontal, it is not necessary to consider, because the defendant's cash-carrier system is a one-wheeled apparatus. The carrier frame is extended in each direction from the wheel parallel with the track, and below it, and "has at each end an upward extension, which extensions are each provided with a notch at the upper end, which notches receive within them the wire of the track. In other words, each end of the track frame is provided with a pair of fingers, or a kind of fork, which embraces the track wire." These two guides check a tendency to oscillation. It is said that they accomplish the same result as the second wheel in regard to oscillation, and they probably do to a certain extent; but they are merely guides which hold the wire, and are not a wheel which supports the carrier, and the invention was too narrow to include a departure from supporting wheels to guiding fingers. The package carriers have two wheels, but it is stipulated that "the length of wire ways vary from about ten feet to about forty-

four feet, and each of the wire ways runs on a down grade from the packing station to the sale station, and these down grades vary from one foot in ten feet to one foot in twenty-two feet." These package carriers run from the packing station to the sale station mainly by the force of gravity. There is no infringement of claim 1 of patent No. 1.

Claim 2 of patent No. 2 was as follows:

"In combination with the wires and supporting bar or ring of a cash-car system, an arresting stop or a spring buffer adapted to receive and hold the car."

The specification says:

"In order to prevent rebounding when the car reaches the terminus of the track, we provide a spring of flat or round metal, which acts as a catch and buffer. The two arms extend above or below the track, and parallel therewith. The ends of the arms are flared outward to receive the forward part of the car, which thus opens the arms and passes between, being firmly clamped and held therein. Thus the force of the shock is broken, and rebounding prevented."

The defendant, instead of the forked buffer, has at each end of the track an enlargement of the track "composed of a coiled wire like a spiral spring, wound around the main track wire, which it loosely encircles, except at the forward end, when it is substantially in contact with the track wire." "As the car comes in, its guide projections (beneath the track wire) bear frictionally against the coiled wire surrounding the main track wire, thus tending to retard the movement of the carrier, and the frictional pressure will increase as the car progresses" until the car is brought to rest. The stop of the patent is a primitive affair, while that of the defendant is neatly and efficiently organized. It may be that the latter stop is an equivalent of the former, but I think that the forked buffer of patent No. 2 was so obvious a mechanical expedient as to be destitute of invention.

The bill is dismissed, with costs.

WESTINGHOUSE AIR-BRAKE CO. v. CHRISTENSEN ENGINEERING CO.

(Circuit Court, S. D. New York. July 9, 1900.)

PATENTS—INFRINGEMENT—AIR-BRAKE MECHANISM.

The Westinghouse patent, No. 360,070, for improvements in fluid pressure automatic brake mechanism, under the construction placed thereon by the supreme court, must be confined closely to the details of the mechanical structure disclosed therein, and is not infringed by a device so constructed that, in the application of the brake, air is admitted to the brake-cylinder from both the train-pipe and the auxiliary reservoir.

In Equity. Suit for infringement of a patent. On motion for preliminary injunction.

The patent sued upon is No. 360,070, March 29, 1887, to George Westinghouse, Jr., for improvements in fluid pressure automatic brake mechanism. The claims relied on are the first four, which read as follows: "(1) In a brake-mechanism, the combination of a main air-pipe, an auxiliary reservoir, a brake-cylinder, a triple valve, and an auxiliary-valve device, actuated by the piston of the triple valve, and independent of the main valve thereof,

for admitting air in the application of the brake directly from the main air-pipe to the brake-cylinder, substantially as set forth. (2) In a brake-mechanism, the combination of a main air-pipe, an auxiliary reservoir, a brake-cylinder, and a triple valve having a piston, whose preliminary traverse admits air from the auxiliary reservoir to the brake-cylinder, and which by a further traverse admits air directly from the main air-pipe to the brake-cylinder, substantially as set forth. (3) In a brake-mechanism, the combination of a main air-pipe, an auxiliary reservoir, a brake-cylinder, and a triple valve having a piston, whose preliminary traverse admits air from the auxiliary reservoir to the brake-cylinder, and which by a further traverse admits air directly from the main air-pipe to the brake-cylinder, and effects a second admission of air from the auxiliary reservoir to the brake-cylinder, substantially as set forth. (4) The combination, in a triple-valve device, of a case or chest, a piston fixed upon a stem and working in a chamber therein, a valve moving with the piston-stem and governing ports and passages in the case leading to connections with an auxiliary reservoir and a brake-cylinder and to the atmosphere, respectively, and an auxiliary valve actuated by the piston-stem and controlling communications between passages leading to connections with a main air-pipe and with the brake-cylinder, respectively, substantially as set forth."

Frederick H. Betts, for the motion.

William A. Jenner and Edmund Wetmore, opposed.

LACOMBE, Circuit Judge (after stating the facts). The entire subject of the automatic air brake art, down to and including the subsequent improvement of George Westinghouse, Jr. (No. 376,837), has been most fully discussed in this circuit in two litigations; the first brought upon No. 376,837 (*Westinghouse v. Air-Brake Co.* [C. C.] 59 Fed. 581; *Id.*, 11 C. C. A. 528, 63 Fed. 962), and the second upon No. 360,070 (*Westinghouse Air-Brake Co. v. New York Air-Brake Co.* [C. C.] 65 Fed. 99; *Id.*, 16 C. C. A. 371, 69 Fed. 715). It would be idle repetition to rehearse again this twicetold tale. To the judges in this circuit it seemed that in No. 360,070 the patentee disclosed to the world a highly meritorious invention; that in the fullest sense of the word he was a pioneer; that, although the mechanism of 360,070 had serious defects, which were eliminated by subsequent improvements, nevertheless it was operative, was novel, and pointed out the path of future success. It seemed clear that the great advance made by 360,070 was that the braking-mechanism, which, considered as a whole, runs from the engine to the rear of the train, was so modified that the compressed air locally vented at each car was by the operation of the engineer's valve vented at the proper time, not to the open air, but into the brake-cylinder. No one had done this before, and there was not disclosed any subsequent efficient brake-mechanism of the type in question which did not make use of this very improvement. Moreover, it did not seem to us that when an inventor so arranged the ports, passages, and moving parts of an extensive piece of mechanism so that the compressed air which operated it was guided into one part of the mechanism instead of into another, thereby securing a novel and most meritorious improvement in its efficiency, his claim was obnoxious to the objection that it was for a function. For these reasons, as will be seen from the citations, *supra*, all the decisions in this circuit held that 360,070 "achieved great necessities and overcame great hindrances"; that it gave to

the world an improvement in the art which was essential to the structure of a successful quick-action air brake, and was an indispensable part of the "bridge which carried railroad car builders from failure to success." Therefore it was held to be a patent of great breadth, and its claims were construed most liberally to cover the meritorious invention they disclosed, and the patentee was given the fullest benefit of the doctrine of equivalents. Were this construction still to prevail, there would be little difficulty in finding infringement in the device of defendant in this suit. But the obstacle in the way of granting relief to complainant is that since this patent was last discussed here the supreme court has reached an entirely opposite conclusion. *Westinghouse v. Boyden Power-Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136. The circumstance that this decision was concurred in by a bare majority of the court may doubtless be considered when it is collated with other deliverances of the same tribunal in order to deduce from them all some principle of general application, but surely, so far as No. 360,070 is concerned, it must end all discussion. That patent, at least, must now be construed by the circuit courts as one which is saved from invalidity as an attempt to patent a function solely by confining its claims closely to the details of mechanical structure which they disclose. This materially simplifies the discussion of the question here presented. The supreme court found that the Boyden structure was saved from infringement by reason of several differences existing between it and that described in No. 360,070. One of these differences is thus stated:

"In the Westinghouse patent the [auxiliary] valve is not in the line of travel between the auxiliary reservoir and the brake-cylinder, and admits train-pipe air only. In the Boyden patent it is in the line of travel, both from the auxiliary reservoir and from the train-pipe, and admits both currents of air to the brake-cylinder."

From the affidavits submitted with the moving papers and the contrasted drawings of the devices of complainant and defendant (Exhibit A), it would appear that defendant's device in this particular resembled Westinghouse, rather than Boyden. The green line representing auxiliary reservoir is represented as passing wholly through the adit 6 to valve 31, and thence directly into the adit to the brake-cylinder. But the defendant insists, and its affidavits, exhibits, and diagrams support the proposition that some considerable portion of the auxiliary reservoir air passes through the additional adit 6, and leaks through under the emergency valve 41. The result of a careful examination of the affidavits and exhibits is to lead to the conclusion that for the purposes of a motion for preliminary injunction it must be admitted that defendant's device acts by allowing no inconsiderable part of its auxiliary reservoir air—most frequently (when 31 is closed) the whole of such air—to follow a line of travel intersected by the auxiliary valve. Complainant's affidavits cannot be accepted as establishing the converse in the face of defendant's affidavits and exhibit, whatever may be developed when testimony is taken under cross-examination. Inasmuch as the train-pipe air concededly follows a line of travel in which the same valve is encounter-

ed, the result is that stated in the Boyden Case,—the valve “admits both currents of air to the brake-cylinder.” Since this change of location of the valve, slight though it be, was expressly enumerated as one of those modifications which differentiated Boyden from Westinghouse, the opinion in 170 U. S., 18 Sup. Ct., and 42 L. Ed. constrains this court to give to a like change the same effect in differentiating Christensen from Westinghouse. The motion for preliminary injunction is denied.

PELZER v. DALE CO.

(Circuit Court, S. D. New York. June 26, 1900.)

PATENTS—INVENTION—ELECTRIC LIGHT AND GAS FIXTURES.

The Stieringer reissue No. 11,544 (original No. 294,697), for a combined gas and electric light fixture, is void for lack of patentable invention, in view of the prior patent to the same inventor, which covered a device for utilizing gas fixtures for electric lights with safety, the improvement on such device embodied in the later patent, by which certain of the arms of the fixture were still used for gas, while the others carried electric lights, being one which would readily occur to a mechanical electrician.

Dyer, Edmonds & Dyer, for complainant.
Henry M. Brigham, for defendant.

SHIPMAN, Circuit Judge. This bill in equity was brought to restrain the infringement of reissued letters patent No. 11,544, dated May 26, 1896, issued to Luther Stieringer, assignor to George Maitland, in lieu of original patent No. 294,697, dated March 4, 1884, for a combined gas and electric light fixture. Another original patent had been issued to Stieringer, dated June 6, 1882, for an improvement in electrical fixtures, and had been reissued as No. 11,478, dated March 12, 1895. These two original patents were declared invalid by the circuit court for the Eastern district of Pennsylvania (Maitland v. Gibson, 63 Fed. 126), which decision was affirmed by the circuit court of appeals (11 C. C. A. 446, 63 Fed. 840). Thereupon applications for reissues of each patent were filed, reissues were granted, the earlier patent was sustained in this court (Maitland v. Archer & Pancoast Co., 72 Fed. 660), and its decision was sustained in the court of appeals for this circuit (29 C. C. A. 607, 86 Fed. 124). The object of the invention described in the reissued patent now in suit was to produce a combined gas and electric light fixture, which should in all material respects have the appearance of the usual gas fixture with radial arms, but in which a part of the projecting arms should be devoted to gas and a part should be exclusively used for electric light. The invention was safe, useful, and successful, while each device of the prior art shown in the record, which attempted to be a combined gas and electric fixture, was a failure. The Stieringer patent was not anticipated, and infringement of its claims 1, 5, and 6 is not denied. The defendant's fixtures are, in material respects, a copy of the patented fixture.

The question of importance is that of patentable invention in view of Stieringer's prior patent, reissue No. 11,478, and this question compels a restatement of what the patentee had done, as shown in the

earlier patent. The demand for that invention, the gist of it, and its utility were described in the opinion of the court of appeals (29 C. C. A. 607, 86 Fed. 124) as follows:

"Shortly before the year 1881 the means by which Edison's incandescent electric lamp could be introduced into houses and buildings which had theretofore been lighted by gas, and which were supplied with gas fixtures, began to be actively discussed by electricians and mechanics. The public was accustomed to gas fixtures. Much money had been expended in developing graceful and ornamental styles. The fixtures to be used exclusively for the new lamp were undeveloped, and those who proposed to try electricity as an illuminating agent desired to use the class of fixtures to which they were accustomed. The objection to such use was that, if the gas-pipe system was employed as a support for the two electrical wires, the gas-pipe outlet, which connected with the ground, would be a source of constant danger to the safety of the electrical appliances and of the house itself. Underwriters against fire became alarmed, and finally demanded that, where incandescent lights were attached to a gas fixture, or a metallic fixture having a ground connection, the wires should be separated 2½ inches from each other, or should be separated from the metal of the fixtures by some solid insulation. * * * The gist of the invention consisted in making use of metallic gas fixtures by introducing insulated conducting wires concealed within the fixtures, and capable of carrying the electric current to and from the electric lamps; in supporting the fixtures by the gas outlets or gas pipes; and in placing a joint having metallic couplings and an intermediate section of insulating material between the upper end of each fixture and the end of the gas pipe, so as to secure complete insulation of the fixture from the grounded piping of the house. The utility of the invention is acknowledged by the universality of its use without special modification. The gas metallic terminals furnish a strong and convenient support, the insulation avoids the danger which would otherwise result from the use of grounded metallic piping, and the concealed wires are neither unsightly nor liable to abrasion."

What Stieringer did was to make a safe and successful electric light fixture from a gas fixture with radial arms, and unaltered in its external appearance. What he successfully undertook in the new invention was to alter this new fixture so that a part of the arms could be used for gas and a part for electric light; and the way in which he accomplished the desired result was, speaking generally, by preventing the flow of gas into those radial arms which were to be used for electric light, by making openings into those arms for the wires which carry the current to the electric lamp arms, and introducing the two main wires into the space between the ordinary iron gas pendant and the ornamental shell which surrounds it. In the complainant's brief a more particular description is given, which is condensed as follows: In the ordinary gas fixture this central iron pendant is screwed at its bottom into a cast-iron distributing body, from which the gas arms project radially. The distributing body is a small cast-iron box, having a hole in its top for receiving the central gas pipe, and holes in the sides for receiving the arms. The central gas pipe, the distributing body, and the arms are the skeleton of the fixture. This skeleton is surrounded by an ornamental shell. The radial gas arms are usually not so surrounded, being generally made of polished brass. Taking this structure, Stieringer closed the gas passage between the gas distributing body and part of the radial arms, and made openings into these radial arms outside of the distributing body, but within the space formed by the ornamental shell. The electric lamps are mounted upon these radial

arms, which are cut off from the gas passageway, while the gas burners are carried by the radial arms which remain open to that passageway. For supplying current to the electric lamps, two main wires are introduced into the space between the ornamental shell and the central gas pipe. They enter that space below the upper end of the central gas pipe, but above an adjustable canopy. Openings are made in the top of the ornamental piping to permit the passing of the wires into this space. These main wires pass down alongside of the central gas pipe, but inside of the ornamental piping, and enter the space between the gas distributing body and the ornamental shell. The electric lamp arms are provided each with two wires, which pass from the electric lamp socket through that arm into the space around the distributing body, where the two arm wires are connected with the two main wires.

It will thus be seen that, having utilized the old gas fixture so as to make it safe for electric light purposes, the patentee, in his second invention, permitted a part of the arms to be used for gas purposes, and sent the electric current through main wires placed in the space between the central pendant and the external shell. This use of that space was not novel, but had been customary in devices for electrically lighting gas fixtures. If one places himself at the point of time prior to the earlier invention, there is, as it seems to me, little difficulty in seeing inventive genius in the entire result of a combined gas and electric light fixture; but when the practical difficulties in the way of safety had been surmounted, and an electric light fixture had been obtained from a gas fixture, I see no inventive genius in permitting the new electric fixture to accomplish in part its original object,—that of furnishing light by gas. The accomplishment of the result would have been difficult for a mechanic of another class, but to the mechanical electrician the important feature of the invention, which was to place the main wires in the vacant space between the pendant and the shell, and connect them with the wires in the electrical radial arms, was a simple matter. I therefore think that Stieringer's improvement upon his first invention, although novel, useful, and still utilized by persons who desire to have in their houses means for the immediate use of either illuminant, has not the element of patentable invention. The bill is dismissed, with costs.

INDIANA NOVELTY MFG. CO. v. CROCKER CHAIR CO.

(Circuit Court of Appeals, Seventh Circuit. June 18, 1900.)

No. 630.

PATENTS—PATENTABLE NOVELTY—BICYCLE WHEELS.

The Marble patent, No. 547,732, for a wooden-rim bicycle wheel, which differs from similar wheels previously made only in making a tongued and grooved joint between the ends of the wooden rim, where they meet, is void for want of patentable novelty, and anticipation in the prior art of joinery.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

The decree of the Circuit Court for the Eastern District of Wisconsin appealed from is one dismissing for want of equity a bill to enjoin the appellee from infringing Letters Patent No. 547,732, dated October 8, 1896, issued to George W. Marble for a wooden-rim bicycle wheel; and Letters Patent No. 506,430, dated October 10, 1893, issued to Charles F. Harrington for a wheel. 90 Fed. 488.

The Circuit Court found that both patents had been anticipated in the prior art, and were, therefore, invalid. On the hearing of the case in this court counsel for the appellant announced that in the prosecution of the appeal they placed no reliance upon the validity of the Harrington patent; and thereupon the appeal was argued solely upon the alleged error of the Circuit Court in holding the Marble patent to be invalid.

The effective portion of Letters Patent No. 547,732, (the Marble patent), is as follows:

"My invention relates to improvements in bicycle wheels, and to that particular class of bicycle wheels having wooden rims. Heretofore wooden rims for bicycle wheels have usually been made from a continuous or single strip of wood curved into the proper circular form and having its meeting ends skived off at an angle and overlapped, forming an ordinary lap-joint, secured together by glue and sometimes by wrapping with thread or fabric, or else the wooden rims have been built up of a number of thin strips glued upon one another. Owing to the necessary curved cross-section of the rim to form the annular channel to receive the tire serious objections have been found in practice to the composite or built-up rim composed of a series of thin strips, and as the bicycle wheel is of the tension-spoke character, so that its strength and stiffness depend upon the rigidity of the continuous or circular arch formed by the rim of the wheel, it is obvious that where the wooden rim is made of a single solid strip of wood with its meeting ends skived off and lapped together the whole strain or tension of the wheel must necessarily come upon this lap-joint and tend to loosen the same and destroy the wheel or cause the two skived and lapped parts to slip toward each other.

"The object of my invention is to provide a wooden rim bicycle wheel wherein the rim may be made of a single solid strip of wood, and which will be of a strong and efficient as well as simple and cheap construction, and wherein the joint at the meeting ends of the solid strip will not tend to weaken or diminish the natural strength of the circular arch, and wherein, also, the tension and strain of the wheel upon the arch will not tend to loosen or weaken the joint forward between the two or more meeting ends of the strip.

"To this end my invention consists in a bicycle wheel having a wooden rim composed of one or more solid strips of wood, and preferably a single solid strip, and having its or their meeting ends joined together by a series of interlocking tongues and grooves extending longitudinally of the strip or strips. The meeting ends of the strip thus abut squarely together end to end, so that the arch of the rim is in fact as strong at the joint as elsewhere, and the strain or tension of the wheel upon the arch also of course simply tends to compress the meeting and abutting ends more firmly together, so that the strain or tension has no tendency whatever to weaken or loosen the joint. The interlocking or interfitting tongues and grooves are preferably formed with parallel sides, though this of course is not an absolute essential. The abutting ends of the interlocking tongues and grooves are also preferably square, but this likewise is not necessary. The interlocking tongues and grooves are likewise preferably formed of the same length, although the construction may be varied in this regard, if desired. The joint as a whole or the series of interlocking tongues and grooves are also preferably arranged to extend in a band transversely or at right angles across the rim—as, for example, diagonally. It will thus be seen that the tongued and grooved meeting ends of the rim abut one against the other, so that the full natural strength of the circular arch is preserved at the joint and so that the strain or tension of the wheel upon the circular arch has no tendency to weaken or loosen the joint.

By means of these interlocking tongues and grooves extending longitudinally or in the direction of the rim at the meeting ends of the strip I have discovered that an exceedingly firm, strong, and durable wooden rim may be formed, having no tendency to work loose or become weakened at the joints when under strain or in use, and wherein, also, the joint formed in the rim is perfectly water tight, so that no moisture can work in or through the rim at the joint, and wherein the form of the joint in no way tends to weaken or diminish the natural strength of the arch, and wherein, too, the compressing strain or tension upon the arch has no tendency to weaken or loosen the joint.

"In the accompanying drawings, which form a part of this specification, and in which similar letters of reference indicate like parts throughout all the views, Figure 1 is a side elevation of a bicycle wheel embodying my invention. Fig. 2 is an enlarged cross-section taken on line 2 2 of Fig. 1, and Fig. 3 is an enlarged detail view showing in plan the joint formed at the meeting ends of the wooden rim.

"In the drawings, A represents the hub of a bicycle wheel; B, its tension-spokes; C, its elastic tire, and D its wooden rim. The rim D is preferably made of a single solid continuous strip of wood curved into proper circular shape and furnished with the annular channel or groove D', constituting the seat for the pneumatic or other elastic tire C. This wooden rim is furnished at its meeting ends with a series of interfitting or interlocking tongues and grooves d d', extending longitudinally or in the direction of the rim. The opposite sides d² d² of each of the tongues d and of the grooves d' are preferably parallel to each other and to the plane of the wheel, though the construction may be varied in this regard. The ends d³ of each of the tongues d and of the grooves d' are preferably square or at right angles to the direction of the rim, as they thus have a better abutment the one against the other, and produce no tendency to spread apart or split the rim, though the construction may be varied in this regard. The series of interlocking tongues and grooves d d' d' d' are arranged, preferably, to extend transversely or at right angles across the rim, although the construction may be varied in this regard. The preferable construction is also to make all the tongues and their corresponding grooves of the same length, although the construction in this respect may likewise be varied. The interfitting tongues and grooves d d', when properly interlocked or fitted together under pressure, are secured together by glue or other suitable cement, thus forming a firm, strong, and water-tight joint.

"Another advantage secured by my improved form of wooden rim and construction of joint is that the joint may be so short as to avoid the necessity of making any of the spoke-holes or other holes through it. Heretofore the length of the joint has been necessarily such that one or more spoke-holes must be formed through it, and, as is well known to those skilled in the art, wherever there is a hole made through the joint the tendency is for moisture to work in and in time loosen or injure the glued or cemented joint.

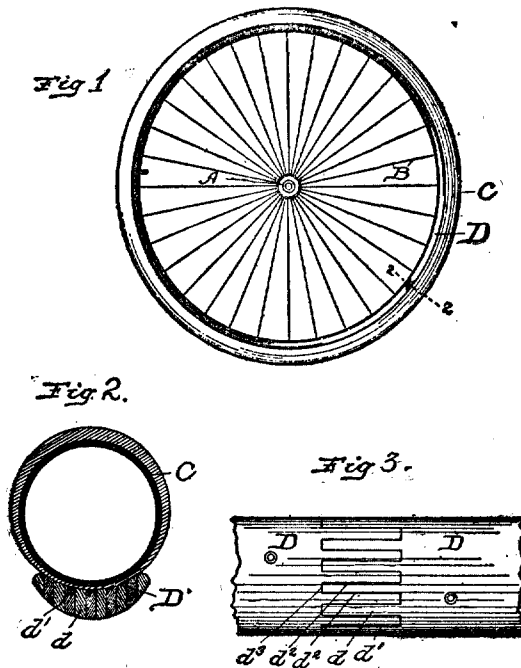
"I claim—

"1. In a bicycle wheel, the combination with a pneumatic or elastic tire and suspension spokes, of a wood rim consisting of a solid strip of wood bent to circular form, channeled on its outer periphery to receive said tire, and having its meeting ends each provided with a series or multiplicity of long narrow interfitting tongues and grooves, glued together, extending longitudinally of the rim and in the plane of the wheel, the ends of the tongues on one end of the rim strip fitting or abutting against the end or bottom of the corresponding grooves on the other end of the rim strip, whereby said rim is furnished with means for performing the triple functions of resisting collapse or compression due to the tension of said suspension-spokes, of acting tensilely to bind or hold the parts of the wheel together, and of resisting breakage, flexure or displacement, as required in its combination with said pneumatic tire and suspension-spokes, substantially as specified.

"2. In a bicycle wheel, the combination with an elastic tire and suspension spokes of a wood rim serving to resist collapse or compression, tensile strains, and also breaking or flexure strains, and consisting of a solid strip of wood, channeled on its outer periphery to receive said tire, and having its meeting ends furnished with a series or multiplicity of interfitting tongues glued together, the glued side surfaces of said interfitting tongues affording an extended

glue surface lying substantially in the plane of the wheel and longitudinally of the rim so as to resist tensile and breakage or flexure strains, substantially as specified."

The drawings accompanying the patent are as follows:



The pertinent portion of Letters Patent No. 238,491, issued to G. E. Davis, March 8, 1881, to which reference is made in the opinion following, is as follows:

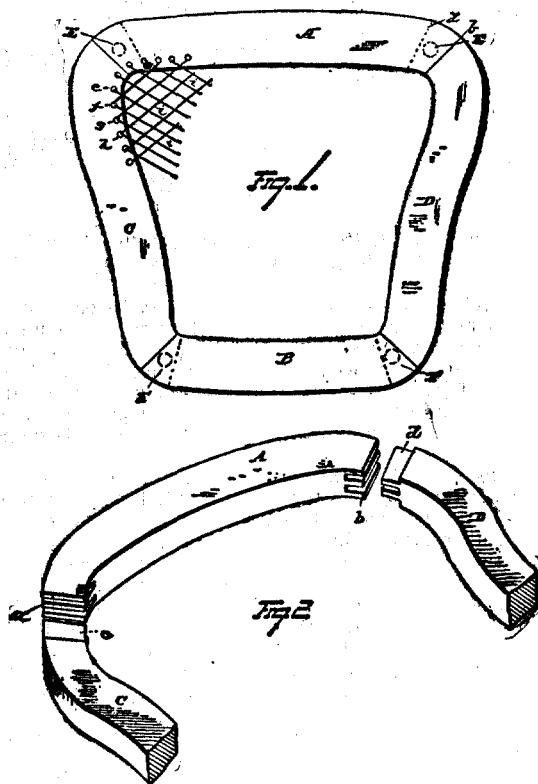
"My invention relates to an improvement in chair-seat frames, the object being to provide a novel means whereby the four pieces of an ordinary chair-seat frame may be inflexibly secured together in such a manner that it will not, when so constructed, be weakened by the insertion of the chair legs or posts at the point of juncture, that it may withstand the straining tendency of the flexible caning, and that it may be capable of passing uninjured through the various wrenches and strains to which all chairs of this character are subjected.

"Third, the joint formed in this old construction is a square joint, and a joint of this kind is the very one the least adapted for its purpose here, as it is directly open to the majority of strains and wrenches to which a chair is the most subject, all of which have a direct tendency to loosen the front and back pieces of a chair-seat frame, but particularly the front pieces, both of which front and back pieces are secured to the side pieces by a square joint. The inner edges of the frame pieces are perforated with small holes, through which the cane-strands are passed, and as a matter of course the greatest strain will come on the front piece, and, although the leverage is slight, the strain on the several strands, taken collectively, will exert a very strong and marked force, tending to raise the outer edge of the upper face of the front frame-piece and depress the inner edge of the same. This strain will, in itself alone, in a short time weaken the square-joint connection and loosen the dowel-pins. Another frequent cause of breakage and defect in chairs constructed with square joints is the vertically-tilting strain caused

by tipping back in them, at the same time resting the feet on the front rounds. The chair-legs, thus unsupported and pressed inwardly, will naturally tend to pull the dowel pins from their sockets, and results very often in splitting the front piece of the chair-seat frame.

"A and B represent the front and back pieces of a chair-seat frame, and C and D the side pieces thereof. The front piece, A, is mortised at both ends, a b representing the mortises. Into those mortises fit, in snug connection, the tenons, c d, formed on the front ends of the side pieces, C D. It is preferred to cut the mortises a b rather deep and the tenons c d correspondingly long, so that the two pieces may become very closely incorporated with each other, and also to prevent a greater side surface to the glue. When these mortised and tenoned ends are driven together they will form a miter-joint; and both pieces being cut diagonally to the grain of the wood forming them, the glue will adhere with equal tenacity to both surfaces presented and form an exceedingly strong joint, where, in the old construction, as it would only adhere to one of the two adjoining frame pieces, its presence added but little to the usefulness and strength of the chair. But this arrangement of long tenons and deep mortises, presenting a large surface to the adhering action of glue, and the manner of cutting the frame pieces diagonally to the grain of the wood and forming a miter-joint, the two pieces joined become so incorporated with each other that a hole for the reception of the chair-leg may be bored, as at E and F, directly at the point of juncture without impairing the value and strength of the connection and without any danger of cracking either of the pieces. Small holes e f g h are made in the inner edges of the frame-pieces for the insertion of the cane-strands i l."

The drawings accompanying the Davis patent are as follows:



Archery Bows, to which reference is made in the opinion, were described by Claude Thompson as follows:

"Q. 5. How were those bows which were made of two pieces constructed?

"A. They were made of two staves of the wood, the upper staff of which was a trifle longer than the lower. These two staves were joined in the center of the bow or place of hand-grip by a finger joint or saw joint, and across the back of the bow, or rather a piece lengthwise of the bow the length of the joint in the center was glued on. Around that was wrapped a wrapping of hempen fibres forming the base of the handle. Around that was glued a piece of plush cloth making the handle cover.

"Q. 6. What was the approximate length and size of these bows?

"A. The approximate length was six feet. At the center they were probably two inches in diameter tapering both ways gradually to probably a quarter of an inch in diameter.

"Q. 7. And for what were they used?

"A. They were used for weapons of sport at archery practice at targets or as implements of the chase.

"Q. 8. How many jointed bows, of the description which you have just given, have you examined so as to know their construction in detail?

"A. Probably half a dozen.

"Q. 9. State whether or not the bows which you examined and learned to be constructed as you have described were used?

"A. They were all of them.

"Q. 10. Where were they used?

"A. They were used in the United States in different parts of the country, principally at Crawfordsville, Ind.

"Q. 11. And by whom were they used, as far as your recollection serves you?

"A. The ones that I have examined particularly were used by Maurice Thompson and Will H. Thompson, though I may have seen some and examined them used by others whom I do not now recollect.

"Q. 12. Maurice Thompson is your father?

"A. He is.

"Q. 13. And William H. Thompson, of whom you speak, is your father's brother?

"A. He is.

"Q. 14. At what time or period did you see the kind of bows, which you have described as possessing a central figured joint, used?

"A. The period covering from 1872 or 1873 to 1884. That is, they were in actual use during those times. Bows having the same construction are now in my father's possession and have been used within the year."

The further facts necessary to the decision of this case are stated in the opinion of the court.

John W. Munday, for appellant.

H. G. Underwood and E. H. Bottum, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

GROSSCUP, Circuit Judge, after the foregoing statement of facts, delivered the opinion of the court, as follows:

While mere results are not ordinarily patentable, many constructions, and many processes—simple and obvious enough when looked at after the occurrence—have been held to be patentable inventions, not so much because the patentee exerted inventive thought in his immediate work of construction, as because the step taken lay toward the creation of some new aid to the convenience of mankind—some distinct addition to the equipment of civilized life. Such, for illustration, was Glidden's barbed wire fence, and the Goodyear hard rubber, or Vulcanite. The merit, attributed to this class of invention, lies in the end reached, rather than in the means employed. In determining the validity of patents of this character the courts have been liberal in their inclination to overlook the obviousness of the

means devised, in their purpose to reward, if possible, the mind that has added something new to the sum of valuable things.

The patent under consideration does not fall within this class. Marble has not introduced into the world a new article, or a new means of making an old article. He did not conceive the wooden bicycle rim, or the desirability of its having a strong, close joint. The rim was already in existence, and the necessity for such a joint was already obvious; and, in the allied arts, the precise joint, in all features of mechanical construction, was already at hand.

The cardinal purpose of joints, in whatever use employed, has always been to resist strain. The principal strains upon the wooden bicycle rim may be stated as follows: The vertical strain arising from the load upon the wheel; strains not necessarily vertical, but in the plane of the wheel, caused by hard, abrupt contact with objects in its path; torsional strains due to the sudden turning of the wheel to maintain equilibrium; and torsional strains, frequently wrenching in character, caused by the wheel falling into uneven places, such as holes or ruts. It is, of course, impossible to preconceive every character of strain to which the rim is exposed; they run in form, both simple and compound, from the straight, steady, vertical strain upon an upright wheel, to the sharp, sudden, transverse strains of a falling wheel, or a wheel caught in a rut. They comprehend, in variety, perhaps, and in intensity, a larger number than any joint in the prior art was expected to resist; and in that respect alone the problem presented difficulty.

This difficulty was sought to be overcome—as many such are—not by the invention of something new, but by experimentation in the adaptability of joints already well known. The selection of the joint described in the patent under consideration was the result of tests made of the joints of the prior art. Marble searched the old art for the joint best fitted to meet the required conditions. The lap-joint was discarded because its ends, being nonabutting, were liable, under tension or sudden strain, especially when moistened from mud holes or wet grass, to loosen and slip toward each other. It was found that the coherence of the glued surfaces of lap-joints, unaided by the shouldering of end against end, was inadequate to the strains imposed. The joint described in the patent was chosen, chiefly because the ends of the fingers abutting squarely against the ends of the corresponding groove brought to the joint the compactness and strength of shouldering; because the longitudinal fingers inserted into these grooves knit the joint more closely together against torsional strain; and because, perhaps, the glued surfaces, being in the plane of the wheel, exerted against vertical strain a greater coherency than if they had been transverse to the plane of the wheel. But the last consideration is not mentioned in the patent, and would be as inefficient against torsional strains, except for the reinforcement of the timber strength of the fingers, as were the Harrington glued surfaces against vertical strains. The joint, as a whole, as the patent shows, and the nature of the problem required, was chosen, not for any one reason, but for many reasons, among them those already pointed out.

It has already been said that the joint chosen for this new use

was itself old. Indisputably, in its precise mechanical construction, it has been in constant use in the allied arts. Some illustrations have been called to our attention. We have incorporated into the statement of facts but two—the Davis Chair and the Archery Bow—not because they stand alone in the art of joinery, but because they are examples of many uses of the same general character. The strains imposed upon the joint of the Davis Chair are, of course, different in degree, and in variety, from those upon the rim of a bicycle wheel; but it is apparent that some of them tax the capacity of the glued surfaces to hold together; and that the coherency of these glued surfaces is enhanced by the fact that the strain applied is in the direction of the plane of the joint. It makes no difference that, ordinarily, the strain of the Davis joint falls upon the shouldering of the inner ends of the interlocking fingers against the ends of the corresponding grooves. The fact remains that, in the use of the chair, there are strains that tax the coherency of the glued surfaces. The purpose of the chair joint is to meet these strains, though occasional only, as well as those of a more common character.

The strain upon an archery bow is in the direct plane of the surface of the joint. It differs from like strains upon the rim of a bicycle wheel only in the fact that in the bow the strain is a more constant one,—not the result of a sharp, abrupt stroke,—and that the strength of the joint is re-enforced by its wrappings. But here, as in the bicycle rim, the strain is borne by the capacity of the glued surfaces to hold together.

But counsel for appellant insist that the transference of this old joint into the uses of the bicycle rim is patentable invention, not because the joint is in any part new; nor because, in its later use, it performs a function different from that of its prior uses; but solely because, to use the language of the brief:

“Marble was the first to discover the highly important and valuable fact that a glued joint between two pieces of wood is many times stronger against breaking strains applied in the plane of the joint than it is against breaking strains applied at right angles to the plane of the joint.”

We are not convinced that Marble was the first to understand this fact in the art of joinery. It is one, indeed, that seems obvious to any mind giving it a little thought. It was, it is true, not phrased in so many words by the inventor of the Davis patent, or the designer of the archery bow, or the hundred others who have put together for similar purposes similar joints; nor were all the other principles of physics entering into the strength of such joints specially pointed out. Upon what reasoning may we say that the designers of these prior joints, because they omitted its mention, must have been in ignorance of so obvious a principle? Would not such reasoning attribute to men, who have worked and thought in the art of joinery for centuries, an obliviousness that is almost incomprehensible?

But if omission of specific mention of this so-called principle of physics is proof that the thought was not present with the prior joiners, upon what reasoning shall we accredit its presence to Marble, who, through more than the two hundred lines of his patent, makes no mention of it, either as a discovery, or as a fact. Pains are taken by him to point out that the joint for which he asks a patent is strong

and efficient; is simple and cheap of construction; that the meeting ends of the strips shoulder, end to end, so that the arch of the rim is in fact as strong at the joint as elsewhere; that the tongued and grooved meeting ends of the rim, extending longitudinally and abutting one against the other, make a strong, firm, and durable rim; and that the joint thus formed is perfectly water tight. These are all advantages that Marble thought it worth while to specially mention, and some of them, such as the square shouldering of the fingers, end to end, were reiterated; but nowhere is there an allusion to a discovery that a glued joint between two pieces of wood is many times stronger against breaking strains applied in the plane of the joint than it is against breaking strains applied at right angles to the plane of the joint. If failure to mention this principle of physics by the prior joiners is proof that they were in ignorance of its existence, we can see no reason why a like omission in the Letters Patent under consideration should not be regarded as proof of a like ignorance upon the part of the patentee. The logic applied by counsel to the silence of the prior art results, when applied to the Marble patent, in the complete undoing of the claimed discovery. We are, on the whole, content to hold that there is no sufficient evidence, either in the patent, or in the record before us, upon which to predicate a finding that this so-called principle of physics relating to the strength of glued surfaces is an original discovery of Marble.

Laying aside this claim, then, as untenable, the question recurs, Does the transference of this joint from the older uses into this later use embody patentable invention? In both the earlier uses and the later the joint performs the same function; in both it is intended to resist strains of many kinds, from many directions, and of many degrees of intensity; in both the resistance is accomplished, partly by the ends of the fingers, and their corresponding recesses shouldering squarely together; partly by the strength that a close knitting of the timber accomplishes; and partly by the glueing of the surfaces in the plane of the joint. The joint, as a whole, is the old joint, put, perhaps, in its later use, to the test of severe strains; but bringing to these tests no element of resistance not utilized in the older uses. Such a joint is, in no sense, and to no degree, a new mechanical means unless it can be said also that a beam made to resist one hundred pounds of pressure is different from a beam made to resist one thousand, in cases where both, except in dimension, are mechanically the same.

The decree of the Circuit Court must be affirmed.

THE PROGRESO.

(District Court, D. Washington, N. D. July 3, 1900.)

SHIPPING—BREACH OF CHARTER—DEFAULT OF CHARTERER.

A steamship company organized for the purpose of doing a transportation business between Seattle and Alaskan points chartered a steamship for two trips between Seattle and St. Michaels. She was loaded with passengers, a large number of whom were sold tickets through to Dawson, and a cargo, much of which was contracted to be delivered at the same place. The company sent an agent on the vessel, but, as its officers knew,

he was without sufficient funds to carry out its contracts from St. Michaels, and the company was insolvent and without credit. On reaching St. Michaels the military authorities refused to allow the landing of the passengers until arrangements were made to forward them to their destination. In this emergency the captain took charge of affairs, compelled the company's agent, by threats of criminal prosecution, to turn over all claims for freight, took possession of the company's supplies, and certain coal and merchandise which had been purchased by the company, but not paid for, and shipped on the vessel, and paid for the same to the vendors. By the funds and supplies so secured, and the money received from passengers for the return trip, and by pledging his vessel for the deficiency, he secured passage for his passengers to their destination, and was enabled, after a considerable delay, to discharge his vessel. *Held*, that as the vessel was bound, not only to carry her passengers and cargo, but to discharge them at the end of the voyage, the failure of the charterer to provide for the same was a breach of the charter, which justified the captain in the action taken by him, and gave the charterer no cause of action against the owners, beyond requiring an accounting, and that the owners were entitled to recover the excess of the cost of fulfilling the charterer's transportation contracts over the amounts realized by the captain; such expense being necessary to enable the vessel to discharge, and to fulfill her own obligations.

2. SAME—CONTRACTS WITH PASSENGERS.

The tickets sold passengers from Seattle to Dawson contained a provision by which the purchaser waived the right to hold the vessel or charterer responsible for any damage sustained by their failure to forward him to his destination, unless resulting from the actual negligence or incompetency of the carrier, and providing that if he could not, for any reason, be safely landed at the port of destination, he might be landed at the next port at which such landing could be safely made. *Held*, that such provision contemplated only a case of necessity arising otherwise than by default of the carrier, and could not be invoked by the charterer as requiring the captain of the vessel to land his passengers at some other port than St. Michaels, where there were no military authorities to interfere, and where they would be left unprovided for, in violation of their contracts.

This is a suit in rem against the steamship Progreso to recover damages for breach of a contract by which her owners chartered said steamship to the Seattle & Yukon Steamship Company for two voyages between Seattle and St. Michaels, with an option for two other voyages between the same ports. The master and owner defend on the ground that the charter party was broken by the charterer, and have also filed a cross libel, claiming damages alleged to have been caused by the failure of the charterer to perform said contract on its part. Hearing on the merits. Decree for cross libellant.

Donworth & Howe, for libellant.

Ballinger, Ronald & Battle, for interveners.

Metcalfe & Jurey, for claimant and cross libellant.

HANFORD, District Judge. The libellant, in his capacity as receiver of the Seattle & Yukon Steamship Company, an insolvent corporation, commenced this suit to recover damages for losses to said corporation alleged to have been caused by the breach of a contract by which the steamship Progreso was chartered for the purpose of carrying passengers and freight between Seattle and St. Michaels during the season of 1898. The firm of D. R. Campbell & Sons have come into the case as interveners, on the ground that, by virtue of an assignment of the charter party made to them as security for

money loaned to the Seattle & Yukon Steamship Company, they are entitled to any damages which may be recoverable. It is admitted that the charterer paid to the owners of the steamship the full amount of money stipulated to be paid for the first voyage, and that the steamer was dispatched to St. Michaels with passengers and freight taken on board at Seattle, Vancouver, and Victoria. The owners defend on the ground that the Seattle & Yukon Steamship Company made contracts with passengers and shippers for through transportation from Seattle, Vancouver, and Victoria, via St. Michaels, to Dawson City and other points on the Yukon river, and failed to make adequate arrangements for carrying the passengers and freight beyond St. Michaels, and when the Progreso arrived at St. Michaels the landing of her passengers and freight was not permitted until arrangements were made for carrying them up the river, so that the ship was detained an unreasonable time at St. Michaels, and her master was compelled to incur very heavy expenses. The court has had a wearisome task, in having to digest over 2,000 typewritten pages of testimony and a quantity of documents submitted as evidence, presenting a vast amount of details, with most tedious repetitions and reiterations; but, after all, the case must be determined upon a few important and salient facts, which are as follows: The Seattle & Yukon Steamship Company attempted to do a large and lucrative business without capital other than its pretentious name, the energy of its promoters, and \$70,000 borrowed from a manufacturing firm in the state of Maine. The Progreso was chartered to run from Seattle to St. Michaels, and a contract was made with a shipbuilding firm in Seattle to sell to the company three river steamboats which were being built at Seattle, and were to be delivered at St. Michaels. These boats were partly paid for, and the balance of the purchase price, \$68,000, was to be paid on delivery. With these facilities and preparations, the company commenced advertising and soliciting business, and passenger tickets were sold, without any regard to fixed rates, to about 240 fortune seekers, 157 of whom paid for through transportation, via St. Michaels, to Dawson City, and other points along the Yukon river; and about 1,000 tons of freight was received, more than half of which was for delivery at Dawson City. The money borrowed from the interveners and collected from passengers was mostly expended in making partial payments for the river boats, in fitting, equipping, and supplying the Progreso for her first trip, and for the general expenses of the company. When the steamer was dispatched, she had on board 250 tons of coal, which the company had bought as a cash purchase, but for which no payment was made, and several other lots of merchandise of which the company obtained possession without making payment. A comparatively small amount of freight was to be collected at St. Michaels, part of it was payable at Victoria or Vancouver upon the return of certificates showing delivery of the goods at Dawson City, and a considerable part of it was payable only from proceeds of the cargo after it had been sold. Mr. Grayson, as an agent of the company, was sent on the Progreso, with about \$5,000 in money, and drafts to the amount of \$35,000 drawn upon the auditor of the insolvent company, who had been previously sent to

the Yukon river with a quantity of merchandise for sale, the value of which I have not been able to ascertain from the evidence. This agent and the officers of the company knew at the time of his departure that with the means at his command he could not make payment for the river boats, and they had no expectation of securing them. It was necessary to persuade the builders to deliver one or more of the boats unpaid for, or else raise sufficient money by collections of freight and by the sale of tickets for return passage from St. Michaels to Seattle to cover the expenses of landing the passengers and cargo, and forwarding the same up the river, or else the company must necessarily fail to perform its contracts for transportation of passengers and freight to points beyond St. Michaels. The passengers could not be landed and abandoned at that inhospitable place, because the United States military officers there would not permit vessels to discharge passengers for whom no provisions had been made for habitations or for transportation to their places of destination. The managing officers of the company had no right to expect that Mr. Grayson would be able to make any terms at St. Michaels with the boat builders to get possession of all or either of the river boats contracted for, because the general manager of the company had been distinctly warned by the shipbuilding company that payment as stipulated in the contract, at the time of delivery of the boats, would be exacted. See *Campbell v. Moran Bros. Co.*, 38 C. C. A. 293, 97 Fed. 477. The evidence convinces me that failure to perform the company's contracts with its passengers and shippers was the only possible outcome of the venture. The general manager of the company knew before the ship left Victoria that the company had failed to make adequate provisions for fulfilling its passenger and freight contracts, and that it was unable to do so. Soon after leaving Victoria the passengers became suspicious, and during the run northward there was continual discussion among them, and threatening demonstrations were made towards Mr. Grayson, who realized that, as the representative of the defaulting company, he was the object of their wrath, and that he would probably be lynched at St. Michaels unless he could in some way elude these victims of misplaced confidence. As was natural under the circumstances, he hastened to get ashore on arrival at St. Michaels, and immediately arranged to return to Seattle on the first vessel to depart. Capt. Gilboy, commander of the *Progreso*, was prompt and resolute in grasping the situation. Before arrival at St. Michaels he informed Grayson that the company's charter would be terminated as soon as the *Progreso* anchored at St. Michaels, and on the day of her arrival he caused the arrest of Grayson, and, by threatening him with a criminal prosecution, compelled him to execute an assignment of all the supplies and property belonging to the company which was then in the *Progreso*, and the freight bills. After securing all that Grayson had to turn over, except the cash, the captain made his own arrangements for getting the passengers and cargo landed and forwarded up the Yukon river. He was obliged to deal with a clear case of necessity. The passengers had to be carried up the river, for the reason that there was no other way to get them out of the ship and free her so she could return;

and the captain was the only person at the place authorized to hypothecate the ship, which was the principal available resource. He had to secure a river boat, and purchase fuel and provisions necessary for the trip, and for boarding the passengers and crew during the time of their necessary detention. He purchased the three river boats, which had been contracted to the company, for the price of \$68,000. One was immediately resold for \$30,000 cash; another was resold for \$30,000, to be paid for on her arrival at Dawson; leaving \$8,000 to be raised, somehow, to pay for the third boat, which was used to carry these passengers up the river. He also bought the 250 tons of coal which was delivered on board the Progreso at Seattle without being paid for. Some money was raised by selling tickets for passage on the Progreso on her return trip to Seattle, and some of the owners of freight, who had made contracts for transportation at a very low rate, were induced to give some aid by paying a reasonable price for getting their freight up the river. After making the best arrangements possible with all the people concerned, the captain was obliged to, and did, hypothecate the Progreso for the amount of the purchase price of these river boats, after deducting the cash payment of \$30,000. The charter party is vague and uncertain in some of its terms, and in consequence of its ambiguity there is a serious dispute between the parties as to whether the ship was chartered for a round trip from Seattle to St. Michaels and return, so that the charterer became entitled to the earnings of the vessel on the return part of the voyage, or only to the passage money and freight for the trip going north. On this point I hold that the charterer paid a liberal price for the round trip, and, according to the reason and justice of the case, the charter party must be construed, according to the intent of the parties, as a contract for a round trip. In the argument, stress is laid upon one clause of the charter party, specifying that at the expiration of the lay days at St. Michaels, stipulated for, the ship was to be delivered to her owners for return to Seattle. This, however, is unimportant, because it is absolutely meaningless. None of the parties contemplated that there was to be any change of possession of the vessel at St. Michaels, and redelivery there was impossible, for the reason that the owners did not go to St. Michaels to receive her. There could be no delivery to the captain, as agent of the owners, for the reason that the captain and crew were the employes of the owners throughout the entire voyage, and from the beginning the vessel was in the possession of her owners as completely as she could be, by reason of being under command of her captain.

The foregoing recital contains my findings and decision in this case as to the facts, and I have decided the disputed question as to the construction of the contract in favor of the libellant,—that is to say, I hold that the charter party entitled the charterer, upon the terms and conditions stated therein, to the use of the vessel for a round trip from Seattle to St. Michaels and return; and the important question next to be considered is, did the charterer sustain any injury, for which damages may be awarded, by a breach of the contract? In order to reach a correct determination of this question, it is necessary to keep in mind the important consideration that

by loading and dispatching the Progreso the charterer, in effect, pledged her to the fulfillment of each contract made with passengers and shippers,—at least, for their safe transportation to St. Michaels; and this contract was not fulfilled, so as to clear the ship of liens in favor of passengers and shippers, by carrying them to the place of anchorage near St. Michaels. The master of the ship could not then place a gang plank over the rail, and require the passengers to walk to the end of it and drop into the sea, after the manner of pirates in dealing with captives; nor could he bring them back to Seattle, or land them at Dutch Harbor, as counsel have contended he might have done, without subjecting the vessel to liability for heavy damages. There is therefore in the charter party an implied agreement that the charterer would act in good faith, and make adequate provisions for landing the passengers and discharging cargo on the arrival of the ship at St. Michaels; and it is my opinion that a failure on the part of the charterer to make such provisions constitutes a breach of contract, and that the contract was broken by the charterer, in sending the ship on her voyage, laden as she was, without having made provisions or having the ability to unlade at St. Michaels. Counsel for the libelants and interveners have labored hard in attempting to show that the passenger contracts contained in the tickets which were sold do not entitle the passengers to be landed at St. Michaels, although they paid for a through passage from Seattle, via St. Michaels and the Yukon river, to Dawson. The argument is based upon stipulations printed upon each ticket as follows:

"The purchaser waives the right to hold said vessel, its owners or charterers, responsible for any damage or loss sustained by their failure to forward him to his destination, unless such failure results from the actual carelessness, negligence, or incompetency of the carrier. * * * If the purchaser of this ticket cannot, for any reason, be safely landed at port of destination upon arrival of vessel thereat, he may be landed at the next port reached by the vessel upon her then voyage, at which such landing can be safely made."

The contention is that, under this clause, if the military authorities at St. Michaels interposed their authority for the protection of the passengers by preventing the ship from putting them ashore and abandoning them at that place, the master could lawfully proceed to the nearest convenient place where the power of the government would not be exerted, and there put his passengers ashore, and leave them in the wilderness, unprovided for. This clause of the contract, however, cannot be construed as giving the carrier any such right. It only relates to cases of necessity, and that means necessity created by some cause other than a default of the carrier; and no right to land them at a place other than St. Michaels could arise until every available means of fulfilling the contracts had been exhausted. The necessity of the case, resulting from the insolvency and incompetency of the Seattle & Yukon Steamship Company, imposed upon Capt. Gilboy the duty, and clothed him with authority, to provide means for landing them and boarding them while they were detained at St. Michaels, and meeting the expense of their transportation up the river. *Frank Waterhouse v. Rock Island Alaska Min. Co.*, 38 C. C. A. 281, 97 Fed. 466. The return of the ship to Dutch Harbor or Seattle without discharging her passengers and freight would not

have been an advantage or benefit to the charterer. By such proceeding the opportunity to use the ship for carrying other passengers and cargo would have been lost. Now, the measure of damages for breaking the contract, if it was broken by the owners, is the loss which the charterer sustained by reason of the breach,—in other words, the value of the use of the ship on her return trip; and it is a very plain proposition that the use of the ship could be of no value to the charterer unless her north-bound passengers and freight could be discharged at St. Michaels, and the entire loss for which the charterer has any ground for claiming compensation is due entirely to its own failure to make provisions for unlading the ship at St. Michaels. The acts and conduct of the captain and owners of the ship, of which complaint is made, do not constitute a breach of the contract with the charterer, because not effective to deprive the charterer of any right. It is true that Capt. Gilboy was in error in assuming that the charter was terminated when the ship came to anchor at St. Michaels, but his mere assertion of that claim was not the reason for, nor the cause of, the failure of the charterer to discharge the ship and reload her for the return. On the contrary, it was the lack of preparation and the incompetency of the charterer to take care of the passengers and cargo which justified Capt. Gilboy in assuming control of the enterprise, and in serving notice upon Grayson that he considered the ship to be no longer in the service of the charterer. It may also be conceded that Capt. Gilboy's conduct was unfair and harsh towards Grayson, in causing his arrest and threatening him with a criminal prosecution; but that was not a cause of any loss to the libellant, for it all took place after Grayson had ascertained that the drafts for \$35,000 in his possession could not be cashed at St. Michaels, and when, being conscious of his unpleasant situation, he had abandoned his trust and had completed arrangements for his immediate return to Seattle. In view of all the facts, whatever was wrong in the means adopted by Capt. Gilboy to secure what was available for the benefit of the passengers and shippers, to whom the charterer was obligated, is insignificant, as compared with the greater wrong of the company in sending a shipload of passengers and a valuable cargo to such a place as St. Michaels, with a deliberate intention to dump them on the beach and abandon them there, after taking money for carrying them through to their several places of destination. In this suit the libellant stands in the place of the party responsible for putting Capt. Gilboy in a situation in which he was compelled by necessity to use the provisions and materials which were accessible, and he is precluded by the wrongful conduct of that party from recovering compensation for the minor offenses of the captain.

There is no evidence as to the value of the use of the ship on the return trip from St. Michaels, to Seattle, except the inference which may be drawn from the proof as to the price paid for the round trip, and as to the amount which the ship actually did earn. The most liberal estimate of the value which can possibly be made, based upon this evidence, is the amount of the gross receipts for the return trip. As this amount was absorbed in paying the necessary expenses of carrying out the passengers' contracts, which Capt. Gilboy was oblig-

ed to do in order to free the ship, it follows that there is no damage recoverable by the libelant on this account, even if the contract was broken by the owners. I have in fact given the libelant the benefit of the gross receipts for the return trip, in disposing of the cross libel, by allowing said amount to stand as a credit in favor of the charterer, to diminish the damages recoverable by the cross libelant.

The libelant's claim for the value at St. Michaels of the 250 tons of coal, and for the value of the stores and provisions appropriated by Capt. Gilboy, is without foundation in law or justice. The insolvent corporation never owned the coal, because it never paid anything for it, and the arrangements that were made for carrying an agent of the vendor to St. Michaels had the effect, as the parties intended, to continue the vendor's control and right of property in the coal until it was paid for; and the failure of the company to pay for the coal at St. Michaels justified the agent of the owners in rescinding the contract, and selling the coal, as he did, to Capt. Gilboy for cash. The provisions charged for were necessary for feeding the passengers, according to the contracts of the company to carry them to their points of destination and feed them while en route. I give no effect to the assignment executed under duress. Independently of that document, necessity imposed upon the captain a duty to feed the passengers, and he was fully authorized by law to use the supplies in the ship for that purpose. Besides the coal, there was other merchandise on board the Progreso which had been bought by the Seattle & Yukon Steamship Company and not paid for, and which Capt. Gilboy disposed of. He or the owners have been required to account to the vendors, and, having acted in good faith in the matter, I consider that they are not legally liable to the libelant. The vendors were the true owners. They had the right, on account of the insolvency of the Seattle & Yukon Steamship Company, to reclaim the goods or the proceeds after the same had been sold. Capt. Gilboy had a right to treat the goods as abandoned by the Seattle & Yukon Steamship Company, and to sell the same for the best price obtainable, for the benefit of the true owners. Having done so, and having settled with the vendors to their satisfaction, neither he nor his employers can be held liable for any profits which the Seattle & Yukon Steamship Company might have made if it had been competent to finish what was undertaken. Merchandise and property other than provisions which Capt. Gilboy disposed of for money, and which were owned by the Seattle & Yukon Steamship Company, must be allowed for; and I have credited the value thereof, as shown by the evidence, against the cross libelant's counterclaim. I also reduce the counterclaim by crediting \$1,050 on account of cash advanced by the charterer for wages of the crew, and the further sum of \$310 admitted to be a legal claim of the charterer for boarding the officers and crew of the Progreso on the voyage. Other items allowed to reduce the counterclaim include the gross receipts for passengers carried on the Progreso on her return trip, for freight and passengers carried on the river steamer going up to Dawson, and for passengers on the return trip of the river boat to St. Michaels. As the Seattle & Yukon Steamship Company is hopelessly insolvent, the amount of any judgment in favor of the cross libelant in this suit

will be of only nominal value, and for that reason it is useless for the court to bestow the amount of labor upon the mass of testimony in this case necessary to make a fine adjustment of accounts. It is sufficient to say that I find from the evidence that the total amount of money which came into the hands of Capt. Gilboy, and freight bills which were collected or which may yet be collected, and the value of the property which the Seattle & Yukon Steamship Company owned, other than provisions used in feeding the passengers and crew, and money advanced to pay the crew, and the indebtedness of the ship to the charterer for board of the officers and crew, does not exceed \$34,000.

The cross libelant claims, as part of its damages recoverable in this suit, the cost of carrying the Progreso's passengers from St. Michaels to their points of destination up the river, calculated at the prevailing rates chargeable for passage on other steamers at the time; but as Capt. Gilboy did not send his passengers forward on steamers operated by other carriers, nor pay the rates charged in the cross libel, the court rejects that basis of estimating the damages. The testimony shows, however, that Capt. Gilboy and his employers did actually expend money and incur liabilities for discharging the Progreso at St. Michaels, for supplying and fitting her for her return trip, for supplying and furnishing the river boat to carry freight and passengers up the river, and for operating the boat to Dawson and return to St. Michaels, and for returning her crew to Seattle, which was a necessary expense, and for other necessary incidental expenses, including the cost of feeding the passengers and crew while detained at St. Michaels,—a total amount of over \$28,000. To this amount should be added, as part of the damages recoverable by the cross libelant, the reasonable value of the services of Capt. Gilboy, and of Mr. Griffith and Mr. Corey, whom he employed to assist him, as purser and freight clerk of the Progreso, which the court estimates at the sum of \$1,500, and the further sum of \$7,350 as demurrage for 21 days, during which the Progreso was detained after the expiration of the lay days stipulated for in the charter party. The court finds the actual damages sustained by the cross libelant amount to at least \$2,850 over and above all proper set-offs, and a decree in favor of the cross libelant will be entered against the libelant, in his capacity as receiver, for the sum last mentioned, payable only from the estate, if any, of the insolvent corporation. I disallow the claim of the cross libelant for the further sum of \$8,000 paid for the steamboat D. R. Campbell. She may be worth as much or a great deal more than her cost, and, without evidence to show that her value is less than her cost, there is no basis for estimating damages on account of this transaction. The cross libelant has unnecessarily increased the expense of this law suit by swelling the volume of evidence by unnecessary matter, and repetitions and reiterations, so that it has been most difficult for the court to glean from the vast bulk of testimony the facts constituting the merits of the case. For this reason I direct that a clause be inserted in the decree requiring the respondent and cross libelant to pay 75 per cent. of the referee's fees for reporting the evidence.

HOGE v. CANTON INS. OFFICE OF HONG KONG, Limited.

(Circuit Court, D. Washington, N. D. August 3, 1900.)

1. REMOVAL OF CAUSES—PETITION—ALLEGATION OF CITIZENSHIP.

The absence of any allegation, in a petition for removal of a cause to the federal court, identifying the plaintiff with the person to whom the policy of insurance sued upon is made payable, is not fatal where the person named in the complaint and in the policy is so well known that the name alone is sufficient as a descriptio personæ of the plaintiff.

2. SAME—ACTION BY ASSIGNEE OF CONTRACT.

Where an action is brought in a state court upon a policy of insurance by one purporting to be the assignee of the party to whom the policy issued, but who the complaint shows was originally a principal party to the contract, and is the person to whom the defendant promised indemnity, so that the assignment was a useless formality, it is not necessary that a petition for removal of the cause to the circuit court of the United States show that the assignor of the cause of action sued upon is a citizen of a different state from that of the defendant.

3. SAME—SEPARABLE CAUSES OF ACTION.

Where a complaint in an action in a state court states four distinct causes of action agreeably to the rules of pleading in such state, and one of such causes of action is within the jurisdiction of the circuit court of the United States, the cause is removable to the latter court in its entirety, although the record fails to show that the remaining causes of action would have been within its jurisdiction if sued upon separately.

Action at law on four separate policies of marine insurance, commenced in the superior court of the state of Washington for King county, and removed into the United States circuit court. Heard on motion to remand. Motion denied.

J. B. Howe, for plaintiff.

J. M. Ashton, for defendant.

HANFORD, District Judge. There are four separate causes of action set forth in the complaint in this case, each of which is founded upon a marine policy insuring merchandise shipped from Seattle on the steamship Laurada, which was wrecked in Behring Sea. Each of the policies upon its face purports to have been issued to S. G. Simpson for account of another person, to whom the loss, if any, should be paid; each of the policies is for an amount exceeding \$2,000, and the complaint alleges that the merchandise in each case exceeded the sum of \$2,000 in value, and was totally lost by a marine disaster insured against. The complaint alleges that the policies were, before the commencement of this action, assigned to the plaintiff by S. G. Simpson and the several persons to whom the losses were payable. Three were for the benefit of persons other than the plaintiff, and one was issued to S. G. Simpson for \$2,750 "for account of James D. Hoge, Jr.," and makes the "loss, if any, payable in Seattle to James D. Hoge, Jr." The complaint alleges that the right of action upon this policy was "assigned to the plaintiff by said S. G. Simpson and the said James D. Hoge, Jr.," and also alleges that the merchandise insured was owned by said James D. Hoge, Jr., and that he paid the premium for the insurance. The case was removed into this court from the state court in which it was commenced on the

ground of diverse citizenship of the parties, and the plaintiff has moved to remand for the reason that the petition for removal does not set forth the citizenship of the assignors of the several causes of action, and fails to show that this court would have had cognizance of either of the causes of action if no assignment thereof had been made.

Considering all the facts shown by the complaint as well as by the petition for removal, there appears to be nothing lacking in the way of a full and positive statement of every fact essential to the exercise of jurisdiction, by this court except an allegation to identify the James D. Hoge, Jr., named in one of the policies as the same person who is the plaintiff in this action. The name, however, is sufficient as a *descriptio personæ* of the plaintiff. Without any other description or averment, the name in his complaint indicates a particular person well known in Seattle, and the name in the policy of insurance is equally effective. Any business man having to act with reference to the rights of the parties involved in this action, would rightfully assume that the plaintiff is the identical James D. Hoge, Jr., for whose benefit the insurance was written, and I hold that the court may rightfully act upon the same assumption. 15 Am. & Eng. Enc. Law (2d Ed.) 918.

An assignee or transferee of a chose in action could not bring an action in a circuit court of the United States by original process to enforce a right of action acquired by an assignment or transfer thereof to him, unless the court would have had jurisdiction if no such assignment or transfer had been made; and a defendant, when sued in a state court upon an assigned or transferred cause of action, must, in order to remove such an action into a United States circuit court, show that the latter court would have had jurisdiction if the assignment or transfer had not been made. These several propositions being conceded, the failure of the defendant to show in its petition for removal that the assignors of the several causes of action sued upon were citizens of a state or states other than the state of which the defendant is a citizen would leave the record incomplete, and deprive this court of jurisdiction, if it were not for the showing made in the complaint that the assignment of the right of action upon the policy of insurance originally issued for the benefit of the plaintiff was a useless formality, and not effective to transfer any right of action. The complaint shows affirmatively that Simpson did not pay for the insurance, nor have any insurable interest in the merchandise, nor any right to assign the policy. He sustained no loss by destruction of the merchandise, and the defendant never became obligated to pay him anything for its loss. On the face of the policy he does not appear to be even nominally the owner of it as trustee or otherwise, and he never had any right of action upon the policy which he could assign or transfer to any one. The case, as stated on the face of the record, comes fairly within the rule of the decision of the supreme court in the case of *Holmes v. Goldsmith*, 147 U. S. 150, 164, 13 Sup. Ct. 288, 37 L. Ed. 118, in which case a promissory note was signed by the three defendants, which contained a promise to pay \$10,000 to the order of one W. F. Owens, and was delivered by the

signers to the nominal payee for his accommodation and benefit. Owens then indorsed the note, and delivered it to the plaintiff in the action, and received the consideration for his own use. The supreme court held the transaction to be a loan by the plaintiff to Owens, and that the latter, although he was nominally the payee of the note, was in fact a maker; that while the note was in his hands he had no right to sue the defendants, who signed it for his accommodation, and, as it did not become a chose in action until it had been indorsed and delivered to the plaintiff, there was in fact no assignment or transfer of a right of action by the mere formality of indorsement and delivery by Owens, and the plaintiff therefore had a right to sue upon the note in a United States circuit court, as the original owner of it. In principle, the case at bar is exactly similar, for the plaintiff's right of action was not acquired from any person or persons who previously owned it. He was originally a principal party to the contract, as he owned the goods, paid the premium, and suffered the loss, and is the person whom the defendant promised to indemnify. He alone could be an assignor. But an assignment by the plaintiff to himself creates no new right; neither does it constitute a bar to the exercise of a right. As the complaint states one distinct cause of action, which is cognizable in this court, I hold that the case was properly removed into this court in its entirety, notwithstanding the fact that the record is incomplete to show that the other three causes of action would have been within its jurisdiction if sued upon separately. Under the Code of this state the plaintiff had the right to unite the four causes of action in one complaint, and to submit them all to adjudication in one action. But his right in this respect does not deprive the defendant of its right to remove the case into this court. *Sharkey v. Mill Co.* (C. C.) 92 Fed. 425. Motion denied.

MUTUAL RESERVE FUND LIFE ASS'N v. PHELPS et al.

(Circuit Court, D. Kentucky. August 25, 1900.)

1. MUTUAL INSURANCE—MORTUARY FUND—GARNISHMENT.

The credits due or to become due a mutual insurance company upon mortuary calls and premiums from persons insured in the association, being a trust fund for the payment of the losses of contributors to it, cannot be diverted by garnishment or an order of court to the payment of the judgment of a mere creditor, who is not a member of the association.

2. FEDERAL COURT—INJUNCTION—PROCEEDINGS IN STATE COURT—VALIDITY—RECEIVERS.

More than 60 days after judgment in an action against plaintiff in a state court, the plaintiff therein filed a supplemental petition to obtain satisfaction of the judgment by subjecting the mortuary calls and premiums thereafter to become due the defendant association; and thereupon the state court on the same day, although no notice of the petition had been served upon the association, transferred the cause to the equity docket, and appointed a receiver for the association in that state, and directed it to collect all the income and revenues of the association from its policy holders. *Held*, that the proceedings under the supplemental petition were void, and did not constitute a proceeding pending in the state

court, within Rev. St. U. S. § 720, which forbids the issue of an injunction by a federal court against proceedings in a state court.

8. SAME.

The order appointing the receiver in the supplementary proceedings in the state court being a nullity, the receiver is not an officer of the state court, and therefore the receiver and the plaintiff in the state court may be enjoined in a federal court from receiving the mortuary assessments and premiums due the plaintiff herein.

4. SAME—IRREPARABLE INJURY—MULTIPLICITY OF SUITS.

The holders of complainant's certificates being numerous, a mortuary call being due in a few days, and its payment to any other person than the association being likely to result in the lapse of many certificates and in irreparable injury to many members, besides doing serious injury to the business of the association, and causing a multiplicity of suits, and the mortuary calls being, moreover, not subject to any form of garnishment, the plaintiff is without any adequate remedy at law, and is entitled to an injunction restraining the judgment creditor and the receiver appointed by the state court from seeking to reduce the income and revenues of complainant to possession for the satisfaction of said judgment.

George Burnham, Jr., S. T. Tyng, and Pirtle & Trabue, for complainant.

Zack Phelps and B. F. Washer, for defendants.

EVANS, District Judge. On the 14th day of July, 1885, James S. Phelps procured a certificate of membership (otherwise a policy of life insurance) in the complainant association, and at stated periods thereafter paid the dues and the mortuary calls or premiums thereon as stipulated in the certificate. This continued until about January, 1900, a period of nearly 14½ years, and for that length of time he continuously paid the premiums for carrying the risk. Pursuant to the stipulations of the certificate or policy, as the insurer claimed, the mortuary calls were increased to a higher rate, and probably fixed upon a different plan than the insured thought was permitted by the terms of the certificate; and after the date last named he refused to pay the increased rates, and on the 28th day of February, 1900, instituted an ordinary action at law in the state court to recover the entire amount of the calls or premiums so paid by him, together with interest thereon. Upon a service of process, which the state court considered valid and sufficient, judgment in that action was rendered in the plaintiff's favor on May 19, 1900, for the entire claim then ascertained by the court to be the sum of \$2,360, for which amount, with interest from that date, and the costs of the proceeding, judgment was then rendered against the association. It will be seen that this judgment allowed to the insurer no compensation whatever for the risk it had taken and carried for the 14½ years, during which the certificate or policy had been in force, and the premiums and calls had been paid. On the 21st day of May, 1900, an execution of fieri facias was issued upon the judgment, and was placed in the hands of the sheriff of the proper county, who subsequently, namely, on June 12, 1900, returned the writ, in substance, "No property found." More than 60 days after the judgment, to wit, on the 4th day of August, 1900, the plaintiff in that action filed therein an amended and supplemental petition seeking to obtain satisfaction of the judgment by subjecting the assets and credits of

the insurer in Kentucky, and which consisted of the mortuary calls and premiums afterwards to become due from other insurers upon like certificates or policies; and upon considering this last paper the state court, although no process had been issued upon it, nor any notice of it given to the association, on the same day of its being filed transferred it to the equity docket, acted upon it, and appointed the Fidelity Trust & Safety-Vault Company receiver for the complainant in Kentucky, and directed it to collect all the revenues and income from the members or policy holders, and also ordered them, under threat of contempt, to pay the same as they accrued to the said receiver, although none of them were parties to the action, nor had any of them been summoned to answer as garnishees. After unsuccessfully attempting to file a petition for the removal of that action to this court on the 22d day of August, 1900, and after an equally unsuccessful attempt to have the bond tendered therewith approved by that court as sufficient, the complainant began this action, seeking to enjoin the efforts of the defendants Phelps and the Fidelity Trust & Safety-Vault Company to reduce any of complainant's revenues or income to their possession, upon grounds set forth in the bill of complainant,—that the last steps taken in the state court were void; that its policy holders were very numerous, and a great multiplicity of actions would otherwise result. Whether the judgment in the state court action was valid, as being based upon a sufficient service of process, we need not inquire at this stage of the proceeding. As the defendants are estopped from denying its validity, we shall assume it to be valid, for the purpose of the inquiry before us, only remarking that in the late case of *Swann v. Association* (C. C.) 100 Fed. 922, we had occasion to pass upon a somewhat kindred question, though not in that case inquiring into the nature of the agency of a "local treasurer," such as Mr. Frese appears possibly to have been in this case. That may become an important question in the future progress of this case, when the character of his agency, if any, is fully disclosed, but it is not so at present.

Whether the fund raised by the complainant from mortuary calls and premiums through its manner of insuring is a trust fund for all its members and beneficiaries, which cannot be diverted to the benefit of a mere creditor, who is not now a member, and for that reason possibly not entitled to participate as such, he not having contributed to the joint fund to be raised upon future mortuary calls, is an important question, though it need not now receive more than an incidental consideration. Ordinarily we might say that such a fund could not be subjected to a creditor's demand in a case like the one in the state court, and by process which, if anything, is substantially that of garnishment. In this case, where the mortuary calls, as shown by defendant Phelps in his pleading in the state court, are a trust fund to pay the losses of the contributors to it, the matter seems even clearer. Whether a premium or a mortuary call yet to be paid for life insurance, where the policy can only be kept alive by its payment, is a subject of any species of garnishment by creditors, in the hands of the policy holder, is another question which may become of much moment. Ordinarily we would certainly say that it was not a

debt due to the insurer at all, nor an asset belonging to it, until it was actually paid. The relation of insurer and insured admits of the construction only that the insured may purchase the insurance for a prescribed period by voluntarily and at his option paying the premium. This and the plan of insurance offered by the complainant may be slightly different, but, if the mortuary calls are not paid, the certificate of membership must in all cases lapse. So that, if the policy lapse, the insured has got nothing for his money. He has only paid a portion of a debt of the insurer, if what he is about to pay for the purchase of insurance for the future is taken from him for another and different purpose. It may be assumed to be at least extremely doubtful whether premiums or mortuary calls, not being in any sense debts, but only a cash payment for the purchase, at the option of the insured, of some future benefit, can in any sense be garnishable. If they can, the policy holder will lose, and the insurance company gain. The policies and all accumulations, if any, may be forfeited for nonpayment to the company, and the money, instead of paying for insurance, may be most unjustly diverted to the payment of the insurance company's debt. Justice to the policy holders, and every consideration, therefore, would seem to enforce the conclusion that the accruing premiums or calls cannot be garnished by any mere creditor of the company.

Section 720 of the Revised Statutes of the United States forbids the issuing by this court of any injunction against any proceedings in a state court, except in bankruptcy matters. This necessarily means a pending, and not a past or terminated, suit. The statute is a wise one, as nothing could be more incongruous and unseemly than for the courts of the United States to attempt to control by their processes the ordinary actions of the state courts. Of course, this does not mean that if this court first acquired jurisdiction of a subject-matter, or if a case had been lawfully removed here, in some instances, in support of its own jurisdiction, the parties thereto might not be directly operated upon by the court; but the statute otherwise plainly forbids this court to enjoin a proceeding in the state court, and this rule is extended to the officers of that court, as an inherent part of it. And this court will not enjoin a proceeding of the state court in this instance if one is there pending. It is, therefore, of the utmost importance to ascertain whether, since the final judgment in the ordinary action at law was rendered, on May 19, 1900, there has been any pending proceeding in the state court, within the meaning of the law, or whether there is any proceeding now pending there, within the meaning of that statute. If the defendants are mere wrongdoers, and if their threatened actions are injurious to the complainant, different results may follow. Assuming it to be valid, the court is clearly of opinion that, from and after the rendition of that judgment on that date, that action was *functus officio* for all purposes of pleading. Its force was spent, and all steps attempted to be taken thereafter, except in way of writs for the execution of the judgment, were *coram non iudice* and void. *Brown v. Vancleave*, 86 Ky. 381, 6 S. W. 25; *Meadows v. Goff*, 90 Ky. 540, 14 S. W. 535. Pursuant to these authorities, and many oth-

ers to the same effect which might be cited, the filing of the supplemental petition, and the action of the court appointing a receiver thereupon, will be treated as mere nullities. Into a suit at law that was already terminated by final judgment, and which was therefore off the docket, a supplemental pleading was sought to be injected, seeking its enforcement by merely equitable proceedings. No summons was issued upon it. No notice of it was given to the party most interested in it, and it was acted upon and disposed of by the court immediately. No attachment was issued under which property was seized or garnishees summoned as a foundation of possible jurisdiction of a res, and, in short, the whole so-called supplemental proceeding was an attempt to graft a live branch upon a dead stock. This must be a futile effort. A transfer to the equity docket of what was of no legal validity did not aid or strengthen it. The attempted proceeding was not authorized by any of the provisions of the Civil Code regulating attachments. Those provisions obviously apply to cases altogether different from this. Especially does not section 227 apply. It provides for the case of a garnishee actually summoned as such in the action, whose answer is not satisfactory. In that event a supplemental petition may be filed in the original case, which, indeed, as to him, has never been terminated by final judgment. Here there is nothing in the slightest degree resembling that, as no attachment was issued nor garnishees summoned. Nor do sections 298 and 299 of the Civil Code (Ed. 1899) authorize the appointment of a receiver in such a case, and certainly not in such a manner.

Assuming for the purposes of this motion only that the judgment of May, 1900, was valid, and regarding the action in the state court as having terminated at the time of its rendition, and as thereafter only providing support to writs for the collection of the judgment, or for a separate suit in equity, under section 439 of the Code, the petition for the removal came too late, though whether the necessary jurisdictional amount is involved may present at some time an interesting question. The judgment was for \$2,360, and interest thereon from its date, and for costs. Whether the more than \$360 of interest manifestly included in the \$2,360 then merged into and became part of the principal, in the sense of the removal acts, may yet demand attention. At present, however, it seems immaterial. The orders appointing the Fidelity Trust & Safety-Vault Company receiver being simply nullities, that company is not an officer of the state court, and enjoining it in no way enjoins a proceeding in the state tribunal. This being so, the facts stated in the bill of complaint seem to present sufficient grounds for the temporary injunction prayed for against the defendant, the Fidelity Trust & Safety-Vault Company, and also against the defendant Phelps, except that he should be left at full liberty to collect his judgment by all lawful means, other than by subjecting thereto the mortuary calls, assessments, premiums, and dues accruing upon the certificates or policies of members of the complainant association, to which, as we have seen, he has as yet manifested no right. This court could not enjoin the execution of any of the writs for enforcing the judgment, and it

might be the same if the insured in this case had, before complainant's bill was filed, brought an action in equity, under section 439 of the Civil Code, to enforce his judgment. The Kentucky Code of Practice (section 5) prescribes two separate kinds of actions. One of these is an ordinary action at law; the other, an equitable action. In *Davidson v. Simmons*, 11 Bush, 333, the court of appeals of Kentucky held that the action in equity provided for in that section (then section 474) was the only action allowed by the laws of Kentucky to enforce a judgment at law. That remedy by suit is exclusive. The amended and supplemental petition in the state court in this instance, even though transferred from the law docket to the equity docket, was in no sense a suit in equity; nor, for the reasons already given, can it be regarded as a legal proceeding at all. It can only be considered as a vain thing. Of course, the state might have authorized such steps as those last taken in its court, but it has not done so in its Code of Practice or otherwise, as the cited authorities demonstrate. The holders of certificates in the complainant association in Kentucky appear to be numerous, and a mortuary call has been made, which is due in a few days. Their payment to any person except the association may result in the lapse of many certificates, and in irreparable injury to many members, unless they pay both to the receiver and to the association. Much confusion is inevitable. A multiplicity of suits seems unavoidable, and the business of the complainant may be most seriously affected by what we have seen are wholly unmaintainable proceedings. Besides, it has the right to protect that trust fund. We have also seen that those mortuary calls cannot properly be the subject of any form of garnishment. Manifestly, there is no adequate remedy at law for this state of things, and an injunction pendente lite is granted, as prayed in the bill, with the modification indicated as to defendant Phelps.

GILBERT v. MURPHEY.

(Circuit Court, E. D. Wisconsin. August 24, 1900.)

ATTORNEY AND CLIENT—SETTLEMENT—LIABILITY OF ATTORNEY TO ACCOUNTING—RES ADJUDICATA—PLEADING.

An attorney, while representing a receiver appointed in Illinois in suits pending against N. in Wisconsin, purchased for a nominal sum an outstanding claim against the estate represented by the receiver, brought suit thereon, and attached the debt due the estate in the hands of N., and then effected a settlement with N., whereby all of the moneys due from the latter to the estate of the receiver were appropriated to the payment of the claim purchased save \$1,000. To a bill filed by the receiver against the attorney for an accounting the attorney pleaded an adjudication in the action of the receiver against N., that the receiver acquired no title to the property in Wisconsin by his appointment in the Illinois court, and that defendant became privy to said adjudication, and entitled to the protection thereof, as to property purchased after the judgment was rendered. *Held* that, the settlement with N. having been effected while the relation of attorney and client subsisted, defendant's liability to account for the proceeds thereof could not be resisted by any plea in respect to the legality of the receiver's claim.

In Equity. On plea filed by the defendant, set down on behalf of the complainant for argument.

Henry Schofield, for complainant.

Fish, Cary, Upham & Black, for defendant.

SEAMAN, District Judge. The complainant sues as receiver of the estate of one Fredericksen, under appointment by the superior court of Cook county, Ill., as successor to one Filkins, who was the previously appointed receiver in the same matter. The bill charges, in substance, that the defendant, an attorney at law, and citizen of Wisconsin, acted as attorney for the said predecessor in the receivership, in conjunction with Cook & Upton, who were attorneys for the receiver at Chicago, and with one Hewetson, who was the agent and representative of the receiver in the various matters; that, so acting, certain suits were conducted by said defendant in Wisconsin to recover large claims asserted on behalf of the receivership against one Nunnemacher, which resulted in a decision by the supreme court adverse to the right of the receiver to maintain an action thereupon in the courts of Wisconsin, and such suits in the name of the receiver were eventually discontinued by the advice of the defendant; that pending the appeal to the supreme court in such proceedings, and for the ostensible purpose of providing against an adverse decision therein, such attorneys purchased for a small consideration a large claim against the trust estate held by one Rice, on which another suit was instituted by the defendant in the name of Upton, the nominal purchaser, with a garnishee and attachment proceeding against Nunnemacher, the same person who was defendant in the last-mentioned suits; that thereupon a settlement was made with Nunnemacher, whereby he paid over to the defendant, as such attorney, \$36,000, as a compromise of all such claims against him, of which \$1,000 only was paid over to the receiver, and the defendant failed and refused to account to the trust estate for the remaining \$35,000, but the same was in some manner divided up between the attorneys and the agent, Hewetson, without accounting therefor to or with the trust estate; that Nunnemacher demanded and obtained upon such settlement releases of the trust estate, and discontinuance of all the suits, including the action in the name of the receiver, which was then dismissed by the defendant, together with the withdrawal of a petition for rehearing of the appeal to the supreme court then pending. On the allegations of the bill an accounting is sought against the defendant as for a trust arising out of his relation to the receivership in the transactions, with such other relief as equity may afford.

The defendant sets up by way of plea to the bill the matters and issues involved in the action by the receiver against Nunnemacher in the state court, and the decision of the supreme court, as res adjudicata that the receiver acquired no title to the property in Wisconsin by his appointment in the Illinois courts, and could not maintain his action in question, which was in the nature of a creditors' suit; that "the property or money sought to be reached by the

complainant in this suit was acquired" by the defendant from Nunnemacher after such "determination and adjudication by the supreme court, whereby this defendant became privy to the said adjudication, and entitled to the benefit and protection thereof," and is the identical property which was there adjudicated as not belonging to the receiver, and has like status herein. No issue being taken upon the facts averred in the plea, such averments stand admitted for the purpose of this hearing. The terms of the adjudication by the supreme court are not set out specifically, and it is not entirely clear whether the allegations in that regard are not of the pleader's inferences of their legal effect, rather than of their terms in fact; but for the purposes of this decision the allegations which purport a statement of what was adjudicated are assumed to be a true recital of the terms. The opinion of the supreme court, as referred to in the plea, is reported in *Filkins v. Nunnemacher*, 81 Wis. 91, 51 N. W. 79. That this decision is conclusive between the parties and privies upon the issues there involved cannot be questioned here, however open to question, as a precedent merely, in the light of other authorities, and of later expressions as well by the same court. But I am clearly of opinion that it is not *res adjudicata* of any issue tendered by this bill, and cannot be invoked by this defendant, either as a bar or by way of estoppel, to relieve him from meeting the allegations in suit. The rights of the complainant as set out in the bill are dependent wholly upon the existence of a trust relation—that of attorney and client—between the defendant and the estate represented by the complainant, and upon the receipt by the defendant in that relation of the fruits of a settlement without accounting therefor. If the settlement with Nunnemacher was made, as alleged, of a claim asserted on behalf of the estate represented by the defendant, it is plain that no question can be raised by the latter of the legality of the claim so asserted to dispute his liability to account for the proceeds of the settlement. Indeed, if the claims alleged to have been purchased by the attorneys were of an adverse interest, and were acquired while the relation of attorney and client subsisted, the question of liability to an accounting could not be made contingent upon an inquiry as to the legal status of the client's title or right of enforcement. *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065. The merits of the controversy can be considered only when the allegations of the bill are met by answer, and, without passing upon the questions discussed in the opinion by the supreme court of Minnesota in the kindred case of *Gilbert v. Hewetson*, 82 N. W. 655 (apparently involving the same transactions set out in this bill), the plea filed on behalf of the defendant is overruled, with leave to answer the bill on or before the October rule day. So ordered.

FIRST NAT. BANK OF COVINGTON v. CITY OF COVINGTON et al.

(Circuit Court, D. Kentucky. August 14, 1900.)

1. TAXATION—RETROACTIVE STATUTES—CONSTITUTIONALITY.

A legislature probably cannot constitutionally enact a retroactive law imposing taxes for previous years upon property which was not during such years subject to taxation under any valid law.

2. SAME—NATIONAL BANKS—DISCRIMINATION.

St. Ky. § 4077, enacted in 1892, provided for the taxation of the franchises of all corporations for state and local purposes. As applied to national banks, such statute was held invalid by the supreme court of the United States, as in violation of Rev. St. § 5219, which prohibits the taxation of shares of national banks at a greater rate than is imposed on other moneyed capital. By act of March 21, 1900, it was provided that shares of stock of national banks should be assessed and taxes collected thereon in the same manner as real estate, and (section 3) that such banks which had not paid franchise taxes under the prior law should be assessed on their stock thereunder for the years subsequent to 1892. *Held*, that such retroactive provision could not be upheld as a curative statute, the prior law being void as to national banks, and that it was itself invalid, as in violation of Rev. St. § 5219, being applicable to national banks alone, without any provision for the retroactive taxation of other moneyed capital in the hands of individual citizens, and it being very improbable that the tax thereby imposed was the equivalent of the franchise tax required to be paid by other corporations.

3. SAME.

Such provision is also invalid upon the further ground that it imposes double taxation, as applied to a national bank which had accepted and each year paid taxes under the Hewitt act of 1886, which imposed a fixed tax for state purposes upon each share of bank stock, and provided that any bank which accepted its provisions and paid the tax thereby required should be exempted from all local taxation, notwithstanding a general provision of the new law that credit should be allowed for taxes paid under the Hewitt act; there being no provision either in the act itself, or in the other laws of the state, by which such credit can be enforced or allowed.

4. SAME.

A state law taxing national banks by requiring their shares to be listed and assessed, and taxes to be levied thereon in the same manner as real estate, is not the equivalent in law, and *prima facie* not the equivalent in fact, of a law requiring state banks and other corporations to pay taxes upon a valuation of their franchises, and can only be sustained, under Rev. St. § 5219, by proof showing that in its operation it does not result in discrimination.

5. INJUNCTION—RESTRAINING COLLECTION OF TAXES.

A national bank may maintain a suit in equity in behalf of its shareholders to enjoin the collection of taxes upon its shares under a law claimed to be invalid; and, where the validity of the entire tax is contested, the complainant will not be required to pay any part of the tax as a condition to the granting of a preliminary injunction.

In Equity. On motion for preliminary injunction.

J. W. Bryan, for complainant.

W. H. Julian (F. J. Hanlon and Harvey Myers, of counsel), for defendant.

EVANS, District Judge. The complainant brings this action to enjoin the city of Covington and its officers from assessing and collecting for municipal purposes the taxation on its shares of capital

stock provided for in the act of the general assembly of Kentucky approved March 21, 1900, entitled "An act relating to the taxation of shares of stock of national banks," which is as follows:

"Whereas, the supreme court of the United States has lately decided that article 3, chapter one hundred and three, of the acts eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three, is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while state banks are now and have been ever since eighteen hundred and ninety-two taxable for all purposes, state and local; therefore—be it enacted by the general assembly of the commonwealth of Kentucky:

"Section 1. That the shares of stock in each national bank of this state shall be subject to taxation for all state purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

"Sec. 2. For the purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the state, county, city, town and district for the taxes upon said shares of stock.

"Sec. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies: provided, that where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of this section as to said year or years; and provided further, that where any national bank has heretofore, for any year or years, paid state taxes under the Hewitt bill in excess of the state taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its state taxes required by this act.

"Sec. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

"Sec. 5. The assessment of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessment of real estate and collection of taxes thereon may be enforced.

"Sec. 6. The purpose of this act is to place national banks of this state, with respect to taxation, upon the same footing as state banks as nearly as may be consistently with said article three of the revenue law and said decision of the supreme court.

"Sec. 7. Whereas, it is important that state banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage."

To clearly understand the scope of this very important controversy, it is necessary to say that in 1886, in an effort to remedy the confusion growing out of certain unrepealable provisions in the charters of the older banks in regard to taxes, the legislature passed what is commonly called the Hewitt act, the pertinent provisions of which are as follows:

"Section 1. That shares of stock in state and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed 75 cents on each share thereof, equal to \$100, or on each \$100 of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addi-

tion, pay upon each \$100 of so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeds an amount equal to 10 per cent. of their capital stock, which shall be in full of all tax, state, county and municipal. * * *

"Sec. 4. That each of said banks, institutions and corporations, by its corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the act of congress, or under the charters of the state banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the state of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such banks." Gen. St. Ky. 1886, c. 92, art. 2.

This rate of taxation, all the avails of which went to the state, was higher than that paid by other property, but on that account the banks were exempted from local taxation. In 1892 the legislature enacted what is now section 4077 of the Kentucky Statutes, as follows:

"Sec. 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The auditor, treasurer and secretary of state are hereby constituted a board of valuation and assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchises and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time as the business of the board may require."

Section 4078 prescribed the manner of ascertaining the value of the franchises to be assessed. As a basis for this assessment, banks, under section 4092, were required to make reports on the 1st day of March of each year of their condition the preceding 31st day of December, and to pay the tax on July 1st following. This subsequent legislation was intended to repeal, and in express terms did repeal, the Hewitt law. After the enactment of the legislation last referred to, the complainant, in November, 1893, instituted an action in the state court to enjoin the levy for that year, as against it, of the taxation thereby provided for, and in its petition averred that long before the enactment of this legislation it had accepted the provisions of the Hewitt act, within the time named therein, and that it had up to that date paid the taxes provided for by the terms of the Hewitt act, as accepted by complainant, and in due

form sought the judgment of the state court upon its claim that the Hewitt act, and its acceptances thereof, constituted an irrevocable contract between the complainant and the state of Kentucky, which the legislation of 1892 would impair. The court in which the action was brought in 1894 distinctly adjudged that this contention was well founded, and that the provisions of the Hewitt act, and their acceptance by the complainant, did constitute an irrevocable contract between the state and this bank, and, further, that the legislation of 1892 was void as to the complainant, as impairing that contract. The decision of the court of appeals of Kentucky affirming that judgment, being in favor of the right claimed under the constitution of the United States, could not be appealed to the supreme court of the United States. The bill of complaint, as amended, in the case before us, insists not only that the question of taxation between the complainant and the state of Kentucky, including the municipality of Covington, up to 1904, is conclusively settled and adjudged by the court of appeals upon the basis referred to, but that the act of March 21, 1900, is also unconstitutional—First, in its attempt, by section 3, to authorize the levy of taxation upon the complainant for the years previous to March 21, 1900; and also, second, because the taxation provided for by the said act discriminates against national banks, and levies upon the shares of national banks a greater rate of taxation than is levied upon other moneyed capital, and particularly upon capital invested in state banks, and denies them the equal protection of the law.

As clearly established by many decisions, and particularly by that announced in the case of *Owensboro Nat. Bank v. City of Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850, all state laws providing for the taxation of shares of national banks must be subject to the provisions of section 5219 of the Revised Statutes of the United States, which is in this language:

"Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The supreme court, in the case last referred to, held that section 4077 of the Kentucky Statutes, so far as it affects national banks, is void, because it is in conflict with that section. The Hewitt law having been repealed in 1892, and section 4077 of the Kentucky Statutes being void as to national banks, there was no state statute in force for taxing the shares of the latter for municipal purposes until the act of March 21, 1900, was passed. The third section of that act is now assailed upon the ground that it undertakes to tax those shares retroactively and illegally. The court will not attempt

to decide that there may not, in extreme cases, be a legitimate statutory enactment imposing a retroactive taxation for previous years upon a class of property not then subject to taxation at all. But it would at least be a rare case, and one which would come extremely near to taking property for public use without just compensation, and might be most dangerous and oppressive, as well as destructive of many other established principles of the law of taxation. If the power to do this exist at all, there is no limit to it; and it might illustrate the subject to consider the result if church property now exempt should, as it lawfully might, be made subject to taxation in the future, and not only so, but retroactively, for 10, or 20, or even 50 years back. Here would be a practical confiscation of such property for public use. Nor does the court mean to deny that where the law in fact imposes taxation upon property, which, however, is overlooked by the assessor, or otherwise omitted from the assessment, or some other step is taken which is faulty, the defects may not be cured by legislation. That curative legislation is admissible in such cases is a well-established doctrine of the courts, but there was in Kentucky no legislation—valid legislation—for taxing national bank shares as such before March 21, 1900; and the act of that date was not passed to validate defective steps taken to levy a lawful tax, but it is legislation which imposes an altogether new tax upon a new subject. Any attempt to give it the appearance of being a curative statute is merely nominal and colorable, and cannot be effective. The previous legislation had been void because it was opposed to section 5219, Rev. St., and could not be cured, though other new and different legislation might be enacted. Moreover, it imposes a tax upon national bank shares alone, and the retroactive feature of section 3 is a manifest discrimination against national bank shares, as there is no corresponding provision in any law of the state for the retroactive taxation of moneyed capital in the hands of state banks or of individuals. Other banks paid, and now pay, only a franchise tax for municipal purposes. National banks must, according to the act, pay, not a tax equivalent to the franchise tax imposed upon state banks, but a tax the rate of which is the same as that upon "real estate," which rate might not comply with section 5219 of the Revised Statutes, unless it is the same as that put upon other "moneyed capital," as that phrase has been construed by the supreme court. It is manifestly very improbable that the rate of taxation on real estate can be equivalent to the rate imposed by the franchise tax. At all events, for the reasons indicated, it seems to the court to be very clear that section 3 of the act conflicts with the requirements of section 5219, because there is nowhere any corresponding retroactive imposition on state bank shares, and the rate of taxation on real estate can hardly be the equivalent of the rate of taxation imposed on state banks by the franchise tax. And besides, as the bill shows, the state has collected and received from the complainant in this case the high taxes imposed under the Hewitt law up to the current year. There is no way to sue the state of Kentucky in her courts to compel it to refund the tax thus paid. Nor is there any way to compel the state

to make an adjustment of such payments in the collection of the taxes under section 3 of the act of 1900, although it is therein vaguely provided that credit shall be given, but our laws afford no way authoritatively to make the provision effective. No officer is charged with the duty or given the power to make it so. Until the state in this case has refunded the taxes wrongfully collected (if it should so turn out) under the Hewitt act, or shall provide some adequate way for doing so, it must be content with the taxation levied in the way provided by its own legislation,—at least, so long as it retains the money. Otherwise, there would be a double taxation. Certainly the state must not, in attempts to correct its legislation upon the subject of taxation, discriminate against national bank shares in such a way as to violate section 5219. So long as the state retains the taxes collected under the Hewitt law from this national bank, it is a manifest discrimination against it to again retroactively tax its shares for the same years, without taxing also in the same way the state banks. We may sum up this phase of the case by saying that it may, in the abstract, be legally possible to pass a valid retroactive tax law, yet in the concrete case before us it was not done; the attempted legislation, for the reason indicated, being in conflict with section 5219.

As the present holders of the complainant's shares may be very different persons from those who held them in previous years, as the present holders may have purchased under the previously existing law, and as their rights and interests would be injuriously affected by large payments for retroactive taxation, at least one phase of what has been said is well supported by the reasoning of the opinion of the court of appeals in *Town of Bellevue v. Peacock*, 89 Ky. 495, 12 S. W. 1042. When the town of Bellevue made a contract with certain persons to improve a street, it was supposed by all parties that the law empowered the town to impose the cost upon the abutting property, and the contract so required. The court of appeals, however, decided that the town had no such power. Subsequently the legislature passed an act attempting to validate the contract, and to impose the necessary taxation retrospectively upon the property. In a suit to test that question the court, in the opinion referred to, held the act unconstitutional, largely upon the ground that, as there was no law to so burden the property at the time the improvements were made, the legislature could not subsequently impose it. The complainant and its shareholders in the case before us stand in substantially the same position as did the owners of the abutting property in the *Bellevue Case* in respect to previous judicial decisions and otherwise. There was no law, until the act of 1900, imposing any such liability as it attempted to create; and, at least unless a similar burden is imposed upon other moneyed capital, the retroactive liability cannot be imposed upon national banks.

Coming now to the question of whether the whole act of March, 1900, is void, as being in conflict with section 5219 of the Revised Statutes, it must be borne in mind that this may be manifested in either of two forms: First, it may appear on the face of the state law itself, as in the statute of 1892, pronounced invalid by the supreme

court in the case of *Owensboro Nat. Bank v. City of Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850; or, second, it may come in the manner of enforcing the state law, or in the manner of operating under it, as in cases like *People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705, and *Whitbeck v. Bank*, 127 U. S. 193, 8 Sup. Ct. 1121, 32 L. Ed. 118. It goes without saying that money invested in national bank shares should bear its ratable portion of the public burdens. Nothing in the legislation of congress, nor in the decisions of the courts of the United States, in the slightest degree prevents this. All that is done is, under section 5219, to guard money so invested against any form of state taxation which puts it at a disadvantage as compared with money invested in state banks. The wisdom and necessity of this rule is obvious. The professed object of the act of 1900 is to make the taxation upon all banks equal. The operations of the act may possibly in the future bring about such a result, though upon the face of the statute it appears well-nigh impossible. *Prima facie*, a discrimination exists, the one being taxed on an entirely different basis or plan from the other. The state banks pay taxes upon a valuation of their franchise, etc., and national banks upon the valuation of their shares in the hands of individual holders. By no intelligent system of valuation does it appear possible to value a franchise annually as high as all the property of the corporation as appears to be necessary in order to make the two modes of taxation agree. These cannot be equivalent in law, and *prima facie* they appear not to be equivalent in fact, though possibly this latter appearance may be overcome by proof. The city of Covington would, therefore, appear to be entitled to have an opportunity, if so desiring, to plead and prove that the result of the operations of the act of 1900 will not in fact discriminate in the next fiscal year against money invested in national bank shares; and, after this opportunity is afforded, the court can determine upon the evidence whether the actual results under the act conflict with section 5219, by imposing a greater rate of taxation upon money invested in national bank shares than upon that invested in state bank shares, should there be any moneyed capital in said city so invested as to bring it within the rules adopted by the supreme court in construing section 5219.

In this particular case, however, the views so far expressed may all become subordinate to the question most energetically urged, that, as to the complainant, the act of 1900 can have no operation before 1904, because up to that time it has an irrevocable contract with the state to the effect that its shares shall only be taxed according to the provisions of the Hewitt law, and that this matter has been finally adjudicated by the courts of the state in the manner stated in the bill. The general doctrine as to the conclusive effect of judgments upon matters in controversy between the same parties, or those in privity with them, is certainly broad enough, as usually stated, to cover cases like this, if there are no exceptions to it. The case of *City of New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202, goes far towards closing the question, and will do so unless its operation should be limited by considerations now to be stated. Of course, as to the claim for taxes for the year named in the suit described in the

bill of complaint, the judgment is absolutely conclusive, although, in the light of later decisions, palpably erroneous. Should its effect be limited to the taxes for the year named in that suit, under the circumstances about to be stated, is an extremely interesting question. The judgment relied upon in the bill was certainly based upon the opinion that the Hewitt law, and the complainant's acceptance of its provisions, constituted an irrevocable agreement between the bank and the state of Kentucky that the former should not be taxed otherwise than pursuant to the Hewitt law for any purpose, but in terms it only embraced the taxes for the year 1893, and only enjoined their collection. It did not, in its language or scope, embrace any others. It, however, as stated, went upon the general doctrine that there was a contract thus created between those parties, which the federal constitution protected from any impairment. *Bank-Tax Cases*, 97 Ky. 591, 31 S. W. 1013. Within a year or so after this judgment was rendered, and from which no appeal could be taken to the supreme court of the United States, for the reason already indicated, the court of appeals overruled the doctrine which it had therein announced, and expressly held that there was no contract growing out of the facts adjudicated in the previous litigation. *Id.*, 39 S. W. 1030. It was then also held that legislation as to the manner of imposing taxation could not be made the basis of a contract, but was a matter entirely under the control of the state, and might be altered at its pleasure. In the case of *Citizens' Sav. Bank v. City of Owensboro*, 173 U. S. 636, 19 Sup. Ct. 530, 43 L. Ed. 840, the supreme court sustained in the fullest manner the last view taken of the question by the court of appeals of Kentucky. So that we have here a claim to the benefit of the doctrine of *res adjudicata*, as against the clearest decision that the judgment relied on was based upon a proposition, not of fact, but of constitutional law, which has been utterly repudiated, not only by the highest judicial tribunal in Kentucky, which had announced it, but also by the supreme court of the United States itself. I have not found any decision upon the exact point; but I am greatly oppressed by the thought that common justice may demand such a relaxation of the general rule as to matters adjudicated as to limit its operation, within very wide bounds, it is true, but still to such as will exclude a case precisely like this, so far, at least, as it affects taxation subsequent to the announcement of the final settlement of the constitutional doctrine. Otherwise, much injustice and inequality cannot be avoided. It is possible that it was with a purpose and desire to consider this phase of the question when it should come up that the supreme court, in the *Owensboro Case*, 173 U. S., at page 648, 19 Sup. Ct. 534, 43 L. Ed. 844, so explicitly withheld an expression of its opinion as to whether the principle of *res adjudicata* would apply to suits for taxes claimed for future years, in a case where there had been such a judgment as is here pleaded. It may be that the authorities, which are very strong, will not permit even such an exception to be grafted upon the general rule; and it may also be that I shall ultimately conclude that in any event it will be becoming, in view of the opinion in the case of *City of New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202, for this court to leave it to a higher tribunal to say

whether there should be any limitations upon the general rule as to the conclusive effect of judgments as between the parties to the litigation. But, as the decision of the motion for a temporary injunction does not absolutely require a final expression on the question, I shall leave it open for further consideration.

It has been suggested that, before any injunction is granted, the complainant in such a case should pay the amount of taxes which is fairly due from it. This is a principle certainly in force where a valid law leaves no doubt that something is due. But, if the claim of *res adjudicata* made by the complainant is maintained, such payment in this case has already been made. And, even if the principle could apply here at all, where the entire tax is contested, it can hardly be enforced until a final judgment has determined whether there is anything at all due from the complainant; and, besides, there appears to be manifest equity in the bill, so far as it seeks to enjoin the enforcement of section 3 of the act.

It is also insisted that for the case made by the bill there is an adequate remedy at law. The case of *Bank v. Stone* (C. C.) 88 Fed. 383, is a sufficient authority to the contrary. That case, it is true, was affirmed by a divided court (174 U. S. 408, 799, 19 Sup. Ct. 881, 43 L. Ed. 1187). And, besides, the relief sought as to section 3 of the act appears to be decisive of this question. It also seems to be settled upon the authority of *Hills v. Bank*, 105 U. S. 319, 26 L. Ed. 1052, and the cases there cited, that the bank itself may sue in cases like this, to protect the interest of its shareholders.

It follows that the complainant is entitled to an injunction *pendente lite*, restraining the defendants, and each of them, until the further order of the court, from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose, for any time or period previous to March 21, 1900, and also, until the further order of the court, restraining the defendants, and each of them, from collecting, either from the complainant or from any of the holders of shares of its capital stock, any taxes upon any of said shares upon any assessment or levy to be made therefor for any time subsequent to that date. The defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900; but not to make any collection of taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed are at a rate higher than is permitted by section 5219, Rev. St., and, if so, to what extent. Counsel will prepare the proper orders.

BELDING et al. v. HEBARD.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1900.)

No. 783.

1. STATE BOUNDARIES—LINE BETWEEN NORTH CAROLINA AND TENNESSEE.

It was the evident intention of the North Carolina cession act of 1789, by which Tennessee was ceded to the United States, to make the crest of the great mountain ranges extending across the state in a southwesterly direction the boundary of the ceded territory, and such intention must be given effect in determining the boundary from the cession act and the acts confirming its survey and location in 1821 by the joint commission, which was authorized to settle, run, and re-mark the line "agreeably to the true intent and meaning" of the act of cession.

2. SAME—CONSTRUCTION OF BOUNDARY ACTS.

The cession act calls for certain well-known natural objects in the boundary, among which is the "Great Iron or Smoky Mountain"; the next call being, "thence along the main ridge of said mountain to the place where it is called 'Unicoy' or 'Unaka' Mountain." The Tennessee river crosses the boundary between said two mountains, and the confirmatory acts, after locating the line to Bald Rock on the summit of the Great Smoky Mountain, "and continuing southwestwardly on the extreme height thereof" to the river, contain the following call: "From Tennessee river to the main ridge, and along the extreme height of the same, to the place where it is called 'Unicoy' or 'Unaka' Mountain." Immediately across the river from the point where the line strikes it is the end of Hangover ridge, which extends southwestwardly, and constitutes the "main ridge," leading from the river to the Unaka Mountain. Along such ridge, within eight miles from the river, are found two or three trees marked as state-line trees in the same manner as those in other parts of the boundary. Another line, designated by trees marked in the same manner, is found extending from the mouth of Slick Rock creek, which empties into the river half a mile to the westward, extending up said creek in a southwesterly direction some seven miles, thence westwardly along a spur to Fodder Stack ridge, thence south along said ridge until it intersects Hangover about eight miles from the river. On this line are 41 trees, the most of them along or near the creek; and all the line trees on both lines appear to have been marked in 1821. The average height of Fodder Stack ridge is some 800 feet less than that of Hangover. Neither the report of the commission nor the field notes of the surveyor are in existence. *Held*, that the evidence afforded by the marked trees along the westerly of the two lines was not sufficient to overcome the presumption in favor of the other line along Hangover, arising from the fact that it answered the two principal calls of the boundary acts,—that for a southwestwardly course, and that for the "extreme height" of the "main ridge."

3. SAME—CONTROLLING EFFECT OF CALLS FOR NATURAL OBJECTS.

The call in the confirmatory boundary acts, "From Tennessee river to the main ridge, and along the extreme height of the same," in the absence of further description, requires a straight line from the known monument on the north side of the river to the top of the main ridge, and cannot be answered by a line running up the valley of a creek to the west of such ridge for several miles.

4. SAME.

It is a universal rule that permanent natural objects called for in a boundary will control those which are less certain.

5. SAME—RECOGNITION AND ACQUIESCENCE.

It having been found as a fact from sufficient evidence furnished by the confirmatory acts of the two states, based on the report of the joint commission, and by the natural objects therein designated, that the state boundary was actually run and established along Hangover ridge, that boundary could not be changed by the action of the state authorities in

recognition of the other line claimed, unless such recognition has been so long and continuous on the part of both states as to create a mutual estoppel, and constitute an adoption of such line as the true and established boundary. It is not sufficient to create such estoppel or constitute such adoption that the surveyor general of Tennessee, in 1836, stopped the survey of lands adjacent to the boundary ceded by the Indians at the marked line of trees on Slick Rock creek, and that for that reason, and because of such marked trees, such line was generally reputed to be the boundary until 1882; it appearing that no grants of any of the lands in the disputed territory were made by North Carolina prior to 1853, and no settlers entered it until 1860, and very few thereafter, all of whom were squatters without title, who have claimed citizenship in one or the other state, as best served the interests of their landlords; and that since 1882 grants have also been made by Tennessee, and opinion as to the true boundary has been divided.

6. FEDERAL COURTS—EVIDENCE—FOLLOWING STATE DECISIONS.

In suits involving land titles the courts of the United States follow the rules established by state decisions as to evidence.

Appeal from the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

This is a bill to restrain trespass and remove a cloud from the title to a large tract of wild mountain land claimed to lie within the Seventeenth civil district of Monroe county, Tenn. The complainant claims title under a grant from the state of Tennessee. The defendants claim title to the same under a grant from the state of North Carolina. The title turns upon the location of the boundary line between the state of North Carolina and the state of Tennessee, and the object of the bill is to have the state line ascertained and determined between the Little Tennessee river and a mountain peak called "Stratton Bald," a distance of some seven or eight miles from the point where the state line crosses the Little Tennessee river. The claim of the complainant, Charles Hebard, is that the said state line crosses the Little Tennessee river about one-half mile below where Slick Rock creek runs into the river; thence directly to the Hangover ridge, and along the extreme height of that ridge to its junction with another ridge called the "Fodder Stack Ridge." This contention, if sustained, places the lands lying between the Hangover ridge and Slick Rock creek within the state of Tennessee, and confirms the title to Hebard under his Tennessee grant. The defendants, on the other hand, contend that the line crosses the Little Tennessee river at or near the mouth of Slick Rock creek, and runs up said creek, following its meanders, something over six miles; then up a ridge leading from the creek to the Big Fodder Stack, and then southwardly with the top of the Big Fodder Stack lead to its junction with the Hangover lead. In other words, defendants insist that for a distance of nearly six miles the state line follows Slick Rock creek, and that the lands lying east of the creek, and between it and the crest of the Hangover spur, were on the North Carolina side of the line, and therefore subject to grant by North Carolina.

The territory now comprising the state of Tennessee was ceded by the state of North Carolina, in 1789, to the United States. The cession act describes the eastern boundary line as follows: "Beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it, running thence along the extreme height of the said mountain to the place where the Watauga river breaks through it; thence a direct course to the top of the Yellow Mountain, where Bright's road crosses the same; thence along the ridge of said mountain, between the waters of Doe river and the waters of Rock creek, to the place where the road crosses the Iron Mountain; from thence along the extreme height of said mountain to where Nolichucky river runs through the same; thence to the top of the Bald Mountain; thence along the extreme height of the said mountain to the Painted Rock, on French Broad river; thence along the highest ridge of the said mountain to the place where it is called the 'Great Iron' or 'Smoky' Mountain; thence along the extreme height of the said mountain to the place where it is called 'Unicoy' or

'Unaka' Mountain, between the Indian towns Cowee and Old Chota; thence along the main ridge of the said mountain to the southern boundary of this state." The line here to be ascertained is included within the call beginning "thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka Mountain." The mountain whose extreme height is to be followed until Unaka Mountain is reached is the "Great Iron or Smoky Mountain." The necessity for a definite location and marking of the line became evident to both states, and in 1821, under acts passed by each state, a joint commission was appointed for the purpose of settling, running, and re-marking the boundary line. The Tennessee commissioners were appointed under an act which provided that the commissioners should "settle, run and re-mark the boundary line between this state and the state of North Carolina, agreeably to the true intent and meaning of the said act of the general assembly of the state of North Carolina, entitled: 'An act for the purpose of ceding to the United States of America certain western lands therein described.'" Acts Tenn. 1820, c. 22. The North Carolina act, providing for the running of the line, was substantially identical with the Tennessee statute above set out. 2 Ired. & B. Rev. St. N. C. p. 94. The joint commissioners did run and re-mark the line, and each state passed an act ratifying, confirming, and adopting the line as run and reported by the commissioners. Acts Tenn. 1821, p. 45, c. 35; 2 Ired. & B. Rev. St. N. C. p. 96. The Tennessee confirmatory act is as follows: "Be it enacted by the general assembly of the state of Tennessee, that the dividing line run and marked by Alexander Smith, Isaac Allen and Simeon Perry, commissioners for and on behalf of this state, and James Mebane, Montfort Stokes and Robert Love, commissioners for and on behalf of the state of North Carolina, which dividing line, as run by said commissioners, begins at a stone set up on the north side of Cataloochee turnpike road, and marked on the west side, 'Ten., 1821,' and on the east side, 'N. C., 1821'; running thence on a southwestwardly course to the Bald Rock, on the summit of the Great Iron or Smoky Mountain, and continuing southwestwardly on the extreme height thereof to where it strikes Tennessee river, about seven miles above the old Indian town of Tallassee, crossing Porters Gap at the distance of twenty-two miles from the beginning, passing Meigs' boundary line at thirty-one and a half miles, the Equovetty path at fifty-three miles, and crossing Tennessee river at the distance of sixty-five miles from the beginning; from Tennessee river to the main ridge, and along the extreme height of the same to the place where it is called the 'Unicoy' or 'Unaka' Mountain, striking the old trading path leading from the valley towns to the overhills towns, near the head of the west fork of Tellico river, and at the distance of ninety-three miles from the beginning; thence along the extreme height of the Unicoy or Unaka Mountain to the southwest end thereof, at the Unicoy or Unaka turnpike road, where a corner stone is set up marked 'Ten.' on the west side, and 'N. C.' on the east side, and where a hickory tree is also marked on the south side 'Ten., 101 M.,' and on the north side 'N. C., 101 M.,' being one hundred and one miles from the beginning; from thence a due course south two miles and two hundred and fifty-two poles to a spruce pine on the north bank of the Hiwassee river, below the mouth of Cane creek; thence up the said river the same course about one mile, and crossing the same to a maple marked 'W. D.' and 'R. A.' on the south bank of the river; thence continuing the same course due south eleven miles and two hundred and seventy-three poles to the southern boundary line of the state of Tennessee and North Carolina, making in all one hundred and sixteen miles and two hundred and twenty-three poles from the beginning, and striking the southern boundary line twenty-three poles west of a tree in said line marked '72 M.,' where was set up by said commissioners a square post, marked on the west side 'Ten., 1821,' and on the east side 'N. C., 1821,' and on the south side 'G.,' be, and the same is hereby ratified, confirmed and established as the true boundary line between this state and the state of North Carolina." The boundary is described in the North Carolina confirmatory act in words identical with those used in the Tennessee act, but concludes with these words: "The whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile." That part of the line here involved begins with the words, "from Tennessee river to the main

ridge, and along the extreme height of the same to the place where it is called the 'Unicoy' or 'Unaka' Mountain."

After some evidence had been taken, the circuit court "ordered that the cause be, and hereby is, referred to Asbury Wright, Esq., of Roane county, Tennessee, as special master, who will, from the proof on file and such other proof as shall be offered by the parties, report to the court the true state line between the state of Tennessee and the state of North Carolina, from the Little Tennessee river to the junction of the Hangover and Fodder Stack ridges, as run and located by the commissioners of the states of North Carolina and Tennessee in 1821, and confirmed by the respective legislatures of said states." A great mass of evidence was taken, and from the entire evidence the special master reported "that the line between the states of Tennessee and North Carolina, from the Little Tennessee river to the junction of the Hangover and Fodder Stack ridges, as run and located by the commissioners of said states in 1821, and confirmed by the respective legislatures of said states, crosses the Tennessee river at the point where it reaches the river on the northeast side, and from the river runs up the Hangover lead, as shown on complainant's map, and along the extreme heights of this ridge, * * * to the junction of the Hangover with the Fodder Stack." This report included a full finding of the facts material to the conclusion reached, some of which will be hereafter referred to. The defendants excepted generally and specially to the findings and conclusions of the master. These exceptions were overruled, and the conclusions of the master adopted, and a decree pronounced establishing the title of complainant. From this decision the defendants have appealed.

E. T. Sanford and T. F. McGarry, for appellants.

S. T. Webb and T. E. H. McCroskey, for appellee.

Before TAFT,¹ LURTON, and DAY, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The intention of the North Carolina cession act of 1789 was to make the crest of the great mountain ranges extending across the state of North Carolina in a southwestwardly direction the boundary line of the ceded territory. This is most evident from even a casual reading of the boundary line therein described. The Painted Rock on the French Broad river is a natural monument of great notoriety. From that point the calls in the cession act are, "Thence along the highest ridge of said mountain to the place where it is called the 'Great Iron' or 'Smoky' Mountain; thence along the main ridge of said mountain to the place where it is called 'Unicoy' or 'Unaka' Mountain, between the Indian towns Cowee and Old Chota." The part of the great mountain range called "Smoky Mountain" is well known, as is also that part of the same range southwest of Smoky Mountain called "Unicoy" or "Unaka" Mountain. There is no trouble about the location of these two great natural monuments in the line. The distance between the two is not less than 50 miles, and the only call which is locative of the line between the two is that the line is to run along "the extreme height of the said range, theretofore called the 'Great Iron' or 'Smoky' Mountain, to that part of the range or ridge called the 'Unicoy' or 'Unaka' Mountain." The commissioners representing the two states were not authorized to agree upon a new boundary, but to "settle, run, and re-

¹ This case was decided before Judge Taft resigned.

mark the boundary line * * * agreeably to the true intent and meaning" of the said cession act of 1789. It was clearly their duty to run and mark a line between the Great Smoky and Unaka Mountains "following the extreme height" of the mountain range connecting these two prominent points.

The line located by the commissioners, as shown by the two acts adopting it as the boundary between the two states, begins at a stone set up on the north side of Cataloochee turnpike, and properly marked. The course of the line from that stone for a distance of 101 miles is "southwestwardly," as repeatedly stated in the boundary acts referred to. From the Cataloochee stone the call is to run southwestwardly "to the Bald Rock on the summit of the Great Iron or Smoky Mountain," and continuing southwestwardly "on the extreme height thereof to where it strikes the Tennessee river, * * * crossing Tennessee river at the distance of sixty-five miles from the beginning." Between the Bald Rock and the Tennessee river several points on the line are called for, but we need not concern ourselves with them, inasmuch as the line to the Tennessee river is undisputed, and is not here involved. The point where the commissioners' line reaches the Tennessee river, now known as the "Little Tennessee River," is one of the fixed and settled questions on this record. The line on the northeast side of the river is well located, and a fore and aft state-line pine tree is standing very near the bank of the river, one-half mile below the point where Slick Rock creek empties into the river on the opposite side. The special master reports that this pine tree on the northeast bank of the river is a state-line tree, marked as a state-line fore and aft tree, the marks showing by annular lines that it was so marked in 1821. He also reports that the parties agreed before him that the line was well established to that tree. The controversy begins, then, at the point where the line reaches the Tennessee river at this well-established monument. The next point in the line as located by the commissioners, upon which all parties agree, is the point where two ridges make a junction southwest of the Tennessee river. One of these ridges is known as the "Hangover" and the other as the "Fodder Stack." This point of junction is about nine miles from the fore and aft pine tree on the northeast bank of the river. The disagreement is as to the true location of the commissioners' line between these two well-located points in the line. Returning to the line as located by the joint commission, we find the next call, after striking the Tennessee river, is in these words: "From Tennessee river to the main ridge and along the extreme height of the same to the place where it is called the 'Unicoy' or 'Unaka' Mountain." Just here it may be observed that the Unicoy or Unaka Mountain is about 15 miles in a southwesterly course from the junction of the two ridges spoken of heretofore. How did the commissioners locate the line between the Tennessee river and the Unaka Mountain? It is to be borne in mind that their authority was to "settle, run, and re-mark" the line "agreeably" to the cession act. The Tennessee river was a water course, which cut a deep gorge through the main mountain range which the line was following be-

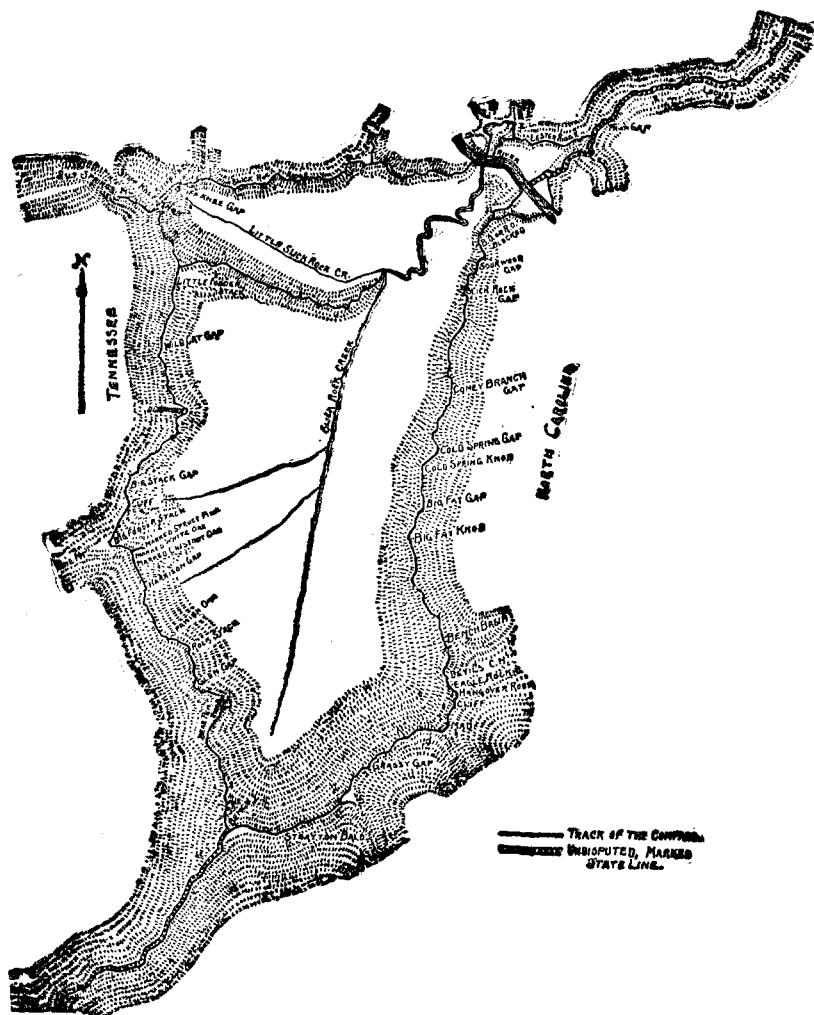
tween the Smoky and the Unicoy Mountain. The cession act placed the boundary "along the extreme height of said mountain (that is, the Great Smoky) to the place where it is called 'Unicoy' or 'Unaka' Mountain." It was the duty of the commissioners to locate the line "agreeably" to this call. They had been following the extreme height of the ridge between the Smoky and the Tennessee river. The river cut through the ridge by a deep gorge, the mountain on either side gradually lowering, and terminating at the river in a bluff. The last monument on the northeastern side is a tree marked as a fore and aft tree. A fore and aft tree is a tree in the line, and the chops are on the sides showing the direction of the line. The chops on this tree indicated that the line there crossed the river. The general course of the line, as called for by the call which brought the line to the river, was southwesterly, and this course was to be continued to the Unaka. The course would, therefore, require the line to there cross the river, as also indicated by the chops on the tree. The general direction of the cession act would keep the line on the extreme height of the mountain ridge or range. Immediately across the river, and in the general course of the line, was the Hangover ridge. This ridge is joined by another ridge called the "Fodder Stack," some eight or ten miles southwest. Its height increases after it leaves the river, and the highest points between the river and the junction with the Fodder Stack are the Hangover and Hao peaks, the former having an altitude of about 4,500 feet. From the point where it is joined by the Fodder Stack ridge or spur, it is admittedly the main ridge, and further southwest becomes the Unicoy or Unaka. From the river the general course of Hangover is southwesterly, and therefore in the general course of the line as described in the cession act. One-half mile below the state-line fore and aft tree, a creek known as "Slick Rock Creek" empties into the river on the opposite side. That creek is some eight or ten miles in length, and has one or more branches. A short distance below its mouth a low spur approaches the river, called "Slick Rock Spur," being a spur of Fodder Stack ridge. Some seven miles up the creek another spur of Fodder Stack is found. The basin of the Slick Rock is about eight miles long and three miles wide. It is bounded on the south and southeast by the Hangover ridge, on the north and northwest by the Fodder Stack ridge, and on the north and northeast by the Tennessee river and the Slick Rock ridge. The mountains shutting it in are from 1,000 to 4,000 feet high, and the basin itself is a rough, broken mountain valley, almost impenetrable by man. The master reports that the Hangover ridge was the main or highest ridge, having an average height of 800 feet greater than the Fodder Stack.

It is admissible, in locating a line, where a difficulty exists in identifying monuments, natural or artificial, to run the line in a reverse way, if thereby doubts may be the better solved. "The footsteps of the original surveyor may be traced backward as well as forward." *Ayers v. Watson*, 137 U. S. 584, 590, 11 Sup. Ct. 201, 34 L. Ed. 803; *Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063. So any ascertained monument may be adopted as a starting point, where difficulty

exists in ascertaining the lines of a survey as actually run. *Ayers v. Watson*, 137 U. S. 584, 11 Sup. Ct. 201, 34 L. Ed. 803. We have two established points in the line as actually run by the state commissioners of 1821, between which points the disputed line exists. One point is the fore and aft tree on the northeastern side of the Tennessee river, and the other is some eight miles southwest from that tree, being the well marked line on the height of Hangover, where a junction is made with the Fodder Stack ridge. If we reverse the survey, and take this junction of the two ridges, or leads, as they are sometimes called, as a starting point in running backwards, one cannot doubt but that the line should follow Hangover to the river. The Fodder Stack ridge would not be observed by surveyors who had reached that point while following the highest ridge from Unicoy or Unaka, for it branches off several hundred feet below the crest of the Hangover, and the fact that a spur was there could only be learned by going down the mountain from three to four hundred feet. To abandon the Hangover in running backwards would also involve a change in direction from northeast to north, and then northwest and then west, and the Tennessee river would not be reached at all but by again diverging and following one or other of two lateral spurs. This situation is most plainly shown by the map of appellees, adopted by the master, as correctly showing the general course of the ridges or leads at the locality in question. This map is here shown upon a much reduced scale.

If the joint commissioners obeyed the call to follow the highest mountain tops, and adhered to the course pointed out in the cession act, they undoubtedly located the line on the Hangover; and if we follow the line which they reported and adopted, whether we endeavor to track them backward or forward, we must conclude from the call for the "main ridge" and "along the extreme height thereof," in the act adopting their survey, that they did in fact locate the line on the Hangover between the river and the junction of the Hangover and the Fodder Stack. The Hangover is undoubtedly the "main ridge" called for in the survey made by the commissioners, and definitely locates the line, unless there appears such definite and positive evidence of another and different actual location of the line as to justify us in finding that the line as described and located by natural monuments is not in fact the line actually run and marked and adopted by the commissioners. Every presumption is that the commissioners obeyed the directions of the cession act, and so, also, every presumption is that the line as actually run, marked, and adopted was a line which conforms to the call to follow the extreme height of the "main ridge" from the Tennessee river to Unaka.

But appellants say that they have shown a well-marked line from the mouth of Slick Rock creek, which follows the meanders of that creek for about seven miles, and then runs up a spur of the Fodder Stack, and connects with that ridge at the peak called "Little Fodder Stack." The Fodder Stack ridge does not run to the Tennessee river at all. North of the peak called "Little Fodder Stack" its general course is to the northwest. It cannot, therefore, be regarded in any sense as the "main ridge" called for by the survey of the joint commission, irrespective of the fact already noticed that its average altitude



is about 800 feet less than that of the Hangover, which does start at the river immediately opposite the main ridge on the northeast side of the river, and upon which the line on that side is confessedly located. From the top of the Fodder Stack the appellants claim that the state line runs south with the summit of that ridge to its junction with the Hangover ridge, which from there runs southwest. To support this contention appellants rely upon the fact that between the mouth of Slick Rock and the junction of Hangover and Fodder Stack ridges they show 41 trees marked as state-line trees, and from this circumstance they contend that this was the line actually marked by the commissioners, and adopted by them as the line, and that the calls for course and the "main ridge" must yield to the actually marked

line. That the commissioners marked the line run by them is made clear by the existence of a marked line over those parts of the undisputed line on either side of the place in dispute. The North Carolina act of 1821, adopting and confirming the survey of the commission, concludes with the words, "the whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree." These words of description do not appear in the Tennessee act of 1821, and neither the original report of the commissioners nor the surveyors' field notes are in existence. The marked trees on this line are shown by blocking to have been probably made in 1821, and correspond in appearance to those existing in the undisputed line. They are strangely scattered along the line claimed. About one-half of the whole number are found within $1\frac{1}{2}$ miles of the mouth of the creek. Then for a distance of $3\frac{1}{2}$ miles not a marked tree is shown, though the line is still in the valley, where there was and is a great abundance of timber. Then, where the line is claimed to have left the creek, there are found a great number of marked trees within a short distance after starting up a spur leading to the Fodder Stack, but from the junction of this spur with the Fodder Stack to the Hangover only two or three trees are found. It is most difficult to account for this line of marked trees, irregularly as they are grouped. The probabilities are that they were marked by the commission. For what purpose? is the question. Their evidential value as establishing the actual state line is greatly impaired by the following circumstances: (1) The line thus marked is not upon the course which is called for by the survey as reported and adopted. (2) It departs from the line of the "main ridge," called for in the commissioners' survey, and a natural monument of the utmost significance. When a monument, natural or artificial, is called for, and its identity is doubtful, great importance may be properly attached to an actually marked line upon the ground. But in this instance there was no reasonable doubt as to the identity of the "main ridge" called for in the commissioners' survey. The greater altitude of the Hangover ridge, as well as its general course, makes it most clear that there could have been no difficulty in determining that the Hangover, and not the Fodder Stack, was the "main ridge." It is, therefore, not a case of ambiguous calls, or doubt as to the identity of a natural monument in the description. The indisputable facts that the Hangover is much the greater in elevation, was in the direct course called for by the cession act, and was indicated by the chops on the established monument on the north side of the river, leave no reason for supposing that the commission mistook the Fodder Stack ridge as the "main ridge," and undertook to reach it by a line up the creek. (3) If we adopt the Slick Rock creek line, we must believe that the commissioners not only turned down the river at an acute angle from the course they had been following, followed the river for half a mile, and yet made no call in their report which would indicate such a departure, or that the river was made the boundary for any part of the line. (4) We must also believe that, instead of following a mountain boundary, which, according to the cession act, ran with the summits of the highest mountains, they deliberately abandoned the heights of the mountain ranges, and followed

a water course from its mouth for seven miles, and yet made no mention of this natural object in their report whatever. (5) The significance of these trees as marking the state line is also affected by the fact that other trees similarly marked are found on the Fodder Stack ridge, which, confessedly, are not upon any line now claimed as the actually located state line. The surveyors who testify to such trees express the opinion that they were marked to designate Indian trails. As this whole region was the habitat of the Cherokee Indians at the time of this survey, in 1821, it is altogether possible that all of this marking was done by the Indians as mere trail marks, or in a spirit of imitation, though the stronger probability is that it was tentatively marked, and then abandoned for the Hangover line, as the one indicated by the cession act, and the report made accordingly. (6) But the significance of the marked trees on the Slick Rock creek line is also weakened greatly by the fact that two, and possibly three, old marked state-line trees are found on the Hangover line. One of these trees is a black or red oak, and the other a sourwood. These trees stand on the summit of the Hangover ridge. The question as to whether they bore the proper marks for state-line trees marked in 1821 was much controverted. The master, after seeing and hearing most of the witnesses, and weighing the evidence, and seeing the blocks cut from the oak, reached the conclusion that the marks were state-line marks made in 1821, and so reported. In this conclusion the learned trial judge concurred. Giving to the finding of the master the weight properly attachable to it by the well-settled rule in that regard, we are unable to see any solid ground for rejecting his conclusion that these disputed trees are state-line trees, and marked as such in 1821 by the state commission. *Kimberly v. Armes*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Medsker v. Bonebroke*, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Singleton v. Felton* (decided at this term by this court) 101 Fed. 526. We have, then, two lines run and marked. One is the better marked, possibly because it passed through more timber, and timber better adapted to carry the marks than the other, which followed a rocky, barren, mountain ridge, where the trees, as shown by the evidence, were scrubby and scarce. The other line, though more scantily marked, is found just where the course and natural monuments called for in the report of the survey would locate the line if neither had been marked. That the line ought to run on the extreme height of the Hangover ridge from the Tennessee river to the Unaka mountain, if the calls of the confirmatory boundary acts of both states are to control, is most evident.

The order of applying descriptions of boundaries is first to natural objects, course, and distances. In *Brown v. Huger*, 21 How. 306, 318, 16 L. Ed. 125, 129, the court said:

"In ascertaining the boundaries of surveys or patents, the universal rule is this: that whenever natural or permanent objects are embraced in the calls of either, these have absolute control, and both course and distance must yield to their influences."

In *Newson v. Pryor*, 7 Wheat. 10, 5 L. Ed. 382, it was laid down as a rule that the most material and certain calls must control

those that are less certain and material. The rule in Tennessee is not different. A call for a natural object will control unless it is shown that monuments of boundary were made at the time of the execution of the deed, and adopted as the boundary. *Massengill v. Boyles*, 4 Humph. 206. In *Bishop's Lessee v. Arnold*, Peck, 366, Haywood, J., said:

"When the consideration of questions of boundary first came before the courts in North Carolina, it was with difficulty the courts could bring themselves to depart from the calls of the grant, under the rule of evidence that parol proof should not be received to add to or detract from a written instrument, and the law to this day is, if the grant is intelligible on its face, it must not be departed from; but, many mistakes having intervened in making surveys, plats, and certificates, and filling the calls in grants, it was at length permitted to show the mistake by proofs."

The description of the boundary as run and marked by the commissioners calls for a course from one natural object, the Tennessee river, to another, the Unaka Mountain. In the absence of any further description, the line should be run straight from one monument to the other. 3 Washb. Real Prop. side p. 632; *Burnett v. Jones*, 51 N. C. 210; *Jenks v. Morgan*, 6 Gray, 448; *Caraway v. Chancey*, 51 N. C. 364. The first call in the boundary act of both states is "from the Tennessee river to the main ridge." There are no words of intermediate description. The line should, therefore, be a straight one from the last monument on the river, the fore and aft pine tree, to the "main ridge." There being no possible doubt as to the identity of the "main ridge" referred to, there can be no doubt on the face of the description following that the line should then run "along the extreme height of the same" to the next natural monument, to wit, "to the place where it is called the 'Unicoy' or 'Unaka' Mountain." Finding, as we do, upon the line thus located by identified natural objects, two old state-line marked trees, marked, as shown by blocking and examining the annular growth, in 1821, we have no difficulty in agreeing that the line, as run and marked by the commissioners in 1821 was the Hangover line, as found by the special master, and as claimed by the appellees. The probabilities are that the surveyors tentatively or experimentally marked the line up Slick Rock creek. Discovering that thereby they made a radical departure from the "extreme height" of the mountain chain called for by the cession act of 1789, they abandoned the creek, and ran, adopted, and reported the line as running along the extreme height of the "main ridge," now known as "Hangover Ridge." This is the only reasonable explanation consistent with the absence of descriptive words calling for a line running down the Tennessee river, and then up Slick Rock creek. But it is insisted that the Slick Rock creek line has been long recognized as the line by both North Carolina and Tennessee, and by reputation and adoption has come to be the actual line, though not originally so run and marked. In the case of *Virginia v. Tennessee*, 148 U. S. 503, 522, 13 Sup. Ct. 728, 37 L. Ed. 537, where the question was a disputed boundary between Virginia and Tennessee, the court said:.

"Independently of any effect due to the compact as such, a boundary line between the states and provinces, as between private persons, which has been run out, located, and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the course given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary."

But the court was there considering the effect of acquiescence upon a line run and marked by the commission of each state, which had been long recognized by both states as the true line, though, in fact, as afterwards discovered, it departed from the line called for in the grant which ought to have been pursued. That is not this case. Upon the facts stated, the Hangover line was run, marked, and adopted by the commissioners as the line called for and described in the cession act. From 1821 down to 1836 there is nothing in this record tending to show that either state, nor any persons, were claiming or recognizing the experimental line on Slick Rock creek as the line. The tentative line on the creek seems to have been first treated as the state line as late as in the fall of 1836, when the Tennessee surveyor general stopped a survey of the Cherokee lands ceded to Tennessee in that year, and which included the disputed strip at Slick Rock creek. Evidence as to the reputation of the creek line of trees as marking the state line, and of other acts indicating a recognition of that line as the actual line, must be unavailing, unless it is persuasive enough to satisfy the legal mind that the state commissioners ran, marked, and adopted the Slick Rock creek line as the true line, although it is a radical departure from the description in the cession act, and contradicted by the description they themselves reported of the line they had run and adopted; or such evidence must show such a long and continuous recognition by both states of the creek line as to operate as an estoppel to deny that it was the line run and marked and adopted in 1821. Let us look at the evidence which is to be strong enough to pull the line away from the location indicated by the natural and definite monuments described in the survey. The matters chiefly relied upon by appellants are these:

(1) In 1836 the Cherokee Indians ceded to the United States their lands lying in both North Carolina and Tennessee, and the United States ceded to Tennessee the lands so acquired within that state. The Tennessee legislature, October 18, 1836, passed an act constituting said lands a surveyor's district, to be known as the "Ocoee District," and directed the surveyor general of the state to survey said lands, and plat them off into ranges, townships, and sections. The surveyor general accordingly did survey and plat said lands, and the plat shows that he stopped his survey at Slick Rock creek, and made that the eastern boundary of the Ocoee district. This resulted in leaving unsurveyed a strip of the Cherokee lands lying between the creek and Hangover, some three miles wide and six miles long, and is the land now in dispute. Until 1854 there was no law under which the unplatted Ocoee lands could be granted. But in 1854 an act was passed providing for the entering and granting of lands in the Ocoee district, "whether the same appeared on

the map of the district or not." Acts Tenn. 1854, c. 22. The defendants below, by authority of this act, entered the lands now in controversy in 1882, and carried them into a grant in 1892.

(2) A direct consequence of the omission of the surveyor general to survey and plat the land east of the creek was to give rise to the reputation of the creek as the state line, although it is not so shown by his plat, nor by any report made by him. The fractional sections in the Ocoee district bounded on the creek were granted by Tennessee as fractional sections, though none of the grants call for the creek as the state line. The subsequent deeds of the grantees do frequently refer to the creek as the state line, though none of these fractional sections appear to have been conveyed by deeds so describing the creek earlier than 1853.

(3) In 1837, North Carolina made provision for the sale of the lands acquired by her through the Cherokee cession, but no surveys or grants within the disputed lines were made by that state before 1853. Two entries of land appear to have been made under North Carolina entries in 1853, another in 1859, and in 1860 grant No. 2,784, for 14,800 acres, was issued to Gilbert and Peet, under an entry made in 1853, and surveyed in 1856, under which grant the appellants claim.

(4) To further support the claim that the creek has been recognized as the state line, the defendants sought to prove by one Jones certain declarations made to him by one Thos. Hensley, deceased, that he (Hensley) had been with the surveyor general's party a part of the time when the Ocoee district was surveyed, and that Hensley said the survey was stopped at the creek because it was the state line. This was rejected. Hensley's connection with the party of the surveyors was not shown, and his declaration amounted to nothing more than the statement of his opinion on the subject. As the declaration of a deceased person touching the location of a disputed boundary, it was possibly competent, under the Tennessee decisions holding that the declarations of deceased persons as to the location of a boundary line of land, made previous to the litigation, are competent. *Beard v. Talbot*, Cooke, 142; *Holland v. Overton*, 4 Yerg. 486; *McCloud v. Mynatt*, 2 Cold. 163. In a suit involving land titles, the courts of the United States follow state decisions upon questions of evidence. *Clement v. Packer*, 125 U. S. 309, 8 Sup. Ct. 907, 31 L. Ed. 721; *Ayers v. Watson*, 137 U. S. 584, 596, 11 Sup. Ct. 201, 34 L. Ed. 803. There was admitted in evidence, under the rule stated above, evidence as to the declarations of several deceased persons, some of whom claimed to have been with the state commission of 1821, as to their understanding of the location of the line on Slick Rock creek. There was conflicting evidence locating the line by reputation. There was little in all this of any moment. The line at the point ran through an uninhabited wilderness, almost inaccessible. The fact of a visible line of marked trees on Slick Rock creek, observed by a few adventurous hunters, would naturally start the tradition that the state line was on the creek. The same fact doubtless influenced the surveyor general, and his omission to plat the lands east of the creek would con-

firm the reputation of that line. Not more than a half dozen persons are shown to have ever lived within the disputed lines, and there is a conflict as to whether they regarded themselves as living in Tennessee or North Carolina until after 1882, when they, or the greater number, being mere squatters, began to hold under one or other of the contending titles, and to locate the line to suit their landlords. None of them go back beyond the North Carolina grant under which appellants claim, which bears date in 1860. Since 1882, when appellees obtained their grant from Tennessee, most of these inhabitants, if not all, have attorned to appellees, and have since voted in Tennessee, and hold themselves out as citizens of the Seventeenth civil district of Monroe county, Tenn. No active exercise of jurisdiction over the disputed territory is shown by either state, aside from the issuances of entries or grants to any who chose to apply. As the greater part of their large grant is indisputably in North Carolina, the appellants have paid taxes on the whole in that state. The fact is that the locus in quo is so inaccessible, so worthless for agricultural purposes, and so uninhabited, as to make the active exertion of jurisdiction by either state of no consequence. The land is now supposed to be valuable for timber and mining purposes, hence the present suit.

To sum up the case:

1. The calls of the cession act of 1789, if followed, would locate the line on the Hangover ridge.
2. The legislation of both states, providing for the survey and marking of the line, required the commissioners to locate the line described by the cession act.
3. The calls of the confirmatory acts of 1821 of both states, if followed, locate the line on Hangover.
4. The commissioners did run and mark a line on Hangover, and two state-line trees are identified and established as state-line trees on that ridge.
5. The commissioners also ran and marked a line along Slick Rock creek, which connects ultimately with the Hangover line at the junction of the Fodder Stack with Hangover.
6. Between 1821 and 1836 the disputed strip between these lines was a part of the land occupied by the Cherokee Indians, who in that year ceded their land to the United States; the Cherokee lands on the North Carolina side being subsequently ceded to North Carolina, and those within Tennessee to the latter state.
7. Between 1836 and 1853 the disputed region was an uninhabited wilderness, and neither state actively asserted any jurisdiction.
8. In 1836, Tennessee caused the Cherokee lands ceded to her to be laid off into a land district called the "Ocoee District." The surveyor general omitted to plat or survey the lands between the marked line on Slick Rock creek and Hangover, and bounded his survey by Slick Rock creek.
9. Between 1853 and 1882 grantees under Tennessee, in conveying fractional sections within the Ocoee district, described Slick Rock creek as the state line.

10. After the Ocoee survey, in 1836, and down to 1882, the marked line on Slick Rock creek was reputed to be the state line.

11. Between 1853 and 1860 North Carolina entries and grants were made between the two lines.

12. In 1854, Tennessee, by law, provided for the entering and granting of lands in the Ocoee district, whether platted and surveyed or not, though the act did not assert that there were such unsurveyed lands.

13. In 1882 the entries under which the complainants claim, or a part of them, were made within the disputed lines, and in 1892 the complainants' grantors obtained a grant.

14. After 1882 there was a divided opinion and reputation as to the location of the state line, and since that time the few inhabitants have voted and paid taxes in Tennessee, though the appellants have paid taxes on their grant in North Carolina.

15. The region remains almost uninhabited and inaccessible. Neither state is shown to have exercised jurisdiction over it save by issuing entries and grants as stated.

16. The true line, as actually located in 1821, was the Hangover line.

17. There has been, on the evidence in this record, no such long and continued recognition or acquiescence in the tentative line on Slick Rock creek as to justify this court in saying that it has been adopted as the actual line so long as to stand for a definition of the true and ancient boundary. The conclusions and findings of the master upon the principal points in the case are not shown to have been so plainly erroneous as to justify us in overturning his conclusions as to the existence of the marked state-line trees on the Hangover, nor as to the fact that the Hangover was palpably the "main ridge" called for in the commissioners' report and survey.

The case, on the whole, is one not free from doubts engendered by the existence of the marked line on Slick Rock creek and its apparent recognition by the Tennessee surveyor general as the state line. The result reached by the special master, and confirmed by a most careful and conscientious trial judge, is a result which on the whole is most consonant with the calls in the cession act and the subsequent confirmatory boundary acts. The evidence relied upon to deflect the boundary from the line so plainly described by both acts settling the boundary is not so conclusive as to require us to reverse the action of the circuit court. The decree will therefore be affirmed.

FAYERWEATHER et al. v. TRUSTEES OF HAMILTON COLLEGE et al.

(Circuit Court, S. D. New York. July 12, 1900.)

1. EQUITY—PLEADING FORMER ADJUDICATION—DUPLICITY.

A plea setting up the record of a former suit as a prior adjudication is not double because such adjudication is comprised in the judgments of the court of original jurisdiction and of successive appellate courts to which the suit was carried.

2. SAME—VERIFICATION OF PLEA.

Where a plea filed on behalf of a corporation is verified by affidavit, as required by equity rule 31, the affixing of the corporate seal to such plea is not essential.

Hearing on complainant's pleadings and proofs of the plea of the trustees of Hamilton College to the bill of complaint and of plea of same to the cross bill.

H. L. Stimson, for the plea.

Roger M. Sherman and William Blaikie, opposed.

LACOMBE, Circuit Judge. Careful examination of the ingenious and exhaustive brief submitted in support of the bill and cross bill has failed to convince the court that, so far as the merits of the controversy presented by these pleadings are concerned, the pleas are not sound, and supported by the proofs. It is constrained so to hold by the decision of the circuit court of appeals on the appeal from the order of injunction. It may be difficult to follow the reasoning by which that court reached the conclusion that there had been an adjudication sustaining the proposition that the releases executed by the widow and next of kin were valid, and not procured by fraud; but that conclusion certainly was reached, and was expressed with no uncertain sound. No doubt, the ultimate result of the litigation in the state courts has been by refined technicalities to render inoperative, so far as this estate is concerned, the provisions of a statute which seems to be the conception of a wise and commendable public policy. That circumstance, however, is immaterial. As the circuit court of appeals expresses it, "even if there has been a miscarriage of justice, [the parties] must submit." Since the former appeal the complaint has been amended and cross bill served, whereby relief is sought, not only to impugn the probate of the will and its codicils so far as they were admitted to probate, but also to establish a codicil alleged to have been unlawfully destroyed, and, if no valid will can be established, to administer and dispose of the estate as in case of intestacy. But this in no way changes the situation. The release bears date subsequent to the transactions on which this prayer for relief is predicated, and, if valid, is a flat bar to the granting of any part of the relief asked for. Whether the adjudication in the state court would or would not be a bar to relief upon the additional matter charged in the amended bill and in the cross bill, the release is as effectual a bar to the new matter as it was to the old matter set out in the bill as it stood on appeal to the circuit court of appeals. The plea does not set up the release in bar, but it does set up the proceedings in the state court, which the circuit court of appeals has held to constitute an adjudication that that particular release was made, is valid, and no longer open to attack. Both release and adjudication are proved, and under the decision on the appeal from injunction there is nothing to do except to sustain the pleas, and dismiss the bill and cross bill. Under these circumstances the court will not be astute to find errors

of form in the plea. The plea in this case is not double. It sets up the record of but a single suit as an adjudication, although the decisions of the court of original jurisdiction and of the successive appellate tribunals which disposed of that suit together make up the adjudication upon which defendant relies. As to lack of a corporate seal to the plea, the language of equity rule 31 requires that a plea be "supported by the affidavit of the defendant that it is not interposed for delay, * * * and that it is true in point of fact." This requirement seems to be comprehensive, and, when the plea of a corporation is thus verified, the affixing of its corporate seal to the plea may be dispensed with.

FAYERWEATHER WILL CASES.

(Circuit Court, S. D. New York. July 12, 1900.)

EQUITY—PLEADING FORMER ADJUDICATION—DUPLICITY.

A plea setting up, as former adjudications, judgments in two separate suits or proceedings, is bad for duplicity.

On Pleas to Amended Bill and Cross Bill.

H. L. Stimson, for the motion.

Wm. Blaikie, opposed.

Henry T. Fay, Charles F. Bishop, John E. Parsons, Russell & Holmes, William F. Upson, R. J. Hare Powell, and Thomas H. Hubbard, for pleas.

Roger M. Sherman and William Blaikie, opposed.

LACOMBE, Circuit Judge. The pleas of defendant to the amended bill and the cross bill are sustained, and the amended bill and cross bill dismissed, as to each of the following defendants: Lafayette College, Cornell University, Marietta College, Thomas G. Ritch, Adelbert College, Justus L. Bulkley, Henry B. Vaughan, Bowdoin College, Yale College, Wesleyan College, Manhattan Eye & Ear Hospital, Dartmouth College, Presbyterian Hospital, and St. Luke's Hospital,—in conformity to the views expressed in *Fayerweather v. Trustees of Hamilton College* (decided to-day) 103 Fed. 546. The exceptions to the pleas of Amherst College, Williams College, and Union Theological Seminary for duplicity are sustained. They set up an additional adjudication (by the surrogate), as well as the adjudication in the Five Colleges suit, which is set up in all the pleas.

UNITED STATES v. OREGON CENTRAL MILITARY ROAD CO. et al.

(Circuit Court, D. Oregon. June 30, 1900.)

1. PUBLIC LANDS—GRANT FOR WAGON ROAD—LOCATION THROUGH INDIAN RESERVATION.

Act July 2, 1864 (13 Stat. 335), made a grant of lands to aid in the construction of a wagon road from Eugene City, Or., to the eastern boundary of the state, to be selected within three miles of such road, the route for which was not prescribed, beyond requiring it to cross the Cascade Mountains through the most feasible pass near Diamond Peak. Prior to this act, congress had authorized the president to conclude a treaty with the Klamath, Modoc, and Snake Indians for the purchase of the country occupied by them in Southeastern Oregon (13 Stat. 37), and in pursuance of such authority a treaty was made with the Indians October 14, 1864, by which a tract within such country was reserved for the perpetual occupancy of the Indians, and the remainder was ceded to the United States. This treaty was ratified by the senate in 1866, with certain unimportant verbal corrections, which were ratified by a convention with the Indians December 10, 1869, and the treaty was formally proclaimed by the president February 17, 1870. It went into effect, however, for all practical purposes, in 1866, from which time appropriations were made by congress, and buildings and improvements erected on the reservation as therein provided. In 1869 the road company completed its road to a point 30 miles north of the reservation, and during that year filed a general map of its further location, extending southward through the reservation so as to include within the land-grant limits the most of the arable land therein, which the company claimed under its grant, and for a portion of which it received patents from the land department on completion of its road. *Held*, that the grant did not operate to at once deprive congress of the power to dispose of any of the public lands in Eastern Oregon awaiting the pleasure of the grantee in locating its road, and that the grantee acquired no title thereunder to any of the lands within the reservation as against the Indians who were in occupancy, and whose rights were reserved in the same treaty by which they ceded the remainder of their lands, and as a part of the consideration for such cession; nor did it acquire the title subject to the right of occupancy by the Indians, who were given by the treaty the right to obtain allotments of lands within the reservation in severalty, and to hold the same in perpetuity unless thereafter sold by the United States for their benefit.

2. SAME—PURCHASER FROM GRANTEE—NOTICE OF DEFECTS IN TITLE.

A purchaser from the road company of the lands which had been certified to it under its grant, including those within the Indian reservation, which were at the time of the purchase occupied by the Indians, and on which buildings and improvements had been placed by the government, was chargeable with notice of the Indians' rights therein under the treaty, and cannot claim, as a bona fide purchaser, to stand on any better ground as against such rights than the original grantee.

3. SAME—CANCELLATION OF PATENTS—BONA FIDE PURCHASERS.

A purchaser from the grantee of lands which have been patented or certified under a grant for a public improvement is not chargeable with notice of matters of fact which may affect the grantee's title, such as the location of the limits of the grant, but is entitled to rely on the presumption that such facts were correctly ascertained by the land department; and as against such a purchaser the United States is not entitled to a cancellation of a patent on the ground that it was erroneously issued for lands which were not in fact within the limits of the grant.

4. JUDGMENTS—RES JUDICATA—MATTERS CONCLUDED.

The judgment in an action brought, pursuant to an act of congress, to determine whether a road company had complied with the terms of a land

grant, and, if not, to recover the lands certified or patented thereunder, does not constitute an adjudication which will bar a second suit by the United States to cancel patents issued under the same grant, on the ground that the lands thereby conveyed were not within the grant, where there is no issue in the second suit which was litigated in the first.

In Equity. Suit by the United States to cancel certain certificates and patents to lands issued under a grant to aid in the construction of a wagon road. On pleas and demurrer to cross bill.

John H. Hall, U. S. Dist. Atty.

Dolph, Mallory, Simon & Gearin and Britton & Gray, for California & Oregon Land Co.

BELLINGER, District Judge. On July 2, 1864, congress granted to the state of Oregon, to aid in the construction of a wagon road from Eugene City, across the Cascade Mountains, to the eastern boundary of the state, alternate sections of public land, designated by odd numbers, for three sections in width on each side of such road. 13 Stat. 355. Prior to this act, on March 25, 1864, congress passed an act authorizing the president to conclude a treaty with the Klamath, Modoc, and Snake Indians, in Southeastern Oregon, for the purchase of the country occupied by them. 13 Stat. 37. In pursuance of this authority a treaty was concluded on October 14, 1864, with the head men of the Modoc and Snake Indian tribes. This treaty was ratified by the senate on July 2, 1866, with two amendments, consisting of mere verbal corrections, in no wise affecting the sense of the treaty; but the amendments resulted in a second convention with the Indians, held December 10, 1869. The senate amendments were ratified at this convention, and the treaty was proclaimed by the president February 17, 1870. By this treaty the Indian tribes ceded to the United States all their right, title, and claim to the country then occupied by them, with this proviso:

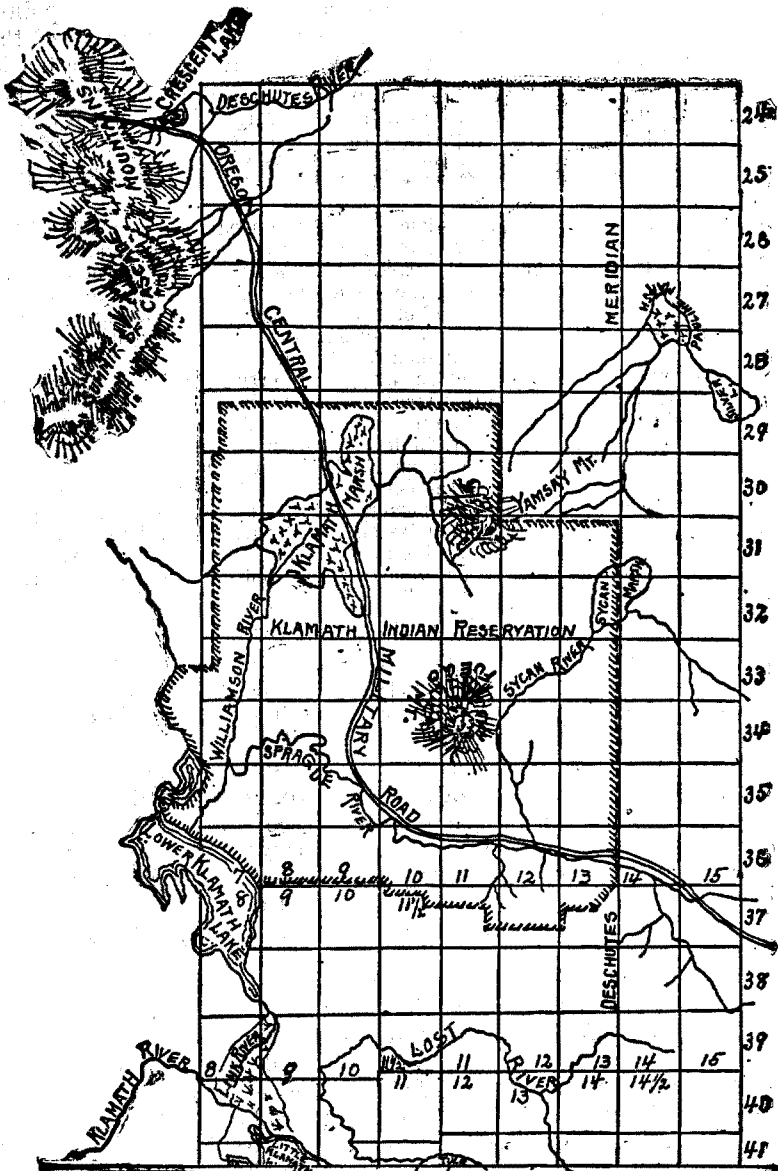
"Provided, that the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the president of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation, to wit: Beginning upon the eastern shore of the Middle Klamath Lake, at the Point of Rocks, about twelve miles below the mouth of Williamson's river; thence following up said eastern shore to the mouth of Wood river; thence up Wood river to a point one mile north of the bridge at Fort Klamath; thence due east to the summit of the ridge which divides the Upper and Middle Klamath Lakes; thence along said ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's river is intersected by the Ish-tish-ea-wax creek; thence in a southerly direction to the summit of the mountain, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning." 16 Stat. 708.

The treaty provided for annual money payments to be made to the Indian tribes, extending over a period of 15 years. It further provided for the payment for such articles as might be advanced to the Indians at the time of the signing of the treaty, for their subsistence during the first year after their removal to the reservation, the pur-

chase of teams, farming implements, tools, seeds, clothing, and provisions, and for the payment of the necessary employes. It was further provided that the United States would erect, at suitable points on the reservation, as soon as practicable after the ratification of the treaty, saw and flouring mills, suitable buildings for the use of a blacksmith, carpenter, and wagon and plow maker, buildings for one manual labor school, and such hospital buildings as might be necessary, and that it would keep these buildings in repair at the expense of the United States for the term of 20 years. Article 6 of the treaty provided as follows:

"The United States may, in their discretion, cause a part or the whole of the reservation provided for in article 1 to be surveyed into tracts and assigned to members of the tribes of Indians, parties to this treaty, or such of them as may appear likely to be benefited by the same, under the following restrictions and limitations, to wit: To each head of a family shall be assigned and granted a tract of not less than forty nor more than one hundred and twenty acres, according to the number of persons in such family; and to each single man above the age of twenty-one years a tract not exceeding forty acres. The Indians to whom these tracts are granted are guaranteed the perpetual possession and use of the tracts thus granted and of the improvements which may be placed thereon; but no Indian shall have the right to alienate or convey any such tract to any person whatsoever, and the same shall be forever exempt from levy, sale, or forfeiture: provided, that the congress of the United States may hereafter abolish these restrictions and permit the sale of the lands so assigned, if the prosperity of the Indians will be advanced thereby: and provided further, if any Indian, to whom an assignment of land has been made, shall refuse to reside upon the tract so assigned for a period of two years, his right to the same shall be deemed forfeited."

On the 24th of October, 1864, the state transferred the grant of lands provided for in the act of congress to the Oregon Central Military Road Company, a corporation incorporated under the laws of Oregon, for the purpose of taking the grant and building the road in question. By the wagon-road grant it was provided, in effect, that, when the governor of the state should certify to the secretary of the interior that any 10 continuous miles of said road were completed, a quantity of land, not exceeding 30 sections, might be sold by the company, and so on from time to time until said road was completed. On the 26th of December, 1866, congress passed an indemnity grant, extending 3 miles beyond the limits of the original grant on either side of the line of the proposed road. On the 27th of July, 1866, the governor of the state certified to the completion, in accordance with the requirements of the act of congress and the laws of Oregon, of the first continuous 50 miles of road, beginning at Eugene City. Thereafter, and on November 26, 1867, the governor of the state certified to the completion of the second section of the road for a distance of 42½ miles, and extending to Crescent Lake, in the valley of the Des Chutes. On the 17th of March, 1869, a map of the general route of the road over the Indian reservation, provided for in the treaty, to the eastern boundary of the state, was filed. The route thus located enters the reservation at its north boundary, continues thence south until near the south boundary, when it turns eastward and leaves the reservation, after traversing it for a distance of more than 60 miles, as shown by the following map:



BOUNDARY BETWEEN OREGON AND CALIFORNIA.

There was a supplementary map of such location filed on the 28th of February, 1870, but this was merely for the purpose of correcting certain unimportant errors in the map first filed, and is of no importance in the case.

The land department, acting upon the assumption that the location of the company's road over the reservation made the grant effective as well within the limits of the reservation as without, certified such lands as inuring to the company under its grant, and in some instances upon these certificates patents have issued. There were also certified and patented to the company lands without the reservation and indemnity limits of the road grant. To cancel these certificates and patents, this suit is brought against the California & Oregon Land Company, which company has succeeded to the title of the Oregon Central Military Road Company through conveyances made in 1874 to B. J. Pengra, and by Pengra and wife to Colby and others, promoters and organizers of the California & Oregon Land Company, to which company, upon its organization, Colby and his associates conveyed the title so held by them. A number of persons, purchasers of parcels of the lands in suit from the latter company, were made defendants in the suit, but as to these the bill has been dismissed upon the motion of the attorney for the United States. To the bill of complaint the defendant company has filed a double plea, fortified by its answer, setting up the defense of a former adjudication in this court of the matters involved in this suit, and that of bona fide purchase for value, without notice. The defendant road company also files its cross bill, praying that the United States, its officers and agents, be restrained and enjoined from proceeding to make allotments of the reserved lands among the Indians, or issuing to any of them any patent of any kind or character, and from placing in such Indians any possession of any of the lands, as it threatens to do, in compliance with the sixth article of the treaty in question.

The questions presented are: Did the grant of July 2, 1864, attach to the lands reserved to the Indian tribes under the treaty of October 24, 1864, and so defeat the reservation, and destroy the Indian right of occupancy provided for in the treaty, and theretofore existing? If not, and such right of occupancy still exists, has the legal title rightfully vested in the defendant company, subject to such right of occupancy, and is the company entitled to an order restraining the proposed allotment of these lands in severalty among members of the Indian tribes? Is the defendant company entitled to the protection of a bona fide purchaser? And is the government precluded in the prosecution of this suit by the adjudication had in the suit of the United States against the defendant to have a forfeiture of its grant decreed?

As to the first question, it is contended for the company that the grant of July 2, 1864, was a present grant, and was at once effective, so as to make any disposition of any land of the class described in the granting act unlawful, without reference to the time when the road was located or its map of route was filed, and that in any event the treaty with the Indian tribes did not take effect until proclaimed by the president on the 13th of February, 1870, and that the road grant

attached to the land in question by the location of its route and the construction of its road in 1869, if it had not done so prior thereto. It is true that congress may dispose of any part of the public domain to which the Indians' right of occupancy has not been extinguished, subject to that right. But, unless the grant is of a specific character, it must be presumed that congress does not intend to dispose of such portions of this domain as it may become necessary, in treating with the Indian tribes, to concede to their permanent use. There can be no treaty of cession without some reservation somewhere for this purpose. This reservation may, of course, be without the ceded territory; but this does not affect the question, since land grants are so common throughout the new country that no locality can altogether escape them, especially where the grants are floating ones. In this case the land-grant act prescribed no route for the proposed road, beyond the most feasible pass in the Cascade Mountains, near Diamond Peak. From this point it only required that the road should continue to the eastern boundary of the state. There were two other wagon-road grants through the wide domain known as "Eastern Oregon," passed July 5, 1866, and February 25, 1867; while on the west side of this range of mountains a railroad land grant, extending from Portland to the southern boundary of the state, reached across the valleys of the Willamette, Umpqua, and Rogue rivers, 30 miles in width, on either side of the Oregon & California Railroad, into the Cascade range, upon the one hand, and the Coast range, on the other. There were still other grants, not necessary to be mentioned in this connection.

Under such circumstances, one of two things is inevitable: The government could, in the pursuit of its "ancient and honored policy," establish in the territory subject to these floating grants permanent Indian reservations, leaving enough available lands to satisfy the grants, or else its sovereign authority in dealing with the Indian tribes could only be exercised in conformity with the interests and wishes of its grantees in these grants. There is not in such cases, as there was not in this case, any impairment of the grant. The reservation in question was directly south, and distant some 30 miles, from the point where the road crossed the Cascade Mountains. Enough lands remained without the reservation to satisfy the grant many times over. The reservation appears not to have been an obstacle in the road's way. It is suggestive that the line of route adopted by the road company, as stated by Indian Agent Dyar in a letter attached to the report of a committee of congress, referred to in the argument in this case, "runs diagonally through the whole length of the Klamath reservation, a distance of sixty miles or more, traversing the very best portions of the same,—in fact, is so located as to embrace within the limits of the six miles in breadth more than one-half of all the land upon the reserve suitable for cultivation or for winter grazing." To satisfy the claims of the road company, it must be held that the road grant, until the filing of its map of route east of the Cascade Mountains, five years after the granting act was passed, covered all of the then undisposed of public domain, and that until the convenience or interest of the road company prompted the location of its line the power of the United

States to dispose of any of these lands, or to provide for the Indian tribes thereon, was suspended. Congress could not have intended an act that involved such consequences. The duty of providing for these tribes was of the utmost importance. Not only did the development of the country depend upon it, but the peace of the country, as well. A combination of the Klamath, Modoc, Snake, and Piute tribes could, according to Agent Dyar (letter of October 16, 1873), at a single stroke destroy the sparse settlements of Southeastern Oregon, and, he might have added, the settlements of Northeastern California. The intrusion of white settlers into the territory inhabited by these jealous and warlike tribes made it indispensable that there should be a treaty of cession and reservation,—a thing impossible if it was within the power of the road company to float its grant in any direction, and attach it to the lands which had been in the meantime reserved, upon the assumption that its grant covered a practically limitless extent of country. The power of the government to conclude treaties with the Indians, and thereby provide permanent reservations for them, without reference to the existence of floating land grants, is as indubitable as the necessity that requires its exercise. The act of congress authorizing the treaty preceded the wagon-road grant. The treaty was concluded and ratified by the senate three years before the map of location of the road over the reservation was filed. There were two so-called amendments made by the senate, which resulted in a second convention. But these were only amendments in name. They were not amendments in any proper sense of the word, but mere verbal corrections, in no way affecting the sense of the treaty. The word “guaranteed” had inadvertently been used in two places in the treaty,—once in the provision permitting agents, employes, and army officers to be upon the reservation, where it had no meaning whatever, and once where it was used, instead of the word “reserve,” in a provision reserving rights of way across the reservation for roads. The treaty was therefore, to all intents and purposes, ratified three years before the road company’s map of location over the reservation was filed; and if the treaty was not then, and until the president’s proclamation was issued, binding upon the parties to it, it was nevertheless a provisional disposal of the reserved lands, and was effective to withdraw them from the operation of the grant or other disposition. It does not admit of question that it was not within the power of the road company to defeat the treaty after its ratification by the senate, nor, for that matter, prior thereto, by so locating its line of road as to appropriate more than one-half of all the lands upon the reserve suitable for cultivation or for winter grazing. It must be borne in mind that the rights of the Indian tribes under the treaty were rights reserved in their cession to the government. This right has been declared by the supreme court of the United States to be a title,—a right “as sacred as that of the United States to the fee. This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purpose of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken

off by the Indians in such clearing may be sold by them." U. S. v. Cook, 19 Wall. 593, 22 L. Ed. 210. As stated in Land Co. v. Worden (C. C.) 85 Fed. 96, for all purposes, save only that of private sale, the Indians were in fact the owners of these lands.

It is contended that the Indians ceded all their right, title, and claim to the country occupied by them, and that the rights provided for in the reservation were new rights conferred by the treaty, which did not take effect until proclaimed by the president in 1870; that the road grant had attached in the meantime. The proviso in the treaty was a reservation in the cession made by the Indians. Land Co. v. Worden, supra. There is no doubt about this, and, if there was, that doubt ought to be resolved in favor of the Indians, upon the principle that such an instrument must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians, since they are "a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States." Jones v. Meehan, 175 U. S. 11, 20 Sup. Ct. 1, Adv. S. U. S. 1, 44 L. Ed.

— This contention assumes that the treaty was effective to divest the Indians of all rights, including those expressly reserved by them, and constituting the consideration, in part at least, upon which their cession was made; that the rights ceded by the Indians in the treaty the United States and its grantees, including the road company, acquired, while those reserved by the Indians the United States and its grantees, including the road company, also acquired. This opinion was apparently held by committees of congress and officers of the land department, the commissioner of Indian affairs, and by two governors of Oregon, as appears from reports made by the public land committee of each house of congress, to which reference is made in the brief submitted in the road company's behalf. The governor of California, in a letter to the land department, in the interest of the stockholders of the road company, who are citizens of that state, expressed the same opinion. There was one serious difficulty in giving effect to the view so respectably held. The report of the house committee on public lands, submitted January 28, 1879, reporting against the right of the Indian tribes to the lands reserved in the treaty, says:

"But apprehensions of serious conflicts with the Indians have prevented affirmative action. These reservation Indians are jealous and warlike. They made their treaty with the United States in good faith, they were without notice of any prior grant, and they naturally regard the title to the reservation as exclusively their own by virtue of the treaty of 1870. If they are made to understand that the United States had granted to individuals the title to these lands six years before it was stipulated by solemn treaty to set the same apart for them, their confidence in the government will be impaired, and attempted removal will occasion most serious conflicts. It may be conceded that an attempt to remove the Indians would be so dangerous to the peace of Southern Oregon and Northern California that less violent measures of settlement should be adopted, if the same can be lawfully found."

These jealous and warlike natives could not be made to understand that they only were bound by the treaty; that what they ceded in the

treaty the white people acquired, and what they reserved the white people also acquired. The Oregon secretary of state visited these Indians to ascertain their temper in the premises. In his letter, which is appended to the committee's report, he expresses apprehension of trouble, and says, with unconscious humor, that "an Indian does not understand a mistake when it is made against him by whites." The difficulty of making an uncivilized and warlike community understand a mistake by which they were divested of their rights in favor of the party making the mistake is obvious. That these tribes were not ejected from these lands, always in their possession, reserved to them by treaty, improved by the government for them in pursuance of the treaty, and without which, according to Indian Agent Dyar, "the only hope of their ever becoming self-supporting" would be gone, is, therefore, not due to the justice of the government, but to the fear that they would appeal from the justice of the civilized race to the tomahawk and scalping knife of the savage.

If the right of the Indians is a new right conferred by the treaty, it is prior to the road grant, which was still a "float" subsequent to the time when the treaty became operative. The treaty took effect long prior to the president's proclamation in 1870. By several acts of congress, approved July 26, 1866, March 2, 1867, July 27, 1868, and April 10, 1869, appropriations aggregating more than \$122,000 of public money were made in fulfillment of the stipulations of the treaty. Included in these appropriations was one for \$35,000 made by the first of these acts for the subsistence of these Indians during the first year after their removal to the reservation, and for the purchase of teams, farming implements, tools, seeds, etc. The same act made further appropriations of \$11,300 for the erection of a saw mill, flouring mill, buildings for blacksmith, carpenter, and wagon and plow maker, necessary buildings for one manual labor school and for hospital buildings, and \$4,000 for the erection of agency buildings, required by the treaty to be erected at some suitable point on the reservation as soon as practicable after the ratification of the treaty. There were further appropriations by this act of \$1,500 for the purchase of tools, materials, stationery, etc., "for the fiscal year ending June 30, 1867," \$6,000 for salaries and subsistence of various employes, and \$3,600 for salaries of physician, miller, and school teachers, each for the fiscal year ending June 30, 1867. By each of the several acts of 1867, 1868, and 1869, there were appropriations, among others, for keeping these various buildings in repair. All these appropriations were, in terms, in fulfillment of the treaty described as the treaty of October 14, 1864. And these acts of congress show conclusively that if the Indian tribes were not removed to the reservation until after the president's proclamation in February, 1870, as alleged, at least the various mills and shops and the buildings for a manual labor school and hospital were erected "at some suitable point on the reservation" long prior thereto, and that three annual appropriations of \$1,000 each had been made for repairs of these buildings, and that seeds and tools were purchased, and employes and teachers, etc., were paid salaries, and subsisted on the reservation, during the same time. There can be no more authoritative ratification of the treaty than its execution by congress and the

president, and the president's proclamation in 1870 was a delayed formality, not necessary to give effect to the treaty that had been in operation during the three previous years. By these appropriations and improvements and repairs there was a segregation of the reserved lands from the public domain, and a permanent appropriation of them, long before the road company located its route across the reservation, or had turned from its easterly course south in that direction. There is, furthermore, a conclusive presumption from these acts of congress that the Indian tribes were in the meantime located on the reservation, although the fact, if material, must, in the state of the pleadings, be assumed to be otherwise.

It is alleged in the answer filed in support of the plea that the road was fully completed through the reservation in 1866. But it is clear that the pleader intended this date for 1869. The governor certified to the completion of the second section (42½ miles) of road on November 26, 1867, and this section extended no further than Crescent Lake. The north boundary of the reservation was still more than 30 miles distant, so that the line from Crescent Lake through the reservation would be probably 100 miles in length. It is inconceivable that the certification of completed road would have stopped at Crescent Lake at the end of 1867, if 100 more miles of road had in fact been completed in 1866, or that the map of location through the reservation would not have been filed until 1869. In the brief filed for the company in the case of *Land Co. v. Worden*, supra, it is stated that the road company had built its road on and over the reservation, and filed its map of definite location, more than two months before the second convention with the Indian tribes was held. That convention was held on December 10, 1869.

It is insisted that, if the treaty was effective to reserve the lands set apart for reservation to the use of the Indian tribes, nevertheless the road company is entitled to the fee, subject to that use. As to this, I repeat that it must be presumed that congress did not intend to create any interest in land set apart to the permanent use of the Indian tribes. The intention to bestow the fee subject to the burden of the Indian occupation must necessarily refer to the temporary character of that occupation. Here the treaty provides for allotment of the reserved lands, and guaranties to the allottees the perpetual possession and use of the tracts so granted, reserving to the United States the right of sale for the benefit of the Indians whenever their prosperity will be advanced thereby. This leaves nothing to be taken cum onere, and where there is nothing there is no fee.

The defendant relies upon the defense of a bona fide purchase. It is alleged that at the time of the transfer to the defendant corporation of the lands in question by B. J. Pengra and wife, grantees of the Oregon Central Military Road Company, neither the present company, nor any of its officers, agents, or stockholders, had any notice or reason to believe or suspect that its grantors were not, at the time of the execution and delivery of the several deeds, actual owners, in good faith, of the lands so conveyed; that said purchasers relied upon the certified lists, and upon the statements and rep-

representations therein made by the commissioner of the general land office and the secretary of the interior that the lands described in such lists had been duly and legally granted to the state of Oregon, and had been duly and legally earned by the Oregon Central Military Road Company. The defendant admits that it had constructive notice of the several acts of congress pleaded in the bill of complaint, and of the laws in regard to the public lands of the United States and the disposal thereof. And it had more than this. It had notice of the provisions of the treaty, since its right of possession to all the lands inuring to it under the grant depended upon that treaty. The rule is elementary that:

"Wherever a purchaser holds under a conveyance, and is obliged to make out his title through that deed, or through a series of prior deeds, * * * he has constructive notice of every matter connected with or affecting the estate which appears, either by description of parties, by recital, by reference, or otherwise, on the face of any deed which forms an essential link in the chain of instruments through which he must derive his title. The reasons for this doctrine are obvious and most convincing. In fact, there could be no security in land ownership unless it were strictly enforced." 2 Pom. Eq. Jur. § 626.

All persons dealing with lands claimed under this road grant are presumed to have notice of the treaty by which the Indian right of occupancy to these lands was extinguished. Moreover, there were valuable improvements upon that part of the reservation now claimed by the road company, made by the government, for the benefit of the Indians, under the treaty. Dyar, in a letter of September 20, 1873, which is appended to the report of the congressional committee hereinbefore mentioned, says, "A part, at least, of the government farm and improvements at Yainax station is on the land claimed by the company." The reservation was then occupied by the Indian tribes as a reservation. The conveyance by the military road company, through Pengra and Colby and associates, to the California & Oregon Land Company, was in 1874. Congress had been for nine years making large appropriations for public reservation buildings and repairs, etc., on the reservation. Such a thing as a purchase without notice under such circumstances is impossible; nor is there such thing possible as a bona fide purchase of land in the notorious possession of the true owner, with a title of record.

As to the lands without the limits of the grant, I am of the opinion that the plea of bona fide purchase should be allowed. A purchaser desiring to purchase lands to which the company has a patent, or a certificate upon which patent issues, cannot be expected to know, nor to employ a surveyor to find, the precise limits of the grant. He may reasonably act upon the assumption, nothing appearing to the contrary, that the proper officers of the land department have ascertained the fact. It is not, in such a case, a question of law, but one of fact, proved by the public surveys and records of the land office in the keeping of its officers.

As to the plea of former adjudication, it is enough to say that the causes of action in the two suits are not the same, and that the points in controversy are not the same. The former action was in pursuance of an act of congress passed for the purpose of having

forfeitures decreed of certain wagon-road grants, the grant to the Oregon Central Military Road Company included. The title of that act was, "An act providing in certain cases for the forfeiture of wagon road grants in the state of Oregon." Act March 2, 1889. By the terms of the act it was made the duty of the attorney general to cause suits to be brought "to determine the questions of the seasonable and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part, the legal effect of the several certificates of the governors of the state of Oregon of the completion of said roads, and the right of resumption of such granted lands by the United States, and to obtain judgments, which the court is hereby authorized to render, declaring forfeited to the United States all of such lands as are coterminous with the part or parts of either of said wagon roads which were not constructed in accordance with requirements of the granting acts, and setting aside patents which have issued for any such lands, saving and preserving the rights of all bona fide purchasers of either of said grants or of any portion of said grants for a valuable consideration, if any such there be." 25 Stat. 850. None of these questions touch any matter in controversy in the present suit. In the former suit the questions presented were: Was the government imposed upon by false and fraudulent certificates of the governor of Oregon certifying to the seasonable construction of the road? And did the company purchase in good faith in reliance upon the bona fides of such certificates? Here the question is not one of the right of the company to the grant, but of the inclusion of certain lands within the grant. It is true that in the former suit there was a specific description of the lands involved, but that was merely a method of describing the grant. There was in that case no question of Indian rights, of the effect to be given to the treaty with the Indian tribes of Southeastern Oregon and Northeastern California, of the time when that treaty became effective, and of its effect to exempt the lands reserved by it from the operation of the grant. In this case there is no question of the seasonable construction of the road, or of fraud practiced upon the United States by false certificates of its completion. There was no single question common to both suits. In their scope and purpose, they were and are totally different, and the interest for which this suit is brought and the right in which the United States appears are different from those involved in the former suit. These cases do not admit of the application of the principle of finality of judicial decision. That principle is a salutary one, not a snap judgment. The demurrer to the cross bill of the defendant the California & Oregon Land Company is sustained, and its pleas are overruled, except only as to so much of the plea of bona fide purchase as relates to land alleged to be without the limits of the company's land grant.

SCHWARTZ et al. v. DUSS et al.

(Circuit Court of Appeals, Third Circuit. July 10, 1900.)

No. 27.

APPEAL—REVIEW—FINDINGS OF FACT.

Where a circuit court, with the consent and agreement of parties, appoints a master with authority to take testimony and find all issues of law and fact, findings of fact made by the master and confirmed by the court are conclusive on appeal unless plain error is unmistakably shown; and, unless such plain error is found, the appellate court will not review questions of law which could only arise on a state of facts different from that found.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

This was an appeal from the decision of the circuit court reported in 93 Fed. 528.

George Shiras and S. Schoyer, Jr., for appellants.

D. T. Watson, for appellees.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. This is an appeal from the decree of the circuit court for the Western district of Pennsylvania. The plaintiffs below, appellants here, seek in this suit to recover a portion of the property of the Harmony Society, which they allege is defunct, and claim that its property ought to be distributed among those entitled thereto. In the year 1803, George Rapp and his son John, and several of their friends, left the kingdom of Wurtemberg, came to the United States, and located at a place called Harmony, in Butler county, Pa., where they were joined by a considerable number of other emigrants. They remained there until the year 1814, when they removed to Posey county, Ind., where they remained until the year 1825, when, becoming dissatisfied, they moved back to Pennsylvania, and located at Economy, in Beaver county, Pa., where they ever since have resided. They formed a society or an association called the "Harmony Society," and in 1805 they made the first written contract between them. The said society was organized upon the principle of community of goods and land ownership. The members of the said society who had brought with them from Wurtemberg money combined their funds, and held all their property in common, they living as members of a common household, and each member enjoying alike with every other the fruits of their common labor in equality and brotherhood. The occupation or business of said society was agriculture, except in so far as it was necessary to manufacture shoes, clothing, and other necessities for the community. The members of said society obeyed George Rapp as their spiritual and temporal leader and ruler. The only laws or rules governing said society were made by him, the members thereof having no voice in their enactment. About the year 1807 the community promulgated the doctrine of celibacy as being necessary for the success of a communistic society. The agreement of 1805 (Exhibit A, p. 47, vol. 1, Record) is as follows:

"Be it hereby known to all who need to know that the following agreement has this day been made and concluded between us, the subscribers of the one part, and George Rapp and his associates, of the other part:

"Article 1. We, the subscribers, on our part, and on the part of our heirs and descendants, deliver up, renounce, and remit all our estate and property, consisting of cash, land, and chattels, or whatever it may be, to George Rapp and his associates, in Harmony, Butler county, Pennsylvania, as a free gift or donation, for the benefit and use of the community there, and bind ourselves on our part, as well as on the part of our heirs and descendants, to make free renunciation thereof, and to leave the same at the disposal of the superintendents of the community, as if we had never had nor possessed it.

"Art. 2. We do pledge ourselves jointly and severally to submit to the laws and regulations of the community, and to show due and ready obedience towards those who are appointed and chosen by the community as superintendents in such manner that not only we ourselves endeavor, by the labor of our hands, to promote the good and interest of the community, but also to hold our children and families to do the same.

"Art. 3. If, contrary to our expectation, the case should happen, and we jointly or severally could not stand to it in the community, and we would within a few or more years break our promises, and withdraw from the community, for whatever cause it may be, never to demand any reward, either for ourselves or children, or those belonging to us, for any of our labor or services rendered, but whatever we jointly and severally shall or may do we will have all done as a voluntary service for our brethren. In consideration whereof George Rapp and his associates adopt the subscribers jointly and severally as members of the community, whereby each of them obtains the privilege to be present at each religious meeting; not only they themselves, but also their children and families, shall and will receive the same necessary instructions in church and school which is needful and requisite for their temporal good and welfare as well as eternal felicity.

"Art. 4. George Rapp and his associates promise to supply the subscribers jointly and severally with all the necessaries of life, as lodging, meat, drink, and clothing, etc., and not only during their healthful days, but also when one or more of them become sick, or otherwise unfit for labor, they shall have and enjoy the same support and maintenance as before; and if, after a short or long period, the father or mother of a family should die, or be otherwise departed from the community, and leave a family behind, they shall not be left widows or orphans, but partake of the same rights and maintenances as long as they live or remain in the community, as well in sick as healthful days, the same as before, or as circumstances or necessity may require.

"Art. 5. And if the case should happen, as stated above, that one or more of the subscribers, after a short or long period, should break their promise and could or would not submit to the laws and regulations of the church or community, and for that or any other cause would leave Harmony, George Rapp and his associates promise to refund him or them the value of his or their property brought in, without interest, in one, two, or three annual installments, as the sum may be, large or small; and if one or more of them were poor, and brought nothing in the community, they shall, provided they depart openly and orderly, receive a donation in money, according to his or their conduct while a member, or as he or their circumstances and necessities may require, which George Rapp and his associates shall determine at his or their departure.

"In confirmation whereof, both parties have signed their names.

"Done in Harmony, February 15, 1805."

They became the owners of about 7,000 acres of land at Harmony, Butler county, which, on May 6, 1815, was conveyed by Frederick Rapp, as their attorney in fact, to Abraham Ziegler, for the consideration of \$100,000. And in that year, or in 1814, the society removed from Butler county, Pa., to Posey county, state of Indiana, where, in 1821, a second agreement with each other, in German, was entered into by them. In 1825 the society removed from Indiana to Beaver

county, Pa., where they purchased and settled upon a tract of land containing about 3,000 acres, now known as "Economy," where they have since remained, and which has since become very valuable, and on which they have erected many buildings, including dwellings and factories of various kinds, and made many valuable improvements. After the settlement at Economy, in 1827, another agreement was entered into and signed by all the then members of the association. This agreement is substantially the same as the agreement of 1805, in so far as it relates to the rights and duties of the members of the society. It had, however, in it a stipulation, constituting the sixth article, that the society would refund to any members who for any reason should withdraw therefrom "the value of all such property as he or they may have brought into the community, in compliance with the first article of this agreement." And if the persons withdrawing were poor, and brought nothing into the community, they should, nevertheless, receive a donation of money according to the length of their stay, and to their conduct and necessities, in the judgment of the superintendent of the association. In 1836, owing to troubles occasioned by a secession of members, it was deemed wise to abrogate this article, and accordingly an agreement supplementary to that of 1827 was entered into by all of the then members of the community, in which "the principle of restitution of property" was, for reasons stated, renounced, and the said sixth article of the agreement of 1827 was expressly and entirely "annulled and made void as if it had never existed"; all other articles remaining "in full force as heretofore." This supplementary agreement then provided as follows:

"(2) All the property of the society, real, personal, and mixed, in law or equity, and howsoever contributed or acquired, shall be deemed now and forever joint and indivisible stock. Each individual is to be considered to have finally and irrevocably parted with all his former contributions, whether in land, goods, money, or labor; and the same rule shall apply to all future contributions whatever they may be. (3) Should any individual withdraw from the society, or depart this life, neither he, in the one case, nor his representatives in the other, shall be entitled to demand an account of said contributions, whether in land, goods, money, or labor, or to claim anything from the society as matter of right. But it shall be left altogether to the discretion of the superintendent to decide whether any, and, if any, what, allowance shall be made to such member or his representatives as a donation."

After the death of George Rapp, in 1847, and in that year, another agreement was entered into by the then members of the society, confirming the agreements of 1827 and 1836, except so far as the same were affected by the death of the said George Rapp, and providing for a different scheme of administration. The executive powers, which had theretofore been mainly exercised by the said Rapp, were vested in a board of nine elders, to be chosen as therein provided. The agreements of 1827, 1836, and 1847 are those under which, or some of which, the plaintiffs claim the right to share in the property and assets of the society, as heirs of former members. The bill alleges that the complainants were heirs and next of kin of those who either were members of the society, and withdrew from the same before the execution of the agreement of 1836, or of those dying in the society before that time, or of those who died members of the society after having

joined in the agreements of 1836 and 1847. The bill alleges that the defendant John Duss, with others, entered into a conspiracy, on more than one occasion, to wreck the society, and take to himself and his co-conspirators the property and assets of the same. The bill further alleges that there had been, prior to and up to the time of the filing of the bill, such an abandonment by the defendants, constituting the present membership of the society, of the principles and purposes upon which and for which the said society was founded, as to work a dissolution of the same. The complainants therefore contend that, such being the case, the present property of said society reverts to the complainants and such others as were heirs at law and next of kin of those who contributed and gave to the said society its property. To support the charge of abandonment of the purposes of the society, various specific allegations are made concerning the alleged immorality of John Duss and others of the defendants, of the intemperance alleged to prevail among them, and the alleged renunciation of the religious principles generally upon which the society was founded. In view of the findings of the master, hereinafter referred to, it is unnecessary to consider these allegations in detail. After the cause was at issue, upon the agreement and request of the parties, the court below appointed W. W. Thompson, Esq., as examiner and master, with authority to hear and take all the testimony, and find all the issues of fact and law, and to report the testimony and such findings to the court. In pursuance of this appointment, a great amount of testimony was adduced by the parties and taken by the examiner, who returned the same to the court below, together with a long and most elaborate report, embodying his findings, as master, of the facts and conclusions of law arising thereon. To these findings of the master exceptions were duly taken and filed, and argued before the court below. That court, after hearing the case upon the pleadings and evidence, the master's report, and the exceptions thereto, made a decree dismissing the complainants' bill. From this decree an appeal has been taken to this court, and numerous exceptions have been filed. But it is only necessary to consider the two underlying questions. These are succinctly and correctly stated by the master, in his report, as follows:

"First. Have the plaintiffs, or any of them, such a proprietary right or interest in the property and assets of the Harmony Society as entitled them, upon the dissolution of the society, to any part of or share in such property or assets, or as entitled them to the account prayed for in the bill? Second. Has the Harmony Society been dissolved by the common consent of the members, or by an abandonment of the purposes for which it was formed?"

These obviously fundamental and determining questions have been most ably discussed by the master in the light of the testimony and documentary evidence, all of which, together with the master's report, are contained in the record before this court. The findings of fact by the master bearing on the first of these questions, were as follows:

"(1) That none of the plaintiffs were ever members of the society. (2) That all of those members of the society through whom Christian Schwartz claims as their heir signed the agreements of 1836 and 1847, and continued members until their death. (3) That Anthony Koterba claims as heir of his father, Joseph Koterba, and his half-brother, Andreas Koterba; and that Joseph Koterba joined in the organization of the society, and also signed the agreement

of 1827, and afterwards, in 1827, withdrew from the society; and that Andreas Koterba signed the agreements of 1827, 1836, and 1847, and died a member of the society. (4) That the grandparents of David Strohaker, viz. Christian Strohaker and wife, and Matthias Rief and wife, joined the society in 1805, and all remained members until their death; all dying between 1820 and 1825, except Mrs. Rief, who died between 1830 and 1836. That his father, Christian Strohaker, signed the agreement of 1827, and withdrew from the society in 1827. That his aunt, Catharina Strohaker, signed the agreements of 1827, 1836, and 1847, and continued a member of the society until her death. (5) That Lawrence Scheel and Jacob Scheel, ancestors of Allen and G. L. Shale, joined the society in 1805. That Lawrence withdrew in 1824 or 1826. That Jacob Scheel signed the agreement of 1827, and died, a member, about 1837. (6) That none of the parties through whom the plaintiffs claim contributed any money or property to the society."

As a conclusion of law upon the facts thus found, the master reports:

"The plaintiffs, therefore, under their agreements, have no claim on the property of the society through any of their ancestors. Not through those who withdrew before the execution of the agreement of October 31, 1836, because those who withdrew had had returned to them the value of any property they might have contributed, and had received the compensation for their interest or part in the society or its property. Not through those who died in the society before 1836, because all their interest in the property had become vested in the society, and did not descend to their heirs. And not through those who died in or withdrew from the society after the agreement of 1836, because they had by that agreement expressly renounced for themselves and their heirs all right to claim anything on their withdrawal or death. In all the cases cited above the principle of survivorship in the remaining or surviving members was recognized as existing, and approved and enforced."

As a mixed finding of fact and of law, the master, for reasons set out at great length in his report, answers the second question above stated as follows:

"That there has been no abandonment of the purposes for which the Harmony Society was founded, and that the said society has not been dissolved by reason of any such abandonment, and that the plaintiffs are not entitled to the relief prayed for in the bill."

The report ends with a recommendation by the master that the bill of complainants be dismissed, with costs.

Where the court, with the consent and by the agreement of parties, appoints a master, and confers upon him "authority to hear and take all the testimony, and find all the issues of law and fact," as in this case, in so far as the report of the master and the opinion of the court find facts, such findings are considered as conclusive in this court, unless plain error be unmistakably shown from the great preponderance of evidence in the case. *Bank v. Rogers*, 3 C. C. A. 666, 53 Fed. 776; *Kimberly v. Arms*, 129 U. S. 525, 9 Sup. Ct. 355, 32 L. Ed. 764; *Dravo v. Fabel*, 132 U. S. 487, 10 Sup. Ct. 170, 33 L. Ed. 421. The findings of fact made by the master were confirmed by the court below. The learned judge of that court, in his opinion, states that he read all the testimony in the case, in order to come to an independent conclusion, and that the conclusion so arrived at agreed entirely with that reported by the master. Such finding by the master and by the court, unless found by this court to be unmistakably and plainly erroneous, will be binding here, and will determine this case adversely to the complainants, and make unnecessary any examination of the ques-

tions of law that might have been involved upon different findings of fact. A careful examination of the testimony and evidence contained in the record before us not only fails to make manifest any such plain and unmistakable error in these findings, but convinces this court that they were in all respects justified. The learned judge in the court below has so completely covered all the questions of law and fact arising in this case, and necessary to its determination, that we feel constrained to adopt as our own his opinion, as we find the same in the record, part of which we here repeat as follows:

"The plaintiffs sue as heirs of certain persons who were formerly members of the Harmony Society, and who continued to be members until their voluntary withdrawal or death. The bill is against all the persons who composed the society at the commencement of the suit, namely, June 27, 1894, the membership then embracing 16 persons. The bill joins as co-defendants with the members of the Harmony Society, Henry Hice, John Reeves, and the Union Company, a corporation, the bill charging that these three defendants and the defendant John S. Duss, a member of the society, and the senior trustee thereof, were acting together in a conspiracy to wreck and dismember the society, and appropriate to themselves the entire assets of the society. The bill further alleges that all the purposes for which the society was founded and its established practices had been abandoned, and that by common consent the society had ceased to exist as an association, and had been dissolved, and that 'the assets of such dissolved association have reverted to the donors thereof, among whom were the ancestors and intestates of the plaintiff.' The bill prays for the appointment of a receiver, and for the division and distribution of the assets of the society amongst the persons legally entitled thereto, including the plaintiffs. All the defendants have answered the bill. In their answers they all deny the above recited charges and allegations, and all the averments in the bill upon which the plaintiffs' supposed right to relief rests; and they also deny that the plaintiffs have any interest whatever in the property of the Harmony Society, or any right to intermeddle with its affairs. * * * In conformity with the agreement of the parties, and pursuant to the order appointing him, the master took a large amount of testimony, and made findings which are embodied in a written report to the court. The master filed with his report the testimony and exceptions taken by the plaintiffs to his findings. The cause has been heard upon the pleadings and evidence, the master's report, and the exceptions thereto. The report of the master is altogether adverse to the plaintiffs. He finds that the charges of conspiracy and misconduct and the allegations of abandonment of the purposes and established practices of the Harmony Society and of the dissolution of the society, contained in the bill, are not sustained by the evidence, and that they are not true. Upon every material question of fact the finding of the master is distinctly in favor of the defendants, and he recommends the dismissal of the bill. The master's report covers the entire case, and evinces the most careful consideration of every question here raised. Nevertheless the court has felt it to be its duty to make an independent investigation of the facts and merits of the case, and therefore we have attentively read and considered the whole of the evidence. Avoiding, as needless, a particular discussion of the numerous exceptions to the master's report, we will briefly state our general views and conclusions.

"The constitution of the Harmony Society is embodied, and the general purposes of the association are set forth, in a series of written agreements executed in the years 1805, 1821, 1827, 1836, 1847, and 1890. These agreements were signed at their respective dates by all the then members of the society. By the agreement of 1805 the doctrine of community of property became, and by the subsequent agreements continued to be, a fundamental principle of the society. Its acceptance is an essential condition of membership. By the constitution of the society, individual ownership of property is renounced in favor of the community or society. The members have all things in common, and each is entitled to receive from the society necessary mainte-

nance, support, and education, and in return each is bound to render to the society labor and obedience. The agreement of 1827 contained a provision that, if any member withdrew from the society, there should be refunded to him the value, without interest, of all the property he had brought into the community. The agreement of 1836, however, rescinded that provision wholly, and stipulated that, if any individual shall withdraw from the society, or depart this life, neither he in the one case, nor his representatives in the other, shall be entitled to demand an account of his contributions, whether in lands, goods, money, or labor, or to claim anything from the society as matter of right; but that it shall be left altogether to the discretion of the superintendent to decide whether any, and, if any, what, allowance shall be made to such member or his representatives as a donation. In view of the decision of the supreme court of Pennsylvania in *Schriber v. Rapp*, 5 Watts, 351, and the decisions of the spureme court of the United States in *Goesele v. Bimefer*, 14 How. 589, 14 L. Ed. 554, and *Baker v. Nachtrieb*, 19 How. 126, 15 L. Ed. 528, it is clear that the above-recited articles of agreement are valid contracts, and that thereunder, upon the death of a member of the society in fellowship, no claim enforceable against the society or its property passes to his heirs or personal representatives, and that since 1836 no member voluntarily withdrawing from the society could acquire any such claim. Now, not one of the plaintiffs was ever a member of the Harmony Society. Furthermore, it does not appear that any of the persons through whom the plaintiffs claim contributed any money or property to the society. The master has found that no such contribution was ever made by any of those persons. The correctness of that finding has not been impeached. All the members through whom the plaintiffs claim who left the society withdrew in or before the year 1827. Presumably they retired upon terms satisfactory to themselves. If, however, those persons so withdrawing had any legal demands against the society, those demands have been barred by lapse of time. *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718. The other persons through whom the plaintiffs claim remained with the society, and died in fellowship. They thus received and enjoyed all the benefits secured to them by the recited articles of agreement, and therefore no rights enforceable against the society passed from them to their heirs or personal representatives. The soundness of the view that the deceased ancestors and the collateral relatives of the plaintiffs could transmit to them no rights enforceable against the Harmony Society as a living organization is impliedly conceded by the bill, for it alleges that the society had come to an end. The bill proceeds upon the theory that a dissolution of the society had been brought about. Upon this assumption, and under the allegation 'that recently said Harmony Society has become dissolved as aforesaid,' the bill prays that the court take charge of the assets of the society, and distribute the same amongst the parties legally and equitably entitled thereto. But the hypothesis of dissolution is not well founded. The proofs show that the society is in full life. There has been no dissolution of the society, either by the common consent of the members or by their acts. The membership, indeed, has become greatly reduced, but the rights of the society, as now constituted, are as sacred in the eye of the law as they were when the membership was twentyfold greater. The society as an organization exists in law and in fact. Under the evidence, the findings of the master upon this branch of the case undoubtedly are right. Hence the very foundation of the bill fails. The plaintiffs do not show that they are entitled to any equitable relief whatever. It is not necessary, nor would it be proper, for the court to express any opinion as to what would be the legal status and the ultimate disposition of the property of the Harmony Society were its existence terminated by the death of all its members, or were a dissolution of the society otherwise effected. No such questions are before us. We are not dealing with the assets of a defunct or dissolved association. In respect to the alleged conspiracy to wreck and dismember the Harmony Society, we feel called upon to say that we fully agree with the conclusion of the master. The acts here principally complained of were, we think, designed, not to destroy the society, but to save it from the consequences of business mistakes made by none of the present officers or members of the society, and for which none of them are at all responsible. The measures resorted to in the emergency which was upon the

society were successful in extricating it from great financial peril. Those measures were adopted and carried out under the advice of eminent counsel, whose rectitude of purpose the court cannot doubt. And now, before closing, we deem it to be our duty to declare that, after the most careful scrutiny of the evidence, it is our judgment that the charges of immorality made against John S. Duss, the senior trustee, in the twenty-fourth paragraph of the bill, are not sustained by the evidence, but are disproved. The general rule in equity that costs follow the decree, we think, should be applied here, under the circumstances. *Swentzel v. Bank*, 147 Pa. St. 140, 154, 23 Atl. 405, 415, 15 L. R. A. 305. The bill alleges conspiracy, fraud, and immorality, and these grave charges have not been withdrawn. Having successfully vindicated themselves from these charges, the defendants are justly entitled to full costs."

The decree of the court below dismissing the bill is affirmed

OLIVE LAND & DEVELOPMENT CO. v. OLMSTEAD et al.

(Circuit Court, S. D. California. July 9, 1900.)

1. PUBLIC LANDS—EFFECT OF UNAUTHORIZED MINING LOCATION.

The location as an oil placer mining claim of public lands upon which no discovery of oil had been made vests the locators with no rights in such lands as against the United States, or as against one subsequently acquiring the title thereto or rights therein from the United States by any legal means prior to any such discovery.

2. SAME—RIGHTS OF ENTRYMAN—CHARACTER OF LANDS.

One entering public lands, who has paid the purchase price, or performed all the conditions requisite to entitle him to a patent therefor, is vested with the equitable title, and his right to a patent can only be defeated by a finding by the land department that he was not qualified to acquire the title, or that the land was not subject to his entry, and the character of the land is to be determined by the facts as known to exist at the date of such entry. His rights cannot be affected by any subsequent discovery of mineral, or of any other fact which would take the land out of the class in which it stood when the entry was made.

3. SAME—PRIVATE LANDS INCLUDED IN FORESTRY RESERVATION—SELECTION BY OWNER OF OTHER LANDS.

Under the provisions of Act June 4, 1897 (30 Stat. 11, 35, 36), relating to forestry reservations, which give the owner of, or bona fide settler on, a tract of land which may be included within the limits of a public forestry reservation, the right to relinquish the same and select in lieu thereof a tract of vacant land open to settlement, not exceeding that relinquished in area, where a patentee of such a tract relinquishes the same, and selects in lieu thereof a tract which appears by the books of the land office to be vacant and open to settlement, and files his selection in the land office, he becomes at once the equitable owner of the land so selected; and his right to a patent therefor is not affected by the fact that it is situated in the vicinity of producing oil wells, and that it has surface indications of oil, or that it was selected with a view of its possible value as oil land, where no discovery of oil has ever been made thereon.

4. SAME—RIGHTS OF ENTRYMAN—SUIT TO PROTECT EQUITABLE TITLE.

One acquiring the equitable title to land by selecting the same under such act in lieu of land which he held by patent and surrendered to the government may, prior to the issuance to him of a patent therefor, maintain a suit in equity to enjoin a defendant from sinking oil wells thereon and taking oil therefrom.

In Equity. Suit to quiet title, and to enjoin trespasses on land claimed by complainant under an entry from the United States, but

to which no patent had been issued. On motion for preliminary injunction, demurrer to bill, and motion by complainant for judgment on the pleadings.

Edwin A. Meserve and Shirley C. Ward, for complainant.
M. W. Conkling, for defendants.

ROSS, Circuit Judge. The act of congress of June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," contains, among other things, various provisions in respect to forest reservations, commencing with the declaration that:

"No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein or for agricultural purposes than for forest purposes,"—and including this provision: "That in cases in which a tract covered by an unperfected bona fide claim, or by a patent, is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected; provided further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements and so forth are complied with on the new claims, credit being allowed for the time spent on the relinquished claims." 30 Stat. 11, 35, 36.

The present is a suit in equity to quiet the complainant's alleged title to lots 1 and 5 of the fractional N. W. $\frac{1}{4}$ of section 4, township 4 N., range 18 W., San Bernardino base and meridian, situated in Ventura county, Cal., alleged to have been acquired by the complainant's predecessor in interest, one J. R. Johnston, who is alleged to have selected the land under the above provisions of the act of June 4, 1897, in exchange for patented land within a forest reserve surrendered by said Johnston to the government. The bill includes a prayer for an injunction enjoining the defendants from the commission of their alleged unlawful threatened acts of entering upon the lands in controversy and boring for and extracting any oil that may be found therein. Upon reading the bill an order was made requiring the defendants to show cause why an injunction should not be granted as prayed for by the complainant, and why the temporary restraining order granted by the court should not be continued pending the litigation. In response to the order to show cause the defendants appeared and filed a demurrer to the bill, as also a verified answer thereto. The complainant, claiming that the answer raised no material issue of fact, moved for judgment on the pleadings, which motion was, by the stipulation of counsel for the respective parties, heard with the demurrer and the order to show cause. From the pleadings it appears that on the 20th day of January, 1900, Johnston was the owner in fee simple, free of any lien or incumbrance, of lot 2 in section 5 of township 4 N., range 15 W., San Bernardino base and meridian, situated in Los

Angeles county, Cal., and within the limits of a public forest reservation, containing 36.81 acres, which land was then and still is a non-mineral tract, covered by patent issued by the United States; that on the 22d day of May, 1900, lot 1 of the fractional N. W. $\frac{1}{4}$ of section 4, township 4 N., range 18 W., S. B. M., containing 26.40 acres, and lot 5 of the fractional N. W. $\frac{1}{4}$ of said section 4, containing 10.41 acres, aggregating 36.81 acres, were, and for more than one year continuously theretofore had been, surveyed, unappropriated, and (unless otherwise shown by facts hereinafter stated) vacant public land of the United States, returned and characterized upon the official records of the United States as nonmineral land, free and open to entry and settlement under the laws of the United States, and did not then and does not now contain any known mines, salines, or minerals, petroleum, or mineral oil; that on January 20, 1900, Johnston, desiring to avail himself of the benefits of the above-mentioned act of congress, relinquished and conveyed the two tracts of which he was so the owner to the United States, and recorded the deed in the office of the recorder of the county in which the lands are situated, and on the 22d of May, 1900, filed with the register and receiver of the United States land office at Los Angeles, Cal., the said deed so recorded, together with his selection in lieu thereof of the two tracts first herein described, together with a full, true, and correct abstract of his title to the relinquished lands, duly certified as such by the county recorder of the county in which the lands are situated, showing him to be such owner in fee simple, free of any lien or incumbrance, immediately prior to the time the deed to the United States was made and recorded; that on the said 22d day of May, 1900, the register and receiver of the land office accepted, received, and filed the application of Johnston, and duly entered the same upon the official records of the land office, and the register thereof did then and there certify that the land so selected was free from conflict, and that there was no adverse filing, entry, or claim thereto; and that on the next day, to wit, May 23, 1900, Johnston, by an instrument in writing, sold and conveyed all his right, title, and interest in the selected land to the complainant. The facts thus alleged by the complainant are not denied by the answer of the defendants, except as hereinafter stated, although the legal conclusions alleged by the complainant to flow from them are denied. The answer avers that the land in controversy is of no agricultural value, and of but little, if any, value for grazing purposes, and has no appreciable value for any purpose except for petroleum that may be obtained by boring or drilling therein; that it is in a well-recognized petroleum-producing belt, and that adjacent properties in the belt are actually producing petroleum in large and profitable quantities, and that the surface indications of such producing lands and upon the lands in controversy are the same; that the surface rock and sand and the surface geological formation and stratification upon the lands in controversy are such as would lead any experienced petroleum expert or any practical geologist familiar with petroleum-bearing lands in California to pronounce the same oil or petroleum territory, and chiefly valuable therefor; that one of the most pronounced and well-marked anticlinal folds of sandstone and shale formation in Ventura

county runs through the land in controversy and has its apex thereon, and that where said anticlinal fold is most exposed, by a declivity which sharply cuts the same, bituminous sand several feet in thickness and 100 or more feet long is clearly visible, which sand, when excavated, gives out a distinct odor of petroleum; that such bituminous sand, in the formation in which it is found, shows the land in controversy to be mineral or petroleum in character, and constitutes such a discovery as would justify any prudent petroleum miner in locating the same as petroleum land, and in spending his time and money in developing the same for its petroleum product; that in October, 1899, discovery of bituminous sand in said sandstone and shale formation having been made upon the land in controversy by eight persons, then citizens of the United States, and over the age of 21 years, they did then and there locate the fractional N. W. $\frac{1}{4}$ of said section 4, including the lands in controversy, as placer petroleum lands and as a placer petroleum mining claim, under the name of "La Bonita Oil Claim," pursuant to the laws of the United States, and did then and there clearly mark and define the boundaries thereof by substantial monuments, so that the corners might be readily found and the boundaries readily traced upon the ground; that thereafter, and prior to May 22, 1900, the said locators, by a written instrument, duly conveyed all their interest in the said mining claim to the defendants to this suit, by virtue of which they allege that they are now the owners of the lands in controversy, and entitled to their exclusive use and possession, and entitled to excavate and to bore and drill thereon for petroleum, and to take therefrom, when found, any petroleum that may be obtained. The answer also alleges that Johnston did not select the lands in controversy for their agricultural or grazing value, or for any purpose, except to obtain thereby the undiscovered petroleum that might be found therein, of all of which the complainant had knowledge, and that the selection by Johnston under the act of congress referred to, for the purpose stated, was fraudulent and in violation of the spirit and purpose of the act of congress under which he pretended to proceed. The defendants assert, both in their answer and in argument, that no title vests under a selection of forest reserve lieu land until patent therefor issues, or until approval of the selection by the commissioner of the general land office, and that until such time such selected land is open to mineral discovery and mineral development, and that, if such discovery and development show the land to be more valuable for mineral than agricultural purposes, the attempted selection fails. It is also contended on the part of the defendants that the land in controversy was mineral when selected by the predecessor of the complainant, and therefore not subject to selection under the provisions of the act of congress above referred to; and this, because of its alleged surface indications and of the character of the adjacent land, and because of the alleged opinions that oil experts would express respecting it. The complainant controverts the position of the defendants in respect to the character of the land in question at the time of the location under which the defendants claim and since, and further insists that a selection of land under the act of congress of June 4, 1897, in lieu of patented land surrendered

to the government, operates eo instanti to vest the full and complete equitable title in the selector, provided the land selected was at the time of selection "vacant and open to settlement," and that no subsequent discovery of mineral thereon can impair such title, nor alter the legal character of the land; and, further, that all public lands returned as agricultural are "vacant and open to settlement" whenever they are unappropriated on the books of the local land office, and contain no known salines or mines or producing oil wells, although they may contain some mineral, and be included within a mining location that would be valid as between rival mineral claims.

The great importance that the oil industry has already assumed in this state, the enormous value of oil-producing lands, and the consequent avidity with which they are sought, coupled with the fact that the present suit will serve as a precedent for others now pending, has induced the court to take the case up out of its order, and to give to the questions presented careful consideration, to the end that the law upon the subject may be speedily settled, and the way indicated by which the title to such lands may be acquired, and the important industry referred to encouraged and developed. In the case of *Gird v Oil Co.* (C. C.) 60 Fed. 531, 532, this court pointed out that the government title to oil-bearing lands can only be acquired, under existing laws, pursuant to the provisions of the mining laws relating to placer claims. And in the very recent case of *Nevada-Sierra Oil Co. v. Home Oil Co.* (C. C.) 98 Fed. 673, it was here decided, as it had been many times before by other courts, as well as by the land department of the United States, that mere indications, however strong, are not sufficient to answer the requirements of the statute of the United States relating to placer as well as lode claims, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim. That decision seems to have occasioned surprise among those seeking to acquire from the government lands supposed to contain oil although it was, as was shown in the opinion delivered at the time, in strict accord with the provisions of the statute, and is abundantly supported by the authorities. *Davis' Adm'r v. Weibbold*, 139 U. S. 507, 522, 11 Sup. Ct. 628, 35 L. Ed. 238; *Dughi v. Harkins*, 2 Land Dec. Dep. Int. 721; *Cleghorn v. Bird*, 4 Land Dec. Dep. Int. 478; *Commissioners v. Alexander*, 5 Land Dec. Dep. Int. 126; and numerous cases cited in *Davis' Adm'r v. Weibbold*. It is a matter of common knowledge that, in consequence of the decision in the case of *Nevada-Sierra Oil Co. v. Home Oil Co.*, strenuous efforts were made by strong and influential organizations to induce congress at its last session to dispense with the necessity of an actual discovery of oil as a basis of acquiring such lands under the placer mining laws, and to provide that certain indications of the existence of such mineral should be sufficient evidence of the mineral character of the land; but all of these efforts were unsuccessful, and the law remains the same in that respect as before. Applying the law to the facts as made to appear by the pleadings in the present case, it is clear that the location of the lands in controversy by the predecessors in interest of the defendants in October, 1899, under the

statute relating to placer claims, amounted to nothing, for the reason that no discovery of oil or other mineral had then been made, nor, indeed, has yet been made, in or upon any part of the lands in controversy. It is not pretended that the defendants or their predecessors remained in the actual possession of any part of the premises; and, if they had, the law is well settled that mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them. Neither the defendants nor their predecessors in interest had made such a location as prevented the lands from being, in law, vacant. Others had the right to enter upon the lands for the purpose of taking them up under the mining laws, if it could be done peaceably and without force, or to acquire the government title thereto by any other legal means. *Sparks v. Pierce*, 115 U. S. 408, 413, 6 Sup. Ct. 102, 29 L. Ed. 428; *Belk v. Meagher*, 104 U. S. 279, 287, 26 L. Ed. 735; *Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93; *Horswell v. Ruiz*, 67 Cal. 111, 7 Pac. 197; *McCormick v. Varnes*, 2 Utah, 355; *Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. 280. The real question in the case, therefore, is whether the proceedings taken under the act of congress of June 4, 1897, by the predecessor in interest of the complainant, conferred upon him and his grantee such a right in the lands in controversy as will enable the complainant to maintain its bill.

The statute in question is a plain standing offer on the part of the government to exchange any of its land that is vacant and open to settlement for a like quantity of similar land within a forest reservation, for which it had previously issued a patent, or to which an unperfected bona fide claim had been acquired, provided that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims; the owner of or settler on the tract within the reservation, in the event of his acceptance of the offer, being required to relinquish his tract to the government, in consideration of which he is given the right to select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his patent or claim, as the case may be, with the further provision that no charge shall be made for making the entry of record, or issuing the patent to cover the tract selected. From these provisions it is clear that, in such cases of exchange, title is to be given by the government for title received, and in cases of unperfected claims the claimant is to occupy a precisely similar status in respect to the tract selected that he did regarding that relinquished. In all cases the land authorized to be selected in lieu of that relinquished is required to be vacant and open to settlement. When? Manifestly, at the date of selection. It is upon its then character and condition that the selector has the right, and is bound, to act. Before making his selection he must inform himself of the character and condition of the tract desired, but it would be wholly unreasonable to say that he is required to make a selection based upon what may be disclosed in that regard in the future. The right to select is by the statute given to the party invited by the government to make the exchange, without other condition than that

the land selected shall be vacant and open to settlement. Neither the act of the selector, however, in making the selection, nor that of the officers of the local land office, upon whose books the selected tract appears to be vacant and open to settlement, in accepting and filing the selection, is conclusive of the then character and condition of the land. Presumptively, the character and condition of the selected tract is such as is indicated by the books of the land office, and therefore, the selection, with the approval of the officers of the local land office, of a tract appearing upon the books as vacant and open to settlement, in lieu of a similar tract of like dimensions relinquished to the government, gives an equity in the selector which entitles him to protection until the fact in respect to the character and condition of the selected land is, upon proper notice to the equity claimant, otherwise determined by the land department. The right to make that inquiry extends to the time of the issuance of the patent contemplated and provided for by the statute. *Hawley v. Diller* (decided May 28, 1900) 178 U. S. 476, 20 Sup. Ct. 986, Adv. S. U. S. 986, 44 L. Ed. —; *Lumber Co. v. Rust*, 168 U. S. 589, 593, 18 Sup. Ct. 208, 42 L. Ed. 591; *Knight v. Association*, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974. But this inquiry, as has been said, is limited to the character and condition of the land at the time of its selection. One reason for this has already been stated, namely, that, while the selector under the act in question may and must inform himself in regard to the then character and condition of the land he desires to take in exchange for that relinquished, it would be altogether unreasonable to hold that he is required to make a selection based upon what may be disclosed in that regard in the future. And, turning to the act under consideration, it is seen, as has already been observed, that the power to "select" is by the statute given to the party who is invited to make the exchange, provided always that he confines his selection to the class of lands described in the statute, to wit, those vacant and open to settlement. No other condition is imposed by the statute. The act in question differs very materially in this respect from the indemnity clauses of many of the railroad and other grants, requiring the selections to be made by and with the advice, consent, direction, or approval of some officer of the land department, in which case such consent or approval is deemed a condition precedent to the vesting of any interest in the selected land. The present case is quite similar to that of *Culver v. Uthe*, 133 U. S. 655, 10 Sup. Ct. 415, 33 L. Ed. 776, the facts of which were that one Uthe had a patent from the United States for the land there in controversy, dated February 10, 1851, which purported on its face to be issued under the act of congress of February 11, 1847 (9 Stat. 123), on a military land warrant that he had deposited in the general land office. This land warrant was located on the land then in question at the land office of the United States in Chicago, Ill., on July 10, 1850, under the authority of Uthe himself; and the land-warrant certificate was delivered up, and the patent aforesaid issued to him in due time, and after the proper course of proceedings. The defendant to the action relied upon the fact that the land was swamp land, within the meaning of the act of congress of the 28th of September, 1850 (9 Stat. 519); that by that statute the title to the land was transferred to

the state of Illinois between the time of the location of the military land warrant and the issuance of the patent for it to Uthe, and that therefore the title claimed under Uthe failed, being vested by that statute in the state of Illinois,—the act being a grant in præsent, and taking effect at its date. The supreme court said:

“Under an act of congress which authorized it to be done, Uthe, by directing his land warrant to be located upon this land and delivering up the warrant, and by the proceedings of the land office upon that location, which resulted in issuing a patent to him for the land, had acquired an equitable title to the land, or what may be called a vested interest in it, prior to the passage of the swamp land act by congress. He had done what by the act of congress of 1847 (9 Stat. 123), entitled him to the land on which his warrant was located. He had delivered up the land warrant,—the evidence of his claim against the government. He had received in exchange for it the certificate of the receiver and register of the land office, and these entitled him to a patent after such delay as was necessary to ascertain the fact that the land had been granted to no one else, and that all his proceedings were regular, which facts were to be determined by the commissioner of the general land office, and which were determined in his favor. He had paid for this land. He had paid by the delivering up and cancellation of his land warrant. He had received the certificate of the register and receiver of the land office at Chicago, which, by the laws of nearly all the Western states, have been made equivalent to the title to the land in actions of ejectment, though the strict legal title remained in the United States at the date of the passage of the swamp land act. Are we to suppose that congress intended to give to the state of Illinois the land which it had already, by a contract for which value was received, promised to convey to Uthe? As the grant to the states of the swamp land within their jurisdiction was a gratuity, although accompanied with a trust for the reclamation of said land, it is not easily to be supposed that congress intended to be thus generous at the expense of parties who had vested rights in any of the lands so donated, derived from the United States.”

It is true that in the case just cited a certificate had been issued by the register and receiver of the local land office in lieu of the land warrant surrendered, while here nothing more was done by the register and receiver of the local land office than to receive the deed for the relinquished land, together with the certificate of title thereto, and to accept and file the selection of the tract selected in lieu thereof. But in the present case nothing more was required to be done. The statute makes no provision for the issuance of any certificate by the register and receiver to the selector, or for the issuance to him of any other instrument than a patent. It is well settled that in purchases of land from the government, where one has paid the full purchase price and done all that he is called upon to do by the terms of the statute, he has acquired an equitable title to the property bought. In *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762, it was sought to defeat the title of a mining claimant to his mine, after he had paid the complete purchase price therefor and received a certificate of purchase, by showing that he had not complied with the terms of the United States statute which requires that not less than \$100 worth of labor be performed or improvements made each year “until a patent has been issued therefor.” The supreme court, in denying the soundness of the proposition, said:

“It is a general rule in respect to the sales of real estate that when a purchaser has paid the full purchase price his equitable rights are complete, and

there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real-estate law has been repeatedly applied by this court to the administration of the affairs of the land department of the government; and the ruling has been uniform that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government, in trust for the other party, in whom are vested all the rights and obligations of ownership."

To the same effect are *Simonds v. Wagner*, 101 U. S. 261, 25 L. Ed. 910; *U. S. v. Hughes*, 11 How. 568, 13 L. Ed. 809; *Wirth v. Branson*, 98 U. S. 118, 25 L. Ed. 86; *Deffeback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423; *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182; *Davis' Adm'r v. Weibbold*, 139 U. S. 524, 11 Sup. Ct. 628, 35 L. Ed. 238. In *Re Jack*, 7 Land Dec. Dep. Int. 570, and *Rea v. Stephenson*, 15 Land Dec. Dep. Int. 37, it was held that when a homesteader has completed his entry and made final proof, and final certificate has issued, a subsequent mineral discovery cannot affect his title, and a hearing regarding the same will not be ordered. In *Reid v. Lavelle*, 26 Land Dec. Dep. Int. 100, it was said by the secretary:

"The only questions properly before the land office in this proceeding are those which relate to the actual known character of the land in controversy at the date of cash entry No. 269. If the land was then known to be valuable chiefly for its mineral contents, it was not subject to such entry. * * * The defendant's representations could not relieve the land department of its duty to determine the actual known character of the land at the date of the cash entry. * * * If the land was not mineral in character when Lavelle made his cash entry therefor, and if he is shown to have possessed the necessary qualifications, and to have fully complied with the homestead laws up to that time, his entry must stand."

So in respect to school lands. Under the school-land grant from congress it has been many times held that, unless they contain known mineral at the date of the survey, title thereto passes to the state, and subsequent discovery of mineral in profitable quantities could not divest the state of its title. *Saunders v. Mining Co.*, 125 Cal. 159, 57 Pac. 656; *Ivanhoe Min. Co. v. Keystone Consol. Min. Co.*, 102 U. S. 175, 26 L. Ed. 126; *In re Miner*, 9 Land Dec. Dep. Int. 408; *Barringer & A. Mines & M.* 527. See, also, *Shaw v. Kellogg*, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1052. And in respect to state lieu selections the law is settled that the rights of the parties claiming them are to be determined by the facts as known to exist at the date of the selection. *McCreery v. Haskell*, 119 U. S. 327, 7 Sup. Ct. 176, 30 L. Ed. 408; *Howell v. Slauson*, 83 Cal. 546, 23 Pac. 692; *Milling Co. v. Morgan*, 106 Cal. 416, 39 Pac. 802. In *Wirth v. Branson*, 98 U. S. 118, 25 L. Ed. 86, the supreme court declared:

"A party who has complied with all the terms and conditions which entitle him to a patent for a particular tract of land acquires a vested interest therein, and is to be regarded as the equitable owner thereof while his entry or location remains in full force and effect."

See, also, *Whitney v. Morrow*, 112 U. S. 695, 5 Sup. Ct. 333, 28 L. Ed. 871; *Edwards v. Elliott*, 21 Wall. 539, 22 L. Ed. 488; *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482, in which latter case the court said:

"The power of supervision possessed by the commissioner of the general land office over the acts of the register and receiver of the local land offices in the disposition of the public lands undoubtedly authorizes him to correct and annul entries of land allowed by them where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property, and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other legally acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

The decisions of the land department are to the same effect. See *In re Abercrombie*, 6 Land Dec. Dep. Int. 693; *Harnish v. Wallace*, 13 Land Dec. Dep. Int. 108; *In re Miner*, 9 Land Dec. Dep. Int. 408; *In re Laney*, Id. 83; *In re Plymouth Lode*, 12 Land Dec. Dep. Int. 513.

As has been said, the question that remains open to inquiry by the land department up to the issuance of patent is whether or not the selected land was vacant and open to settlement at the time of its selection. Vacant public lands are open to settlement under the laws relating to that subject when they contain no "known salines or mines" (Act Sept. 4, 1841; 5 Stat. 455; Rev. St. § 2258), whether of gold, silver, petroleum, or any other mineral. The law as to what constitutes a "known mine," under the statutes relating to the settlement of public lands, is also thoroughly well established. In the case of *Deffeback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423, the legislation on the subject was reviewed at length. It was there held that no title from the United States to land known at the time of sale to be valuable for its minerals, of gold, silver, cinnabar, or copper, can be obtained under the pre-emption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws especially authorizing the sale of such lands, except in the states of Michigan, Wisconsin, Minnesota, Missouri, and Kansas. The court say (page 404, 115 U. S., page 100, 6 Sup. Ct., and page 426, 29 L. Ed.):

"We say 'land known at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral,' in the sense of the statute, is applicable. * * * We also say lands 'known' at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of minerals may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after patent has been issued, to contain valuable minerals. Indeed, this has often happened. We therefore use the term 'known' to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

In the case of *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182, one of the grounds on which the government sought to annul the patents was that the lands there in controversy, which turned out to contain large and valuable deposits of coal, were not subject to settlement and sale under the pre-emption laws; being "known mines," within the meaning of those laws. The court held that it is not sufficient to constitute "known mines" of coal, within the meaning of the statute, that there should merely be indications of coal beds or coal fields of greater or less extent, and of greater or less value, as shown by outcroppings. Referring to the act of July 1, 1864 (13 Stat. 343), by which it was declared:

"That where any tracts embracing coal beds or coal fields constituting portions of the public domain, and which as 'mines' are excluded from the pre-emption act of 1841 (5 Stat. 455), and which under past legislation are not liable to ordinary private entry, it shall and may be lawful for the president to cause such tracts, in suitable legal subdivisions, to be offered at public sale to the highest bidder, after public notice of not less than three months, at a minimum price of twenty dollars per acre; and any lands not thus disposed of shall thereafter be liable to private entry at said minimum,"—the court said: "We hold, therefore, that to constitute the exemption contemplated by the pre-emption act, under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine under the conditions existing at the time than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be, under any conditions, sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual 'known mines' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act cannot be successfully assailed."

See, also, *Davis' Adm'r v. Weibhold*, 139 U. S. 524, 11 Sup. Ct. 628, 35 L. Ed. 238; *Railroad Co. v. Valentine*, 11 Land Dec. Dep. Int. 238.

Nor is it of any importance, in view of the provisions of the statute under consideration, that the selection here in question may have been made in the hope of finding oil in the land. The statute conferring the right of selection does not make that right in any way depend upon the intent with which it is made. *Mining Co. v. Reynolds*, 124 U. S. 374, 8 Sup. Ct. 598, 31 L. Ed. 466; *Sullivan v. Mining Co.*, 143 U. S. 431, 12 Sup. Ct. 555, 36 L. Ed. 214. Should doubt exist as to the character of any of the public lands standing upon the books of the local land offices as open to settlement, to which no valid right has attached, it is undoubtedly within the power of the officers of the general land office to withdraw them from settlement or sale pending an inquiry as to their true character. And such action, it is understood, has recently been taken by the land department in respect to some of the public lands in California, whose surface indications and the character of adjacent lands tended to show that they are oil lands. Lands so withdrawn are, of course, not open to settlement, and there-

fore not subject to selection under the act of June 4, 1897, in lieu of any land relinquished to the United States. But they continue open to exploration for minerals, and, when mineral is found therein, to location under the mining laws, if the land be at the time unappropriated. And even where such discovery is made subsequent to a prior location, if the location be otherwise valid, that fact is held to be immaterial, provided always that no rights of others have intervened before compliance by the locator with all of the statutory requirements. *Nevada-Sierra Oil Co. v. Home Oil Co.*, *supra*, and cases there cited.

The case as presented showing that the complainant has an equity in the land in controversy which may ripen into a perfect legal title, it is entitled to the interposition of a court of equity to protect that right as against trespassers who confessedly threaten to enter thereon and to despoil the property of its chief, if not its only, value. In the case of *Railroad Co. v. Hussey*, 15 U. S. App. 391, 9 C. C. A. 463, 61 Fed. 231, there was a grant to the railroad company by congress of certain alternate odd-numbered sections of public land, not mineral, to distinguish which from lands retained by the government a survey was essential; and in its absence the defendant, Hussey, without any right, entered within the grant limits and proceeded to cut down, destroy, and carry away a large amount of timber standing and growing upon what, when surveyed, would be odd-numbered sections, as well as what would, upon survey, prove to be even-numbered sections, of the lands within the grant limits. One of the contentions on the part of the railroad company in that case was that prior to the survey the railroad company and the government occupied the position of tenants in common of all of the lands situated within the grant limits. While denying the correctness of that position, the circuit court of appeals for this circuit said:

"But, because it cannot be properly held that the complainant and the United States are, prior to its survey, tenants in common of the entire body of lands within the limits of the grant to the railroad company, does it necessarily follow that a trespasser may with impunity go upon the lands and cut down and destroy or carry away the timber growing upon them? The bill shows that the lands in question are valuable only for the timber that grows upon them. To cut down, destroy, or carry away the timber thereon is therefore, essentially, to destroy and take away the very substance of the estate. That an injunction will be awarded, in behalf of one showing the necessary interest in the property, to prevent such waste and destruction, is thoroughly settled. *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116. It is apparent that the complainant has no adequate remedy at law. It cannot maintain an action for damages for the cutting of any tree or trees upon the lands in question, or any other action at law, for the reason that it would be essential to the maintenance of such an action for the plaintiff to show that the particular tree or trees for the cutting of which damages were claimed, or other relief was asked, came from the land of the plaintiff; and this, as has been seen, is impossible to be shown in advance of the government survey. Yet the bill shows that the defendant, without any right or authority whatever,—in other words, as a mere trespasser,—has entered upon the body of unsurveyed lands within the limits of the grant to the complainant, and for purposes of speculation and sale has commenced to cut down the timber thereon, and to manufacture the same into saw logs, lumber, etc., and has so cut 850,000 feet of saw logs, and will, unless restrained, continue those illegal acts, and thus remove the very thing which constitutes the

chief, if not the only, value of the lands. Every tree already felled by the defendant, and every tree intended to be cut by him, in the prosecution of his undertaking, necessarily impairs the value of the complainant's interest in its grant; for the condition of the lands within the grant limits necessarily renders it uncertain and impossible to ascertain how many of such trees have been or will be cut from the lands belonging to the complainant. This very uncertainty would seem to vest in such grantees the right to protect the whole as against a mere trespasser and wrongdoer. * * * The bill in the present case alleges that the acts complained of are committed by the defendant upon what, when surveyed, will be odd-numbered sections, as well as what will be even-numbered sections, of the lands within the grant limits. The case is a novel one, it must be admitted; but where so great a wrong is being perpetrated, as must be taken to be true for the purposes of the present decision, and the party seeking to prevent the wrong has no adequate remedy at law, equity, we think, will afford the remedy. 'Ubi jus, ibi remedium,' is the maxim which forms the root of all equitable decisions; and, responding to the objection that certain orders issued in the case of *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.* (C. C. 54 Fed. 746, 751, were without precedent, the court said: 'Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief.'"

It results from what has been said that, until it shall be determined by the land department that the tract of land in controversy was not vacant and open to settlement at the time of its selection by the predecessor in interest of the complainant, an equity in that tract exists in the complainant, which a court of equity should protect against such acts as are here threatened and complained of. Accordingly a decree will be entered in favor of the complainant, with a provision, however, to the effect that should the land department of the government, at any time prior to the issuance of a patent for the selected tract, determine that the land was not vacant and open to settlement at the time of its selection, the operation of the decree shall thereupon cease.

WRIGHT v. WRIGHT et al.

(Circuit Court, W. D. Pennsylvania. June 23, 1900.)

No. 24.

1. JUDGMENTS—COLLATERAL ATTACK—PROCEEDINGS BEFORE AUDITOR.

A judgment entered on a warrant of attorney cannot be collaterally attacked by junior judgment creditors in a proceeding before a master appointed to distribute the proceeds of real estate on which the judgments were liens.

2. SAME—CONSIDERATION.

Where real estate is acquired by a widow and heirs, incumbered with the lien of an indebtedness owing by the ancestor at the time of his decease, and after such lien has expired by operation of law the widow and heirs execute to the creditor, under seal, a note containing a warrant of attorney for a confession of judgment for the full amount of the ancestor's indebtedness, payable 12 months after date, and containing a waiver of exemptions, a judgment duly entered on such note is not subject to attack as being without consideration, especially by the heirs who were parties to it.

8. EXEMPTIONS—WAIVER—EFFECT.

In Pennsylvania the statutory exemption from execution is a personal privilege, which may be waived by the debtor, and where such waiver has been made in a judgment note the debtor cannot afterwards claim his exemption in proceedings before a master appointed to distribute the proceeds of real estate sold for the satisfaction of the judgment.

In Equity. Sur exceptions to master's report distributing proceeds of sale.

W. G. Guiler, for plaintiff.

R. H. Lindsay, for bank.

Albert York Smith, for other exceptants.

ACHESON, Circuit Judge. Creditors can attack a judgment collaterally only for collusion between the parties to it for the purpose of defrauding creditors. In *re Dougherty's Estate*, 9 Watts & S. 189; *Lewis v. Rogers*, 16 Pa. St. 18; *Lennig's Appeal*, 93 Pa. St. 301, 307. Where there has been no fraudulent collusion against creditors, it is an unbending rule that an auditor appointed to distribute money cannot inquire into a judgment rendered in court, but must take it as conclusive. *Dyott's Appeal*, 2 Watts & S. 557; *Thompson's Appeal*, 57 Pa. St. 175, 177; *Lennig's Appeal*, *supra*. The authority of these cases has not been shaken by any later ruling of the supreme court of Pennsylvania. A judgment entered on warrant of attorney is as much an act of the court as if it were formally pronounced on *nil dicit* or a *cognovit*, and until it is reversed or set aside it has all the qualities and conclusive effect of a judgment on a verdict. *Brad-dee v. Brownfield*, 4 Watts, 474; *Lennig's Appeal*, 93 Pa. St. 307. In *Thompson's Appeal*, *supra*, where a judgment entered on a warrant of attorney was collaterally attacked before an auditor by junior judgment creditors, Judge Strong, speaking for the supreme court of Pennsylvania, said:

"When the auditor entered upon the duties of his appointment, Thompson, the appellant, presented a judgment against Kelly, the defendant in the execution, for \$6,000. It was apparently the first lien upon the property, which had been sold, and the proceeds of sale of which the auditor was directed to distribute. Of course, as a judgment it was conclusive upon the auditor. He had no right to disregard it, or to allow to any other lien a priority over it. Later judgment creditors, however, attempted to show that Kelly had intended to give a judgment only for \$600, and that such sum had been paid. If the facts had been so, it would not have justified the auditor in treating it as anything else than a judgment for \$6,000. He was concluded by the record. *Dyott's Appeal*, 2 Watts & S. 567; *Leeds v. Bender*, 6 Watts & S. 318; *Ellmaker v. Insurance Co.*, *Id.* 442."

In the present case collusion between the bank and the defendants in its judgment to defraud the defendants' creditors was not shown, or even alleged. Fraudulent intent is not imputed to any of the parties to the bank's judgment. It is, indeed, a most curious fact that the plaintiff in each of the two junior judgments here claiming priority over the bank actually joined in executing the note with warrant of attorney for the confession of the judgment in favor of the bank. This fact precludes the notion of collusion on their part. There is a total lack of evidence of the collusion requisite under all the authorities to sustain a collateral attack upon the bank's judg-

ment. It was not even attempted to be shown that at the date the judgment note was given to the bank the makers were insolvent or at all embarrassed. The master's finding goes to the extent only that the bank's judgment "is without consideration, except the pre-existing debts of Thomas S. Wright, and that the judgment note or bond upon which it is entered is voluntary." But in Thompson's Appeal, *supra*, want of consideration, even when coupled with fraud upon the defendant in the confessed judgment, was held to be unavailing to junior judgment creditors in a collateral attack before an auditor upon a senior judgment.

The judgment having been given to the bank in good faith for the pre-existing debts of Thomas S. Wright, I am not able to see that its validity could be successfully questioned by these junior judgment creditors even in a direct proceeding before the proper tribunal. The facts are these: Thomas S. Wright died on November 7, 1893, seised, *inter alia*, of the real estate, the proceeds of sale of which the master was directed to distribute. At the time of his death Thomas S. Wright was indebted to the bank, and his real estate came to his widow and children incumbered with the lien of that indebtedness. The bank did not bring suit within the statutory period, and the lien expired. Subsequently, however, the widow, Nancy Wright, and five of the decedent's children, namely, Harry S., Moses, John A., William D., and Bessie Wright, all *sui juris*, executed under their hands and seals, and delivered to the bank, a note containing a warrant of attorney for the confession of judgment for \$8,815, the amount of Thomas S. Wright's indebtedness to the bank. This judgment note was dated January 21, 1897, and was payable 12 months after date, with interest from May 1, 1897, at the rate of 5 per cent. only, and it contained a waiver of exemptions. Judgment upon this note and warrant was entered in the state court on January 29, 1897. That judgment was the first lien on the real estate, the proceeds of the sale of which are here for distribution. The sale was made under a decree of this court discharging all liens. The two contesting junior judgments were entered in the state court by confession on March 28, 1898,—one in favor of Nancy Wright for \$1,485, and the other in favor of Harry S. Wright for \$1,716.91. By subsequent amendment the plaintiff in the latter judgment was styled, "Administrator of Thomas S. Wright, Deceased." Now, even aside from the fact that the note was under seal, there was, I think, ample consideration shown to support the bank's judgment. The debt due from the estate of Thomas S. Wright to the bank remained in full force, notwithstanding the lien therefor on the real estate had expired. It was permissible to the widow and heirs of the decedent to waive the statutory limitation and revive the lien. Practically, this was done, to the extent of their interests by the widow and the children who gave their judgment note to the bank. In taking this note the bank gave time, and made concessions as to interest. This settlement being perfectly just in itself, and free from taint of bad faith, I do not perceive how it could be impeached even by third persons. Much less is it open to question by parties to the transaction. A very slight advantage to one party, or a trifling inconvenience to

the other, is sufficient consideration to support a contract. *Harlan v. Harlan*, 20 Pa. St. 303, 307. The resignation of even a mere colorable claim, and amicable settlement of the dispute, constitute a valid consideration. *Paxson v. Hewson*, 8 Wkly. Notes Cas. 197, 198. The compromise of an action based upon a manifestly groundless claim has been held enough to support a note for the payment of money. *O'Keson v. Barclay*, 2 Pen. & W. 531. There was also a sufficient moral consideration to sustain the judgment. The recognition by the widow and adult heirs that the land which came to them from the decedent continued justly chargeable in their hands with his honest debt was the dictate of good conscience. A debtor is not bound to interpose the bar of the statute of limitations in favor of creditors. *Bergey's Appeal*, 60 Pa. St. 408, 417. In *Leonard v. Duffin*, 94 Pa. St. 218, it was held that the debt of a married woman, which was legally void, and bound her morally only, was a sufficient consideration to support an obligation under seal by a third person to pay it. In *Holden v. Banes*, 140 Pa. St. 63, 21 Atl. 239, the court ruled that the contract of a married woman to pay a debt of her husband out of her separate estate created a moral obligation sufficient to support a bond and mortgage for the same debt executed by her after his death, and that, in the absence of fraud and collusion, other judgment creditors had no standing, on the distribution of the proceeds of the sale of the land, to set up the want of sufficient consideration for the bond and mortgage so executed.

The master, it seems to me, was right in refusing to postpone the bank's judgment to that of Nancy Wright, but wrong in giving priority over the bank to the judgment of Harry S. Wright, administrator. The cases upon which the master relied as his justification for giving priority to this junior judgment over that of the bank are inapplicable here. The bank was not before the master to enforce a note. It claimed under its judgment, which stood upon the record of the state court unimpeached and unquestioned, and the lien of which had been transferred from the land to the fund by the decree of this court. The master was concluded, as we have seen, by the record. But, even if the question of consideration had been open to him, the evidence was with the bank.

The master erred, I think, in allowing to Nancy Wright and Bessie Wright the exemptions they had respectively waived. In Pennsylvania it is conclusively settled that the statutory exemption is a personal privilege, and may be waived. *Case v. Dunmore*, 23 Pa. St. 93; *Bowman v. Smiley*, 31 Pa. St. 225. Here the waiver was in writing and under seal, and it had become part of the judgment. Clearly it was irrevocable. *Id.* In the case of *Hoffman v. McDermond*, 1 Pittsb. R. 197, cited by the master, the waiver was oral and without consideration.

NEWBURYPORT WATER CO. v. CITY OF NEWBURYPORT.

(Circuit Court, D. Massachusetts. August 8, 1900.)

No. 924.

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—FRANCHISE OF CORPORATION—TAKING FOR PUBLIC USE.

The taking by a municipal corporation, for the use of the municipality, of a system of waterworks belonging to a private corporation, under an act of the legislature providing that the valuation to be paid therefor should be the "fair value of said property for the purposes of its use by the city," and that "such value shall be estimated without enhancement on account of future earning capacity, or good will, or on account of the franchise of said company," is a taking without just compensation, and is therefore in conflict with the fourteenth amendment to the constitution of the United States, providing that no person shall be deprived of his property without due process of law.

2. SAME.

Where the franchise granted by the legislature to a private corporation to erect waterworks to supply a city with water is not exclusive, the subsequent grant to the city of the right to build competing waterworks does not constitute a taking of the corporation's property or franchise, within the fourteenth amendment to the constitution of the United States, providing that no person shall be deprived of his property without due process of law.

3. SAME.

By St. Mass. 1893, c. 471, a city was authorized to build its own waterworks, notwithstanding the previous grant of a franchise to plaintiff, but was required to first submit to a vote of its people the questions: First, whether it should purchase the existing works of plaintiff, if the latter desired to sell; and, second, whether it should maintain its own waterworks. The city having voted to supply itself with water, but not to purchase the works of plaintiff, St. Mass. 1894, c. 474, was passed by the legislature, obliging the city to purchase plaintiff's works before proceeding to supply itself with water, if plaintiff within 30 days after the passage of the act notified the mayor of the city of its desire to sell, and provided that, if the parties were unable to agree upon terms of sale, appraisers should be appointed, who should determine the fair value of the property "for the purposes of its use by the city," and "without enhancement on account of future earning capacity or good will, or on account of the franchise of said company." *Held*, that whether the right of the city to build competing waterworks under the act of 1893 existed or not when the act of 1894 was passed, neither the competition authorized under the act of 1893, nor that threatened under the act of 1894, being illegal, the compulsion upon plaintiff to sell its works under the act of 1894 without just compensation, or have the value of same destroyed by the competing works of the city, did not constitute the sale one under duress, which was in effect a taking of plaintiff's property by the city without compensation, within the fourteenth amendment to the constitution of the United States, providing that no person shall be deprived of his property without due process of law.

Lauriston L. Scaife and Robert M. Morse, for complainant.

A. E. Pillsbury and Horace I. Bartlett, for defendant.

Before COLT, Circuit Judge, and BROWN, District Judge.

COLT, Circuit Judge. Under the stipulation of counsel and order of court, the single question now presented is whether the plaintiff has been deprived of its property without due process of law, in viola-

tion of the fourteenth amendment to the constitution of the United States. All other questions as to the plaintiff's relief under its bill, including the question of valuation of the property alleged to have been taken, are to await the determination of the constitutional question.

The plaintiff, the Newburyport Water Company, was chartered by the state of Massachusetts in 1880 to supply the city of Newburyport and its inhabitants with water. St. Mass. 1880, c. 235. The company thereupon constructed a system of waterworks, and proceeded to supply the city and its inhabitants with water. In 1893 the city petitioned the legislature for authority to build its own waterworks. Notwithstanding the opposition of the company, the legislature passed the act of June 10, 1893 (St. Mass. 1893, c. 471), authorizing the city to establish waterworks. After the vote by the city upon the acceptance of the act, the counsel for the city claimed and advised that the city had the right to supply itself and its inhabitants with water. Thereupon the company applied to the legislature to have the city required to purchase its waterworks before it proceeded to supply itself and its inhabitants with water. The application resulted in the passage of the act of June 14, 1894 (St. Mass. 1894, c. 474). This act provided that the city should not proceed to build waterworks under the act of 1893 unless it should first purchase the company's property, which it might do by a majority vote, and that, the city having so voted, the company should within 20 days execute and deliver to the city proper deeds conveying its property; that the property conveyed should thereupon become the property of the city, and that the city should pay to the company the fair value thereof, which, if not agreed upon, should be determined by three commissioners appointed by the supreme judicial court, who should determine the fair value of the property "for the purposes of its use by said city," and "without enhancement on account of future earning capacity or good will, or on account of the franchise of said company." The city voted to purchase, and, on January 29, 1895, the company executed and delivered to the city a duly-authorized deed of all its property and franchise rights. The city took possession of the property, and has ever since managed and operated it. After the conveyance, commissioners were appointed, and on February 3, 1897, they filed in the state court their award. Questions of law arising on the award were reserved by a single justice for the full court, and on June 14, 1897, that court made an order sustaining the action of the commissioners. The commissioners estimated the value of the company's property for the purposes of its use by the city, and excluded from such valuation its future earning capacity, good will, and its right to the use of the streets and to collect water rates.

In order to sustain the contention that the plaintiff has been deprived of its property without due process of law, in violation of the fourteenth amendment to the constitution of the United States, it is necessary to show, as the plaintiff declares in its brief: (1) That the plaintiff's property was taken for public uses; (2) that the property was taken under color of the authority of a state; (3) that the taking was without just compensation. The plaintiff bases the taking of

its property upon the legislative threat to authorize municipal competition, whereby its deed to the city became voluntary only in form, while in fact it was compulsory. This threatened competition, it is claimed, forced the plaintiff, against its will, to convey its property to the city for an insufficient consideration, and made the deed in effect a taking of property without just compensation, under color of legislative authority. The proposition here advanced requires a somewhat extended examination of the acts of 1893 and 1894, and their general bearing upon the single issue before us.

At the outset, it may be observed that, if the plaintiff establish a taking of its property under the acts of 1893 and 1894, it is clearly right in its contention that such taking was without just compensation. The act of 1894 provided that the valuation of the property should be "the fair value of said property for the purposes of its use by said city," and "such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company." A taking under an act providing such a method of compensation would be unconstitutional, because without just compensation. It would be a taking "without due process of law," in violation of the fourteenth amendment. Where private property is taken for public uses, the legislature cannot fix the compensation, or determine in what it shall consist, or prescribe the rules and principles upon which it shall be computed. *Lewis, Em. Dom. § 461.* When a taking has been ordered, the question of compensation is judicial, not legislative. The legislature cannot extinguish any part of such compensation, or, in any manner "interfere with the just powers and province of courts and juries to administer rights and justice." It is sufficient on this point to cite the language of the supreme court in two cases. In *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 327, 13 Sup. Ct. 626, 37 L. Ed. 468, the court said:

"By this legislation congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes. That is a question of a political and legislative character. But, when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 571, 9 L. Ed. 773, Mr. Justice McLean, in his opinion, referring to a provision for compensation found in the charter of the Warren Bridge, uses this language: 'They [the legislature] provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do,—assess the amount of compensation to which the complainants are entitled.' See, also, the following authorities: *Com. v. Pittsburgh & C. R. Co.*, 58 Pa. St. 26, 50; *Pennsylvania R. Co. v. Baltimore & O. R. Co.*, 60 Md. 263; *Isom v. Railroad Co.*, 36 Miss. 300. In the last of these cases, and on page 315, will be found these observations of the court: 'The right of the legislature of the state, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the "just compensation" it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without

his consent, or to extinguish any part of such "compensation" by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our constitution. If anything can be clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so.' We are not, therefore, concluded by the declaration in the act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property."

In *Reagan v. Trust Co.*, 154 U. S. 409, 410, 14 Sup. Ct. 1059, 38 L. Ed. 1027, the court observed:

"If the state were to seek to acquire the title to these roads under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation; that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature?"

We have to ascertain, then, in order to dispose of the question before us, whether there was a taking of the plaintiff's property (the term "property" including franchise rights) by or under the acts of 1893 and 1894. The taking complained of in this case was by right of eminent domain and not under the guise of taxation or police regulation. Eminent domain "embraces all cases where, by authority of the state and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use." *Lewis, Em. Dom.* § 1. Where the state grants a franchise to a corporation, and subsequently grants a similar franchise to another corporation, the question of a taking may be considered from three points of view: Where the first grant is not exclusive, the subsequent grant is not a taking which entitles the owner of the first franchise to compensation. Where the first grant is exclusive, the grant of a rival franchise is a taking, and just compensation must be made. Where the first grant is exclusive, the grant of a similar franchise does not constitute a taking requiring compensation, when the state, by its constitution or statute law, has reserved to itself the power to repeal, alter, or amend charters granted by the legislature. Such reservation becomes a part of the charter of every corporation. Shortly stated, the grant by the state of a competing franchise does not constitute a taking of a former nonexclusive franchise, while in the case of an exclusive franchise it does constitute a taking, in the absence of a reserve power in the state. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 7 Pick. 344, affirmed in 11 Pet. 420, 9 L. Ed. 773; *Hamilton Gaslight & Coke Co. v. City of Hamilton (C. C.)* 37 Fed. 832, affirmed in 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *In re Binghampton Bridge*, 3 Wall. 51, 18 L. Ed. 137; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. Ed. 204; *Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; *Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 98, 11 Sup. Ct. 226, 34 L. Ed. 898; *Water Co. v. Clark*, 143 U. S. 1, 12 Sup. Ct. 346, 36 L. Ed. 53; *People v. Cook*, 148 U. S. 397, 410, 13 Sup. Ct. 645, 37 L. Ed. 498; *New York & N. E. R. Co. v. Town of Bristol*, 151 U. S. 556, 567, 14 Sup. Ct. 437, 38 L. Ed. 269; *City of Covington v. Kentucky*, 173 U. S. 231, 19 Sup. Ct. 383, 43 L. Ed. 679; *Metropolitan R. Co. v. Highland St. Ry. Co.*, 118 Mass. 290, 293;

Thornton v. Railway Co., 123 Mass. 32; Proprietors of Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35; Boston & L. R. Corp. v. Salem & L. R. Co., 2 Gray, 1; Power v. Village of Athens, 99 N. Y. 592, 2 N. E. 609.

The act of 1893 authorized the city to supply itself and its inhabitants with water, provided, if the company so desired, the city should first vote upon the proposition to purchase the company's works. The city voted not to purchase, and did vote to accept the provisions of the act. The franchise rights granted to the company by its charter were not exclusive. This is not disputed. We have then presented the question whether the subsequent grant to the city of the right to build competing waterworks constituted a taking of the plaintiff's property or franchise. It is the settled law of this country, established by the decisions of the federal and state courts, that such a grant is not a taking of a former franchise, giving any right to compensation. "Where the grant is not by its terms exclusive, the legislature is not precluded from granting a similar franchise or erecting a rival way or structure, the result of which may be to greatly impair or even totally destroy the value of the former grant, and such damage is not a taking of the former franchise which entitles its owner to compensation. This principle was settled in the leading case of Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, and has been confirmed by numerous decisions." Lewis, Em. Dom. § 136. In the case of Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. 344, the supreme court of Massachusetts held that the grant by the legislature of a competing franchise did not divest vested rights or impair the obligation of a contract. On appeal (11 Pet. 420, 9 L. Ed. 773), the supreme court of the United States placed its decision on the latter ground. This was before the passage of the fourteenth amendment, so that the only federal constitutional right involved related to contract. In Hamilton Gaslight & Coke Co. v. City of Hamilton (C. C.) 37 Fed. 832, 836, where a municipality was proceeding to construct competing gas works under a state statute, the point was taken that the statute interfered with vested rights, and impaired, if it did not destroy, the property of the company, and was in effect an appropriation of private property to public use without making compensation, in violation of the fourteenth amendment to the constitution of the United States. The court decided against this contention. In the supreme court, on appeal (146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963), as appears from the statement of the case by the court on page 259, 146 U. S., page 90, 13 Sup. Ct., and page 965, 36 L. Ed., the plaintiff invoked the protection of the contract clause of the constitution, as well as the clause that no state shall deprive any person of property without due process of law. The court, in its opinion, affirming the judgment below, only discusses the question whether there was any impairment of the obligation of a contract, and by implication, at least (for the point was necessarily involved in the decision), held that the claim that the plaintiff was deprived of its property without due process of law was so untenable as a legal proposition as not to require discussion. It may be said that, since the decision in Proprietors of Charles River Bridge v. Proprietors of

Warren Bridge, the supreme court and other courts in this country have recognized the law as settled that, where the state grants a franchise which is not by express terms made exclusive, the subsequent grant of a similar and competing franchise impairs no constitutional right; that it is neither a violation of the obligation of a contract, nor an impairment of vested rights, nor a taking of property without just compensation. In *Bridge Co. v. Smith*, 30 N. Y. 44, 61, the court observed:

"Since the case of *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773, it has been understood to be the law that it is competent for the legislature, after granting a franchise to one person or corporation which affects the rights of the public, to grant a similar franchise to another person or corporation, the use of which shall impair or even destroy the value of the first franchise, although the right so to do may not be reserved in the first grant, unless the right so to do is expressly prohibited by the first grant."

In *Salem & H. Turnpike Co. v. Town of Lyme*, 18 Conn. 451, 457, the court said:

"Since the decision of this court in the case of *Enfield Toll-Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 454, and of the supreme court of the United States in the case of *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773, and the numerous decisions to the same effect cited in those cases, we do not think it an open question whether a new road, canal, or bridge, materially diverting travel or business from an old one under a prior charter, is therefore unconstitutional, or to be suppressed."

In *Lafayette Plank-Road Co. v. New Albany & S. R. Co.*, 13 Ind. 90, 92, the court declared:

"The grant of a charter for a road, a bridge, or a ferry does not estop the legislature from granting a subsequent charter for a road, bridge, or ferry which may compete with the former in the transportation of freight and passengers between given points; and the simple fact that the two run parallel, and mutually diminish the business of each other, is no ground for a claim by either for damages."

Although the supreme court, in those cases where the exercise of this power by or under the state has been disputed, has usually confined the discussion of the alleged violation of constitutional rights to the contract clause, the language of the court in those cases is instructive, and has an important bearing on the specific question under consideration. In *Water Co. v. Easton*, 121 U. S. 388, 390, 7 Sup. Ct. 918, 30 L. Ed. 1059, the court said:

"By constructing waterworks of its own, the borough will not destroy the franchises of the plaintiff company. It may impair their value, and probably will do so, but of this the company have no legal cause of complaint. The granting of a new charter to a new corporation may sometimes render valueless the franchises of an existing corporation, but, unless the state by contract has precluded itself from such new grant, the incidental injury can constitute no obstacle."

In *Stein v. Water-Supply Co.*, 141 U. S. 67, 81, 11 Sup. Ct. 896, 35 L. Ed. 628, the court said:

"Guided by this rule, in respect to which there is no difference of opinion in the courts of this country, we are forbidden to hold that a grant under legislative authority of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of waterworks from a particular stream or river, prevents the state from granting to other persons the privilege of supplying during the same period the

same corporation and people with water drawn in like manner from a different stream or river."

In *Hamilton Gaslight Co. v. City of Hamilton*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, the company maintained that its charter was exclusive. The city was proceeding to build works of its own, claiming statutory authority therefor. As we have already observed, the company in that case contended that this was an impairment of its charter, and a taking of its property without due process of law. The court observed at page 268, 146 U. S., page 93, 13 Sup. Ct., and page 968, 30 L. Ed.:

"It may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties."

In *Pearsall v. Railroad Co.*, 161 U. S. 646, 664, 16 Sup. Ct. 709, 40 L. Ed. 844, the court said:

"An exclusive right to enjoy a certain franchise is never presumed, and, unless the charter contain words of exclusion, it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed. This principle was laid down at an early day in the case of *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773, and has been steadily adhered to ever since."

Long Island Water-Supply Co. v. City of Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165, was an appeal from the New York court of appeals. The court (page 696, 166 U. S., page 722, 17 Sup. Ct., and page 1169, 41 L. Ed.) said:

"The court of appeals held that neither the statute under which the company was organized, nor the contract, nor the act of annexation, gave to the company rights exclusive and beyond the reach of legislative action. These conclusions of the court of appeals are vigorously challenged in the argument, but we are of opinion that they are correct. The statute simply provided for the organization of water companies. The contract in terms contained no words of exclusion. It gave to the company the privilege of laying its mains in the streets of the town, and contained a covenant on the part of the town to pay certain hydrant rentals. But grants from the public are strictly construed in favor of the public, and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege."

As the franchise granted to the plaintiff by its charter was not exclusive, the subsequent grant by the act of 1893, giving the city authority to construct independent and competing waterworks, was not a violation of the plaintiff's charter or of any constitutional right.

In establishing the power of the legislature to grant a competing franchise, the conflict has been between the rightful claims of the public and the protection secured to private property by constitutional provisions. Before the case of *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge* (1837), many eminent judges and lawyers were of the opinion that such legislation impaired vested rights of property, and violated the contract between the state and the corporation secured by charter. In that case, however, it was successfully urged, though the court were divided in opinion, that the grant by the sovereign authority of a franchise to build a

bridge over a public waterway and to collect tolls did not prohibit the grant of another franchise to construct a bridge over the same waterway, which was free to the public, though the effect was to impair or even destroy the value of the first grant. Whatever doubt may have formerly existed as to this power of the legislature, and however cogent and just the argument may be against its exercise in a particular case, the right of the legislature to exercise it in any case cannot now be questioned; and when a franchise is now obtained for the purpose of establishing waterworks, or to promote like enterprises in which the public are interested and capital is invested, it should not be upon the assumption or belief that the town or city will refrain from competition and the legislature will refuse to authorize it. On the contrary, this legislative power having been upheld and enforced for so many years, it may well be presumed that, when a franchise is obtained which is not exclusive, it is taken with the knowledge and risk that the legislature is not precluded from granting at any moment a similar and competing franchise.

Before examining the act of 1894, it may be well to call attention to some preliminary considerations. The plaintiff contends that the taking in this case was wholly under the act of 1894, and that the act of 1893 never took effect, because the "vote to purchase" the company's works, under section 12 of the act, was a condition precedent to the city's right to vote to supply itself and its inhabitants with water, under section 13; and, the city having voted not to purchase, the act failed, and consequently the subsequent vote by the city to accept the provisions of the act was nugatory. This construction seems contrary to the intent and purpose of the act. The natural and reasonable construction of sections 12 and 13, looking at the whole act, is that the city should first decide whether it would purchase the plaintiff's works, before determining whether it would build works of its own. For the purpose of our present inquiry, however, it is unnecessary to pass upon this question. If the act of 1893 were in force, as contended by the defendant, there was, as we have seen, no taking of the plaintiff's property under it. If it were not in force, there surely was no such taking. But, whether legally in force or not, it clearly appears that it was the fear or belief of the company, the city, and the legislature that the act of 1893 was operative, which led to the passage of the act of 1894. After the vote by the city accepting the act of 1893, the company petitioned the legislature that the city should buy its property and franchise before proceeding to build waterworks under the act. Accompanying this petition was a proposed bill which provided that the city should, "before proceeding to supply itself and its inhabitants with water under the authority of chapter four hundred and seventy-one of the Acts of the Year One Thousand Eight Hundred and Ninety-Three, purchase from the Newburyport Water Company the franchise, corporate property, and all the rights and privileges of said Newburyport Water Company." It further provided that the compensation to be paid by the city should be determined by three commissioners appointed by the supreme judicial court. Thereupon the legislature passed the act of

1894, obliging the city to purchase the plaintiff's works before proceeding to supply itself and its inhabitants with water under the act of 1893, and at the same time fixing the measure of compensation to be paid by the city. Section 1 declares:

"If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the city of Newburyport in writing that it desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants, under the authority of chapter four hundred and seventy-one of the Acts of the Year Eighteen Hundred and Ninety-Three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same."

The act then provides that, whenever the city shall vote to purchase said property, "notice of the desire of said company to sell the same having been given as hereinbefore provided," the company shall within twenty days convey by deed its property to the city, and the city shall pay "the fair value thereof to be ascertained as hereinafter provided." If the parties are unable to agree upon the value of the property, commissioners are to be appointed, "who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company." Section 4 of the act declares:

"In case said city shall, in violation of section one of this act, proceed to supply itself or its inhabitants with water before making the purchase aforesaid, the supreme judicial court shall, upon petition of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase."

Before the consideration of what the plaintiff claims was the legal effect of this act, let us refer for a moment to its manifest purpose. Recognizing the act of 1893 as in force, it simply prohibits the city from exercising the right to build waterworks under that act if the plaintiff desires to sell its works to the city upon the terms provided. There is certainly nothing on the face of the act which authorizes the taking of the plaintiff's property without its consent. It does not in terms compel the company to sell its property to the city. On the contrary, it expressly declares that the company may do so if it "desires." If the act provide for a voluntary conveyance, the insufficiency of the consideration prescribed has no bearing on the issue before us. The question of compensation becomes material only in the event that the sale under the act was made without the plaintiff's consent. If this does not appear, there is no violation of the constitutional right now invoked, whatever other relief the plaintiff may be entitled to. The great injury which at this time threatened the company's property was municipal competition under the act of 1893, and the act of 1894 was passed as a protection against such impending disaster. The legislature might have provided in that act, and there is much force in the contention that

in justice and equity it ought to have provided, that the plaintiff should receive full compensation for its property purchased by the city, but the failure of the legislature to make such provision cannot change the nature and scope of a statute which authorized a voluntary sale into a statute which authorized the taking of the plaintiff's property without its consent by right of eminent domain.

We will now consider more directly and specifically the general argument advanced by the plaintiff to establish a taking of its property without just compensation. This argument may be summarized as follows: The act of 1893 never took effect, and was void, except so far as it was re-enacted in the act of 1894. The act of 1894 was in effect a threat by the state that it would authorize the city to build competing waterworks, and so ruin the company, unless it consented to convey its property to the city without just compensation; that in consequence of such threat the company conveyed its property to the city; that by reason of such threat the deed of conveyance, though voluntary in form, was in fact compulsory; that such compulsion constituted duress, and made the conveyance a taking; that such taking was plainly without just compensation, by the terms of the act. Stated in another form, the proposition is that a threatened lawful grant by the state to B. of a franchise similar to one already granted to A. is an exercise of unlawful compulsion on the part of the sovereign authority, and that a voluntary conveyance of property under a statute containing such a threat, and not providing for full compensation, is voluntary only in form, while in fact it is made under duress; that consequently such a statute in effect authorized a taking of property without just compensation, in violation of a constitutional right. The plaintiff's contention is founded upon the hypothesis that the right of the city to build competing waterworks under the act of 1893 did not exist when the act of 1894 was passed. If, however, the act of 1893 was in force at that time, as we are inclined to hold, then the state threatened nothing by the act of 1894, because it had already authorized municipal competition. In that case we are confronted with this question: Whether, the city having the right to compete, it was lawful for the legislature to pass the act of 1894 forbidding the city so to do, providing the company chose to sell on terms which did not award full compensation for its property. But it can hardly be seriously urged that when the company was met by legal competition, which meant ruin, it was unlawful for the legislature to pass an act which at least made the situation less disastrous, and providing at the same time that the company need not avail itself of the act unless it saw fit. Nor is the situation any different in principle if we assume that the act of 1893 was void, and that we have only to consider the act of 1894. The only difference is that in one case the legislature had authorized legal competition, and in the other, as it is claimed, it threatened to authorize legal competition. But, if competition be lawful, threatened competition is lawful. And, if it were lawful for the state to authorize municipal competition, it was not unlawful for it to threaten to authorize municipal competition. But it is urged (and this is the

crucial point in the plaintiff's argument) that the threat of competition produced compulsion which amounted to duress, and consequently made the sale by the company to the city not a voluntary, but a compulsory, act, and, being compulsory, its effect was a taking of the plaintiff's property without just compensation. The plaintiff's whole position hinges on the question of compulsion. In approaching this question it may be observed that there was a greater degree of compulsion on the part of the state if we assume the act of 1893 was operative than if we assume it was void. In the former case municipal competition had actually been authorized, while in the latter case it was only threatened. But what was the compulsion in this case? It was the compulsion arising from the fear of competition produced by what is termed the threat of the state to authorize municipal competition. If a person apprehensive of competition sells his property for less than its fair value, it cannot be said that in law the sale was voluntary in form only, and in fact compulsory. In a certain sense, such a sale is compulsory. It is, however, a kind of compulsion which will always exist so long as competition exists. But this is not the kind of compulsion that amounts in law to duress, because it lacks the essential ingredient of duress, namely, illegality. It is unlawful compulsion which constitutes duress. "Duress exists," says Judge Cooley, "when one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will." *Hackley v. Headley*, 45 Mich. 569, 574, 8 N. W. 511. Duress by the government or its officers, in this class of cases, is defined by the supreme court as "moral duress not justified by law." *Maxwell v. Griswold*, 10 How. 242, 256, 13 L. Ed. 405. It must be the pressure arising from unlawful acts or demands on the part of the government or its officers to produce that constraint of will or action, or state of necessity or compulsion, which render acts voluntary in form involuntary and void. In this class of cases the test is, was the cause of the compulsion lawful or unlawful? If the compulsion be founded on lawful competition, or the threat of lawful competition, there is no element of illegality about it. Such compulsion is justified by law. The whole question of compulsion or duress in this case turns upon whether municipal competition, actual or threatened, under the authority of the state, was justified by law. If it were, as we have shown, then the deed to the city was not given under unlawful compulsion or duress, but was voluntary in fact and in law. On the other hand, it may be said that, if it had been unlawful for the state to authorize municipal competition, then the threat so to do might have been held to have amounted to duress not justified by law, and consequently the deed of the plaintiff's property to have been in effect a taking without just compensation under the authority of the state. In the supreme court cases relied on by the plaintiff, it will be found that the compulsion or duress was based upon an illegal act or exaction, or threatened illegal act or exaction, by the government or its officers. *U. S. v. Tingey*, 5 Pet. 115, 129, 8 L. Ed. 71, was a suit brought by the government upon a bond, variant from that prescribed by law,

demanding of a public officer upon the peril of losing his office. Mr. Justice Story, delivering the opinion of the court, said:

"The substance of this plea is that the bond, with the above condition, variant from that prescribed by law, was, under color of office, extorted from Deblois and his sureties, contrary to the statute, by the then secretary of the navy, as the condition of his remaining in the office of purser and receiving its emoluments. There is no pretense, then, to say that it was a bond voluntarily given, or that, though different from the form prescribed by the statute, it was received and executed without objection. It was demanded of the party upon the peril of losing his office. It was extorted under color of office, against the requisitions of the statute. It was plainly, then, an illegal bond; for no officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law. That would be, not to execute, but to supersede, the requisitions of law. It would be very different where such a bond was, by mistake or otherwise, voluntarily substituted by the parties for the statute bond, without any coercion or extortion by color of office."

Maxwell v. Griswold, 10 How. 242, 13 L. Ed. 405, was a case where an appraisement of imported goods was erroneously made as to the point of time of the valuation, and the importer paid the consequent excess of duties. The government contended that this was voluntary. The court (page 256, 10 How., and page 411, 13 L. Ed.) said:

"But this addition and consequent payment of the higher duties were so far from voluntary in him that he accompanied them with remonstrances against being thus coerced to do the act in order to escape a greater evil, and accompanied the payment with a protest against the legality of the course pursued towards him. Now, it can hardly be meant, in this class of cases, that, to make a payment involuntary, it should be by actual violence or any physical duress. It suffices if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment. All these requisites existed here. We have already decided that the demand for such an increased appraisal was illegal. The appraisal itself, as made, was illegal. The raising of the invoice was thus caused by these illegalities in order to escape a greater burden in the penalty. The payment of the increased duties thus caused was wrongfully imposed on the importer, and was submitted to merely as a choice of evils. He was unwilling to pay either the excess of duties or the penalty, and must be considered, therefore, as forced into one or the other by the collector, *colore officii*, through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period, however well meant may have been the views of the collector. The money was thus obtained by a moral duress, not justified by law, and which was not submitted to by the importer, except to regain possession of his property withheld from him on grounds manifestly wrong."

In *Swift Co. v. U. S.*, 111 U. S. 22, 28, 4 Sup. Ct. 247, 28 L. Ed. 343, the plaintiffs, who were manufacturers of matches, and furnished their own dies for the stamps used by them, and were thereby entitled to a commission of 10 per cent. in money on the price of the stamps, accepted for a long period their commissions in stamps because the treasury department would pay in no other manner. The court held that the apprehension of being stopped in their business by this illegal exaction was a sufficient moral duress to make their payments involuntary. Mr. Justice Matthews, delivering the opinion of the court, said:

"The question is whether the receipts, agreements, accounts, and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right. We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with under such pressure has never been regarded as a voluntary act, within the meaning of the maxim, '*Volenti non fit injuria*.'"

In support of the position taken, the court (page 29, 111 U. S., page 247, 4 Sup. Ct., and page 343, 28 L. Ed.) referred to numerous cases:

"In *Close v. Phipps*, 7 Man. & G. 586, which was a case of money paid in excess of what was due in order to prevent a threatened sale of mortgaged property, Tindal, C. J., said: 'The interest of the plaintiff to prevent the sale by submitting to the demand was so great that it may well be said the payment was made under what the law calls a species of duress.' And in *Parker v. Railway Co.*, 7 Man. & G. 253, the wholesome principle was recognized that payments made to a common carrier to induce it to do what by law, without them, it was bound to do, were not voluntary, and might be recovered back. Illegal interest paid as a condition to redeem a pawn was held in *Astley v. Reynolds*, 2 Strange, 915, to be a payment by compulsion. This case was followed, after a satisfactory review of the authorities, in *Tutt v. Ide*, 3 Blatchf. 249, Fed. Cas. No. 14,275b; and in *Ogden v. Maxwell*, 3 Blatchf. 319, Fed. Cas. No. 10,458, it was held that illegal fees exacted by a collector, though sanctioned by a long-continued usage and practice in the office, under a mistaken construction of the statute, even when paid without protest, might be recovered back, on the ground that the payment was compulsory and not voluntary."

The court then cites *Maxwell v. Griswold*, 10 How. 242, 13 L. Ed. 405, and other cases.

In *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 10 Sup. Ct. 5, 33 L. Ed. 236, a customs official proceeded in his appraisalment upon a wrong principle, contrary to law; and it was held that the compulsory insertion, under threat of an onerous penalty, by the importer, of such additional charges upon the entry and invoice, which necessity involved the payment of increased duties, makes the payment of those duties involuntary. In delivering the opinion of the court, Mr. Justice Bradley (page 24, 132 U. S., page 7, 6 Sup. Ct., and page 239, 33 L. Ed.) said:

"In our judgment, the payment of money to an official, as in the present case, to avoid an onerous penalty, though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one. It is true that the thing done under compulsion in this case was the insertion of the additional charges upon the entries and invoices, but that necessarily involved the payment of the increased duties caused thereby, and in effect amounts to the same thing as an involuntary payment."

Mr. Justice Bradley in that opinion refers to the language of the decisions in *Maxwell v. Griswold* and *Swift Co. v. U. S.*, which we have cited, and in speaking of the former case he declares that "the ultimate fact was the moral duress not justified by law."

In the above cases, which are cited by the plaintiff, it is seen that it is the element of illegality which lies at the foundation of this species of duress. In those cases the moral duress was caused by the illegal acts or demands of the government or its officers. In the case at bar there was no moral duress not justified by law, be-

cause it was lawful for the state to authorize, or threaten to authorize, municipal competition. There would have been a close analogy between those cases and the present if the plaintiff had possessed an exclusive franchise, and the legislature had, contrary to law, authorized, or threatened to authorize, municipal competition. In that event it might have been claimed that the company was compelled to convey its property to the city under an unlawful exercise of legislative power, and therefore under moral duress not justified by law.

The plaintiff argues that the measure of compensation provided by the act of 1894 was not justified by law, and that consequently the principle recognized in the above cases is applicable to the present case. But this is an attempt to connect things that are entirely distinct. The compensation to be paid for the plaintiff's property has nothing to do with the subject of duress. It was not the want of just compensation, but the threat of municipal competition, which was the cause of the alleged duress. To connect the alleged duress with the lack of compensation involves the proposition that the compulsion which forced the plaintiff to deed its property to the city was owing to the unlawful compensation provided by the act of 1894, and not to the threatened competition by the city. The want of just compensation has no bearing on the question before us, unless the plaintiff first establishes a duress not justified by law. And this brings us to the decisive point on the issue under consideration, and the conclusion we have reached. We hold, for the reasons already given, that the grant of a competing franchise to the city in this case was a lawful exercise of legislative power, and that the threatened grant of such a franchise under the act of 1894 (admitting this to be the effect of the act) was a lawful exercise of legislative power, and that, being lawful, it could not in either case have the legal effect of making a voluntary conveyance of the plaintiff's property compulsory and void, and that consequently the plaintiff has failed to establish a taking of its property without just compensation under the authority of the state. Upon the single question submitted for our determination, and without passing on any other question concerning the plaintiff's relief under the bill, we are of opinion, after careful consideration, that the plaintiff has not been deprived of its property without due process of law, in violation of the fourteenth amendment to the constitution of the United States, and a decree may be drawn accordingly.

BIGBY v. UNITED STATES.

(Circuit Court, E. D. New York. August 9, 1900.)

UNITED STATES—LIABILITY FOR TORTS—NEGLIGENCE IN OPERATING ELEVATOR
—PERSONAL INJURY

While the license extended by the United States to the public to use its passenger elevator in a post-office building imposes upon the government the duty to use ordinary care to see that the facilities offered to its licensees are in a condition of reasonable safety, no implied contract arises

from such relation to carry the passenger to his destination, which will entitle one who is injured through the incompetence of a person in charge of the elevator to maintain an action against the United States for damages, under Act March 3, 1887 (24 Stat. 505), permitting a recovery against the United States for claims founded upon any contract, express or implied, with the government of the United States, or for damages, in cases not sounding in tort.

Roger Foster, for plaintiff.
George H. Pettit, U. S. Atty.

THOMAS, District Judge. The demurrer is to a petition stating in effect that the petitioner, while on his way to the marshal's office in the post-office building in the city of Brooklyn, was injured by the incompetence of a person in charge of an elevator in said building, operated by the United States, which was a breach of an implied contract whereby the United States agreed to carry the petitioner safely. The cause of action exists, if at all, under that part of the Tucker act, of March 3, 1887 (24 Stat. 505), which permits recovery against the United States for claims founded "upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable." The elevator is the usual passenger elevator employed in buildings of the United States, and is devoted solely to the purposes of the government. The United States was not a common carrier in the operation of such elevator, for "no one can be considered as a common carrier unless he has in some way held himself out to the public as a carrier in such manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him." *Allen v. Sackrider*, 37 N. Y. 341, 342. Neither did the United States expressly stipulate with the petitioner for his carriage, nor did the law imply such undertaking. The law does not imply a contract to carry even in the case of common carriers. It often happens that a common carrier of goods does make a contract for their transportation. Under existing modes of business such contracts are usually made by such carriers, and perhaps less frequently by common carriers of passengers. If an expressed contract to carry exists, the declaration may be upon the contract, although the offended person may declare upon the duty imposed by law. But when there is a mere refusal to carry, or injury or delay, the declaration should be upon the duty implied by law, and not upon the contract, unless there be some negotiation between the parties tantamount to an agreement; in other words, a contract to carry is not implied. If it exists, it is because it has been expressed; for, where the law imposes the duty to carry, it would be idle to imply a contract to carry. When the law commands something to be done, it need and does not resort to the fiction that the party commanded impliedly contracted to do the act. Hence there is no implied contract for the reasons stated, even if the United States be regarded as a common carrier. But the true relation of the parties in fact and legal theory is this: For the purpose of transacting business

with its officials, the United States extended to the petitioner a license to enter its building, and to use in connection therewith the facilities for passing from floor to floor. This permission imposed a duty upon the government. The duty respecting its elevator was similar to that relating to the safety of the floors, stairs, or any other part of its building. The duty was the same as that imposed upon the owner of any building having a public relation. The duty grew out of a permission to enter and to use the building for the purpose for which it was intended. This permission imposed upon the United States the duty to use ordinary care that the facilities offered to its licensees should be in a state of reasonable safety, and a breach of such duty would constitute culpable negligence. Hence the declaration in the present case must be in tort, which brings the case within the exception stated in the Tucker act. The learned counsel for the petitioner urges that a license to enter private premises is a contract, expressed or implied, accordingly as the license is expressed or implied. In the present case the license to enter and use the elevator is implied; hence it would be asserted that there was an implied contract to enter. Here, again, the suggestion is to imply a contract for the purpose of raising a duty, when the law already imposes the duty without implication of a contractual relation. Moreover, the courts and systematic writers have not classed with contracts a mere permission to do or forbear the doing of an act, but have rather regarded such license as authority to do something that otherwise would be unlawfully done. Hence it cannot be inferred that congress, by use of the term "implied contract," intended to include mere breaches of duty productive of injury to the licensee upon property of the government. The authorities collected by the several counsel are interesting and instructive, as is the discussion of the case in the briefs presented. From these and other sources are gathered essential and simple principles which govern the present issue, and require that the demurrer should be sustained, with costs.

FIDELITY & DEPOSIT CO. OF MARYLAND v. COURTNEY.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1900.)

No. 751.

1. INDEMNITY—DISCHARGE OF GUARANTOR—DEFAULT—KNOWLEDGE OF ASSURED—NOTICE.

In an action upon a bond of indemnity to a bank, against loss by fraudulent acts of its president, and which provided that the employer should immediately give notice, in writing, of the discovery of any default or loss thereunder, it appeared that checks drawn by the president were, at his request, carried by the cashier as cash items for a considerable length of time; that other checks were, by the direction of the president, charged to the accounts of other parties than those drawing them; that the money so obtained was used by the president in buying up members of the city council to advance his interests; and that the cashier was required one evening to remain after banking hours to pay out money to certain parties upon a note; but that none of these facts were known to the board of directors, except that of the payment of money after banking hours, which was duly explained by the president, who gave as-

surances that the note was regularly discounted, and was all right, and no notice was given to the defendant. *Held*, that defendant had no reason to complain of an instruction that, if the bank knew of the fraudulent purposes for which the checks in question were used, it could not recover; but that a mere overdraft, without any fraudulent intent, would not be an act which would affect the bank's right of recovery upon the bond.

2. SAME.

Knowledge by the cashier and a director that the president's account was frequently overdrawn, that his checks were carried as cash items, and that money was paid to parties after banking hours, did not amount to a default under the bond, unless acquired by such officers in the course of the business of the bank.

3. SAME.

After a receiver for the bank had been appointed on January 22d, and government experts and a national bank examiner commenced an examination of the bank's affairs, the defalcations of the president began to be apparent some time between the 2d and 9th of February, and 27 days after his appointment the receiver gave written notice thereof to defendant, and that indemnity would be required. *Held*, that the notice was not so late as to require the court to take from the jury the question of its sufficiency, and that the jury were properly instructed that the requirement of the bond that notice should be given "immediately" of the discovery of any default meant that the same should be given "as soon as reasonably practicable and with promptness," and that, if the receiver gave the required notice within a reasonable time after the discovery of the default, it was sufficient.

4. SAME—NOTICE OF DEFAULT.

A notice referring to the certificate issued by defendant guarantying the fidelity of the president of the bank, and to its bond by number, and informing defendant that the president had been found in default to the bank, and that indemnity to plaintiff as receiver of the bank would be required, was sufficient in form to meet the requirements of the bond that upon discovery of any default the bank should give notice to defendant in writing.

5. SAME—PROOF OF CLAIM.

Full particulars of the bank's claim under the bond not being fully developed for six months after the appointment of the receiver, during which time the examination of the bank's affairs was being made, the filing of a claim under the bond at the end of that time was a sufficient compliance with the requirement of the bank that any claim thereunder should be filed "as soon as practicable" after notice of default.

6. SAME—EVIDENCE—LETTER OF CASHIER NOT ADMISSIBLE AGAINST BANK.

A letter written by the cashier of the bank, without the authority of the board of directors, upon the renewal of the president's bond, certifying that all moneys handled by the president had been accounted for, that he had performed his duties in a satisfactory manner, and that no reason was known why defendant's guaranty bond should not be continued, was inadmissible in evidence on behalf of defendant, because not binding upon the bank.

In Error to the Circuit Court of the United States for the District of Kentucky.

This action was brought by the receiver of the German National Bank against the Fidelity & Deposit Company of Maryland to recover upon a bond given to indemnify the bank against loss by fraudulent acts of J. M. McKnight as president thereof. It appears in the record that on June 1, 1894, McKnight was elected vice president, and executed his bond for one year. Upon June 1, 1895, he was elected president, and the bond was renewed by him as president, and was again renewed for the further period of one year. The petition sets up various defaults, aggregating \$18,742.74, and prays judgment for the penalty of the bond in the sum of \$10,000. The bond con-

tained, among others, the following provisions: "Whereas, the employé has been appointed in the service of the employer, and has been assigned to the office or position of * * * by the employer, and application has been made to the Fidelity and Deposit Company of Maryland for this bond; and whereas, the said employer has delivered to the company a certain statement, and it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed: Now, therefore, in consideration of the payment of the sum of — dollars, lawful money of the United States of America, to the company as a premium for the term commencing at the date hereof and ending on the — day of —, eighteen hundred and ninety —, at 12 o'clock noon, the company does hereby agree that it will, within three months after receipt of proof satisfactory to its directors, and subject to the conditions hereinafter expressed, reimburse the employer to an amount not in excess of the penalty of this bond, for such pecuniary loss as the employer shall have sustained by any fraudulent act or acts committed by the employé during the continuance of this bond in the performance of the duties of his said office or position, or of such other position as he may be subsequently appointed to or called to fill by the employer in said service, of money, securities, or other personal property belonging to the employer, or for which the employer is responsible. This bond may be continued from year to year, at the option of the employer, at the same or an agreed premium rate, so long as the company shall consent to receive the same, in which case the company shall remain liable for any dishonest act of the employé occurring between the original date of this bond and the time to which it shall have been continued. This bond is issued and continued upon and subject to the following conditions and provisions: * * * That the employer shall immediately give the company notice, in writing, of the discovery of any default or loss hereunder, and shall file with the company his or their claims hereunder, with full particulars thereof, as soon as practicable thereafter; and no claim which shall not be so filed by the employer with the company within six months after the expiration or cancellation of this bond, or within six months after the employé shall have ceased to be in the employer's service, shall be payable hereunder. * * * That, upon notification to the company of any loss hereunder, the company's liability shall thereupon terminate as regards any subsequent act of the employé. That the employer shall observe, or cause to be observed, due and customary supervision over the employé for the prevention of default; and, if the employer shall at any time during the currency of this bond condone any act or default on the part of the employé which would give the employer the right to claim hereunder, and shall continue the employé in its service, without written notification to the company, the company shall not be responsible hereunder for any default of the employé which may occur subsequent to such act or default so condoned. * * * That there shall be a complete inspection of the accounts and books of the employé on behalf of the employer at least once in every twelve months from the date of this bond, such inspection to include examination of all cash and securities of which the employé shall have custody or charge. That the employé has not, within the knowledge of the employer, been at any time in arrears or default either in this or other employment. That the employer shall at once notify the company on becoming aware of the employé being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits. * * * That the company may, upon giving one month's notice, in writing, to the employer, cancel its responsibility hereunder in so far as it concerns the acts or defaults of the employé subsequent to the end of such month; in which event it will, upon request of the employer, refund the proportion of the premium paid for the unexpired term of this bond."

The amended answer recites the provisions of the bond, and sets up that neither the bank nor the receiver ever gave notice to the Fidelity & Deposit Company of Maryland of the defaults as required; that the bank did not observe the due and customary supervision over McKnight; that the vice president, who was also a director, knew of the embezzlements of McKnight, yet neither the bank nor the receiver notified the company until long after the bank was closed, in January, 1897; that the receiver did not file his claim

against said company until the 18th of February, 1897; that this notice did not give the particulars of McKnight's default, and that defendant did not fully know the same until the 2d of July, 1897; that Rudolph Reutlinger was teller and cashier, and as such had charge of such financial affairs as pertained to said offices; that Adolph Reutlinger was vice president, and was daily in the bank, and thoroughly familiar with all its business affairs, and with the acts and defaults of said McKnight as president; that the directors were also familiar with McKnight's overdrafts; that McKnight's defaults and embezzlements were known to the directors, who allowed them to go on without the knowledge of the Fidelity & Deposit Company; that during the time McKnight was in office the books were out of balance about \$3,000; that the directors and officers allowed McKnight to be constantly overdrawn in his personal account; that his overdraft, January 18, 1896, was \$1,340.14, and on June 8, 1896, it was \$626.23, and that, day in and day out, he was overdrawn, of which fact the directors had knowledge, and these irregular acts and defaults were not known to said defendant, otherwise it would have canceled the bond; that before the renewal of the bond, in 1895-1896, it wrote the bank to ascertain if McKnight had been conducting himself properly, and was informed by the cashier that McKnight had discharged his duties faithfully; that such statements were made with the knowledge of the directors, but that said statements were false and fraudulent, which at the time was unknown to said defendant; and that thereby the company was led to renew the bond, which otherwise would have been canceled. And by another amended answer it is charged that McKnight's wrongdoings were known to the directors of the bank when they occurred, or within a few days thereafter, but that said defendant was not notified until long after the bank went into the hands of a receiver. Replication was filed, and the case went to trial, resulting in a verdict for plaintiff. Testimony was offered tending to show various transactions of McKnight's in the course of his business in the bank; among other things, the overdrafts of McKnight, and that checks were given by him, and carried by the cashier as cash items, at the direction of McKnight, for a considerable length of time. There is also testimony tending to show that McKnight, while a candidate for office of mayor in the city of Louisville, which office was to be filled by the council of said city, obtained \$1,000 for one Edmunds, in bills of \$100 each, which money was obtained on Edmunds' check, he, at the time, having no account at the bank as an individual, but Edmunds & Co. had an account there. Edmunds testified he understood the check was to be taken care of by McKnight. It was also testified that a loan was procured of \$2,000 to Britt and Reeder, which money was obtained at the bank after banking hours, and that McKnight said he had a big scheme on hand, and it appeared this money was given for the purpose of obtaining an illegal contract with the councilmen as to possible legislation which might come before them. McKnight, on being asked for an explanation of the matter, claimed that it was all right; that the note was good; that the matter was brought before the board of directors, where McKnight made an explanation to the same effect, and that it seemed to satisfy the board.

E. T. McDermott, for plaintiff in error.

Wm. M. Smith, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after thus stating the case, delivered the opinion of the court.

1. It is unnecessary to enter into a detailed account of the various defaults, or comment upon the knowledge thereof of the bank directors, as there was a conflict of testimony upon that subject, upon which the court charged the jury as follows:

"There was also evidence tending to show that J. M. McKnight was president of the bank, and the other officers of the bank, including the directory, had entire confidence in his honesty and integrity up to the time the bank

was closed; that none of them had any knowledge that any act of his in the management of said bank was fraudulent or dishonest, until after the closing of the bank; that said bank had a discount committee, who regularly examined and passed on the papers of the bank, as required of such committee, and the directory of said bank undertook to make a monthly investigation—sometimes twice a month—of the affairs of said bank, and required the president to go through the same with them, and make a full report thereon; that some of the directors were in the bank almost daily, inspecting its affairs, and that they did at all times observe due and customary supervision over said president for the prevention of default; that none of the officers of said bank, including the directory, had any knowledge of the various checks set up in the petition as fraudulent, and that were charged to the account of other parties than those drawing them, or on whom they were drawn, except the clerks who charged them up to said account as stated, and there was evidence tending to show that they charged them up to such accounts by the direction of McKnight, the president, and except, further, R. E. Reutlinger, the cashier and teller of said bank, knew of said checks when they came into said bank, and was instructed to hold them as cash items by McKnight, but further than this he had no knowledge. As to the \$2,000 Britt and Reeder note, there was also evidence tending to show that R. E. Reutlinger was required to stay at the bank until after banking hours, and was directed by McKnight to and did lay out the \$2,000 on said note to said parties, but that further than this he had no knowledge thereof. There was also evidence tending further to show that said R. E. Reutlinger informed his father, Adolph Reutlinger, vice president, of the payment of this \$2,000 that night, and that said Adolph Reutlinger made inquiry of McKnight to explain the transaction; that thereupon McKnight told him that said parties were good and solvent, and the note was regularly discounted, and all right, and that, if required, Gaulbert or Whallen would sign same with them, and that he (McKnight) would guaranty the payment thereof; that the parties were obliged to have the money that night, and he so kept the bank open to let them have it. There was evidence tending further to show that said Adolph Reutlinger then went before the directory, and told them what McKnight had said in regard to this note, and said to them that he had made some investigation, and could not find that these parties had any property; that he was unable to say whether or not they were good, and that thereupon McKnight came before said directory, and made the same statement to them that he had made to Adolph Reutlinger, assuring them that the note was good, and that said directors believed him, and relied on his statement, and so passed the note; that there was no other evidence tending to show any further knowledge of said note, or its true character, by the officers or any of the directors of the bank, than is herein stated, except in the testimony of Jacob Reisch, one of the directors, that some short time after the execution of said note Adolph Reutlinger told him what he had learned thereof as herein stated, and further he says that said Reutlinger told him that the money was used in the mayor's race. This latter statement Adolph Reutlinger denied in his evidence."

Upon the subject of the duty of the bank, under these circumstances, to notify the company of these transactions, that it might end its obligations under the bond, if it saw fit to do so, the court charged the jury:

"Now, I suppose in this case, if the bank had known that McKnight was making these drafts for these various fraudulent purposes, such as buying up councilmen, buying up aldermen, paying his own personal debts; if the bank had known that, and consented to it,—there would not have been a fraudulent act by McKnight for which the bank could recover against this company. But if you believe, from the evidence, that the bank did not know of the fraudulent purposes for which the overdrafts were made, if the overdrafts were made in connection with this matter,—if you believe the bank did not know the fraudulent purposes,—then that changes the result; because, if the bank did not know, and still consented to it, it would not relieve the act of McKnight from the character of being a fraudulent act. So that, as I view

the case (you must remember, however, that you are the sole judges of the evidence in this case and its credibility), as I view this case, however, there would be no fraudulent acts upon McKnight's part (limiting my observations now to the overdrafts), there would be no fraudulent acts upon his part merely in an overdraft, if there were no fraudulent intent behind it, which was concealed from the bank."

We think this instruction as favorable as the company was entitled to, and under it, if the jury found that the bank had knowledge that McKnight was doing the acts in question for fraudulent purposes, there could be no recovery upon the bond. We must remember that this obligation was intended to secure the bank against the fraudulent conduct of McKnight in the performance of the duties of his office or position; that McKnight's action, in order to require notice to the company, must have been "of the discovery of a default or loss under the bond." While McKnight might have been guilty of reprehensible conduct, it would not require notice unless such as might result in the loss of security or money or personal property of the bank by fraudulent conduct in the performance of his duties to the bank. Such conduct as amounts to a default under the bond the employer is bound to report, and if he condones or continues the employé in his service, without written notice to the company, the latter would be discharged from responsibility. Misconduct which would not amount to a fraudulent act affecting the duties of the officer of the bank would not require notice unless it came within that clause of the bond which requires the employer to notify the company when the employé engages in gambling or speculation, or indulges in disreputable or unlawful habits or pursuits. Whether McKnight's conduct was of this character the court left to the jury to determine. They must have found that there was no such misconduct as would avoid the bond while the bank was in operation, and which it was the duty of the bank to report to the company. In this connection it is averred that the court erred in saying that this knowledge must be the knowledge of the bank, intending thereby to exclude the knowledge of individual directors. In the charge above quoted, as to the knowledge of the bank directors, we have already said we find no error. We have carefully examined the record, and find no knowledge brought home to the directors individually, or the cashier in his individual capacity, which was not brought to the attention of the board, which would amount to a default under this bond. Such knowledge, in order to be binding upon the bank, must have been acquired in the course of business of the bank transacted by such officer or director. It is not necessary to examine the numerous authorities cited upon this proposition. They are well summed up in Boone, Banking, § 132:

"Notice to the directors of a bank when assembled as a board is notice to the bank; nor can any subsequent change of directors require a new notice. * * * And notice to one or more of the directors, when engaged in the business of the bank, will be deemed notice to the bank."

The testimony shows no such knowledge of McKnight's conduct, acquired in the bank's business by individual directors or officers of the bank, and not known to the board, as would entitle the company to notice. As was said in *Surety Co. v. Pauly*, 170 U. S. 147, 18 Sup. Ct. 558, 42 L. Ed. 982:

"It may well be held that the surety company did not intend to require written notice of any act upon the part of the cashier that might involve loss, unless the bank had knowledge, not simply suspicion, of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty. If the company intended that the bank should inform it of mere rumors or suspicions affecting the integrity of O'Brien, such intention ought to have been clearly expressed in the bond."

2. Upon the question of notice of McKnight's default it is strenuously argued that the notice given by the receiver after he took possession of the bank is not such notice as is required, and for that reason there can be no recovery upon the bond. The bank was closed on the 17th of January, 1897. The receiver was appointed on the 22d of January, 1897. On the 18th of February the receiver gave the following notice:

"Louisville, Ky., February 18, 1897.

"To the Fidelity & Deposit Company of Maryland, Baltimore, Md.—Gentlemen: Referring to the certificate No. 4,043, issued from your security department, guarantying the fidelity of Jacob M. McKnight, president of the German National Bank, under your bond to him, No. 5,002, issued June 1, 1894, in favor of such bank, we hereby notify you that said Jacob M. McKnight, as president, has been found in default to this bank, and that you will be required to make indemnity to me as receiver to the extent of said bond.

"Yours truly, R. H. Courtney, Receiver German National Bank."

When this notice was offered in evidence, it was objected to, the attorney for the defendant stating:

"We have no doubt he sent it [the notice], and make no point on that, but we desire to object to the admission of it, as not being the notice required in the contract, and therefore we received no notice whatever."

Exception was taken to the portion of the charge relating thereto on the same ground that the introduction of the notice in testimony was taken, viz. that it was not such notice as was required by the contract, and was, therefore, misleading. Neither in this exception, nor when the notice was offered in testimony, was it objected that the notice was not early enough in point of time, but in the assignments of error this averment is added. It may well be doubted if this is not extending the assignment of error beyond the exception taken. Assignments of error cannot broaden an exception, and will not be considered unless called to the attention of the court by proper exceptions. We are of opinion, however, that the court fairly left this question to the jury. It is testified by Mr. Courtney that immediately after the bank passed into his hands as receiver:

"I began to ascertain the defalcations. The experts—Mr. Hays, a government expert, and Mr. Escott, a national bank examiner—were at work immediately after Mr. McKnight's arrest. I kept pace with their investigation. It was almost immediately after the bank closed that these defalcations became known: not all of them, but enough to ground the claim upon. I had that notice of February 18, 1897, mailed to the office at Baltimore. It is my impression that I mailed a like notice to the agent here."

The expert Mr. Escott testifies:

"We began to get these shortages about two or three weeks after the bank was closed. They were discovered from time to time. I began to discover them in two weeks."

If, as Escott says, they began to discover the shortages two or three weeks after the bank was closed, that would mean the discovery was

first made between the 2d and 9th of February, 1897. The court left this question to the jury under the following instructions:

"The defendant insists upon this clause of the contract between it and the bank that 'the employer shall immediately give the company notice in writing of the discovery of any default or loss hereunder, and shall file its or their claims hereunder, with full particulars thereof as soon as practicable thereafter, and no claim which shall not be so filed by the employer with the company within six months after the expiration or cancellation of its bond, or within six months after the employé shall have ceased to be in the employer's service, shall be payable hereunder.' In considering that clause of the contract between these parties, I do not think the word 'immediately' should be given such construction as that it would mean instantly, but I believe it conforms with the views of the supreme court and the authorities generally to tell you that it means that it was the duty of plaintiff in this case to give, as soon as reasonably practicable, and with promptness, notice of the discovery of any default. It did not mean that as soon as one was suspected that notice should be given; but if you believe, from the evidence, that within a reasonable time after the receiver in this case (and you must remember that he is the receiver merely, and that he knew nothing about the management of the bank, nothing of its affairs, until he was appointed), if you believe that, within a reasonable time after he discovered—actually discovered—a default, he gave the notice of the 18th day of February, 1897, you are at liberty to infer that that part of the obligation of this bond has been performed."

We think there was not such a lapse of time from the time the receiver began to discover these defaults until he gave the notice of February 18, 1897, as would require the question to be taken from the jury. We have already said no notice is required until the bank had knowledge of facts which would justify it in charging dishonesty. In the Pauly Case, *supra*, while it is true the bond says that notice must be given as soon as practicable, instead of immediately, Mr. Justice Harlan says:

"It was left to the jury to determine when the receiver first acquired knowledge of acts indicating fraud or dishonesty on O'Brien's part, and they found, in effect, that he had no knowledge of any such act until after the report by the expert bookkeepers, made about or a few days before May 23, 1892. The trial court went far enough when it said, in response to an inquiry by a juror, that notice given May 23, 1892, of a fraud by the cashier discovered as early as March 2d,—the day on which O'Brien left the receiver,—was not as soon as practicable after the receiver acquired knowledge of the facts."

Unless the lapse of time is so long as to be obviously a noncompliance with the contract, the question is one for the jury. In May, Ins. (3d Ed.) § 462, it is said:

"If the notice be required to be 'forthwith,' or 'as soon as possible,' or 'immediately,' it will meet the requirement, if given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily to be the judges. To give the word a literal interpretation would, in most cases, strip the insured of all hope of indemnity, and policies of insurance would become practically engines of fraud. Thus, notice within eight days after the fire, and within five days after it came to the knowledge of the insured, has been held to be reasonable. So, where the fire happened on the 10th, and notice of loss, dated the 11th, reached the insurers on the 15th of the same month. But a delay of four months in one case, of thirty-eight days in another, of twenty days in another, and of eleven days in another, there being no sufficient excuse therefor, has been held to be unreasonable. Yet where the insurers had, contrary to their agreement, refused to issue a policy, they were held to have waived their right to object to a notice sent eleven months after the loss. Whether due diligence has been used in giving the notice is a question which is ordinarily left to the jury, to be found

from all the circumstances in the case. But, where the facts and circumstances bearing upon the question of due diligence are not in dispute, it becomes a question of law for the court."

In *Donahue v. Insurance Co.*, 56 Vt. 374, notice of a fire was required to be given forthwith. It was held that such notice must be given with due diligence, and within a reasonable time; and, although notice was given 22 days after the fire, it was held a question for the jury as to whether it was given forthwith. It was said by the supreme court in the *Pauly Case*, *supra*, that an indemnity contract is to be construed most favorably to the insured. In speaking of fire insurance policies, under consideration in the *Vermont Case*, *supra*, the judge said (page 380):

"The condition that the insured should give the company notice forthwith should be construed liberally in favor of the insured."

In *Association v. Smith*, 126 Pa. St. 317, 17 Atl. 605, Chief Justice Paxson, in delivering the opinion of the court,—this being a case in which an injury was received by one holding an accident policy on September 4, 1887, notice being given to the company October 19th, the policy requiring immediate notice of the injury,—said:

"The word 'immediate,' in the contract, must be construed to mean within a reasonable time thereafter, under all the facts and circumstances of the case; and what is a reasonable time must be decided by the jury, unless, as before observed, the delay has been so great that the court may rule it as a question of law."

In *Bennett v. Insurance Co.*, 67 N. Y. 277, speaking of a case where the notice was required to be given forthwith, and it had not been given until 26 days after, Judge Earl said:

"The word 'forthwith' does not here mean immediately or instantaneously after the fire. It means, and has been held to mean, within a reasonable time or with reasonable diligence after the fire. *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468; *Inman v. Insurance Co.*, 12 Wend. 452."

The word "immediate" is certainly no stronger than the word "forthwith," or the expression "as soon as possible." In *Insurance Co. v. Flynn*, 98 Pa. St. 628, it was held that 30 days' delay will not prevent the submission of the question to a jury in a policy which required proofs to be submitted as soon as possible. In *McFarland v. Association*, 124 Mo. 204, 27 S. W. 436, the supreme court of Missouri held:

"Where an accident policy requires 'immediate' notice of the death of the insured to be given, and provides that the same shall be given by letter, notice given within ten days after the death is sufficient. The word 'immediate' will, in such cases, be construed to mean 'within a reasonable time.'"

See, also, *Insurance Co. v. Lippold*, 3 Neb. 391; *Harnden v. Insurance Co.*, 164 Mass. 382, 41 N. E. 658; *Insurance Co. v. Scammon*, 100 Ill. 645.

Assuming that the defalcations were becoming apparent to the experts so that they began to discover them two or three weeks after the bank was closed, we cannot say, as a question of law, that such facts had been discovered as would justify a prudent man in charging another with dishonesty so as to require notice, and we think the question was properly left to the jury under the instruc-

tions given. Some cases have been cited in which it seems a more restricted view of this requirement is taken, but we think the opinion here expressed is more consonant with the intention of the parties and the purposes of indemnity contracts. In Bouv. Law Dict. it is said of the word "immediate":

"Strictly it implies not deferred by any lapse of time, but as usually employed it is rather within reasonable time, having due regard to the nature and circumstances of the case."

3. Nor do we think there is any reasonable objection to the form of the notice given. The purpose of the notice was to enable the indemnity company to terminate its liability, and to obtain such remedies as it might see fit to adopt against the defaulter. The notice sent was general in its character. It advised the company of the default, claimed the full amount of indemnity, and no objection was taken to it.

4. It was further objected at the trial that the proof of claims, which was required by the bond to be made out as soon as practicable after the default, was not furnished in time. This claim was filed in July, 1897. During all that time the investigation was going on, and the books of the bank were being examined. So far as the testimony discloses, the full particulars of the claim were not developed until July so as to be capable of proof.

5. It is claimed the court erred in excluding a certain letter signed by Reutlinger, cashier, concerning McKnight's performance of his duties as president. The president of the Fidelity & Deposit Company, on the 15th of May, 1896, wrote the bank as follows:

"Baltimore, Md., May 15, 1896.

"To German National Bank, Louisville, Ky.—Dear Sir: We hereby notify you that bond No. 5,002 for \$10,000, issued by this company on behalf of Jacob M. McKnight, in your employ as president, will expire on the 1st day of June next. The premium, forty dollars, should be paid on or before the date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed, and forward with remittance for premium to Jos. O. Odiorne, general agent, when the renewal receipt will be sent to you.

"Yours, respectfully,

Edwin Warfield, President."

The certificate referred to was filled in by the cashier, having been inclosed in blank form in the letter from the company, and was returned, of date May 29, 1896, to the fidelity company, and is in the following language:

"The Fidelity & Deposit Company of Maryland: This is to certify that on the — day of —, 189—, the books and accounts of Mr. J. M. McKnight, is president, in our employ, as has no books and accounts were examined by us, and we found them correct in every respect, and all moneys handled by him accounted for. He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guaranty bond should not be continued. His salary is now \$4,500, and he is employed as president.

"Signature:

R. E. Reutlinger, Cashier, Employer.

"Dated at Louisville, Ky., May 29, 1896."

This certificate, signed by the cashier, was excluded, because there was no showing that there had been special authority from the board of directors authorizing or directing the cashier to fill out and send it. It is earnestly argued that the cashier, by virtue of his office, and having charge of the correspondence of the bank, had full

authority to answer this communication in the way which he did; and, being in the apparent scope of his authority, the bank is bound by it. A majority of the court are of opinion that the case is ruled by *Surety Co. v. Pauly*, *supra*, in which the president wrote a similar letter for the cashier, and it was held that the president of the bank, in the absence of express authority, could not bind the bank. There is no showing that the bank authorized the cashier to fill out the certificate and return it. It is not a case of answering a usual letter of the bank in the course of its business. A certificate as to the prior conduct of McKnight was inclosed, and an answer required. Nothing is shown in this case showing express authority, and we do not think such inheres in the duties of the office of cashier without special authority.

Other errors are assigned, which either fall within the principles already laid down, or are not of sufficient weight to require further attention. Finding no error in the record of the proceedings in the court below, the judgment is affirmed.

AMERICAN CREDIT INDEMNITY CO. v. CHAMPION COATED PAPER CO.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1900.)

No. 763.

1. INSURANCE—INDEMNITY AGAINST LOSS BY INSOLVENT DEBTORS—CONSTRUCTION OF BONDS.

Two bonds of indemnity against loss by the insolvency of debtors were issued to a mercantile company, the second being a renewal of the first. They contained identical provisions to the effect that any loss covered by the terms of such bond, and resulting from sales and shipments made during its term, but which should not become provable, under its conditions, before its expiration, might be proved under a renewal thereof "under and subject also to the terms and conditions of such renewal"; and also that, in case such bond was a renewal, losses accruing during its term on sales and shipments made during the term of the preceding bond might be proved thereunder, "subject, also, to the terms, conditions, and limitations of said preceding bond." *Held*, that under such provisions one evident purpose of a renewal was to extend the protection of the preceding bond to losses on sales during its period which did not technically become provable before its expiration, and hence that such losses arising from sales and shipments made during the term of the first bond and proved during the term of the second were governed by the terms and conditions of the original bond, rather than those of the renewal, as to matters in which the two differed.¹

2. SAME—INITIAL LOSS TO BE BORNE BY INSURED.

A bond of indemnity guaranteed the insured against loss not exceeding \$20,000, resulting from the insolvency of debtors "over and above the loss of \$2,000, agreed first to be borne by the said indemnified." It contained further provisions that "the claims provable under this bond include only the amount to be first borne by the indemnified and the amount of this bond," and that "no amount against any one such insolvent debtor shall be covered for more than \$10,000." *Held*, that under such provisions the initial loss to be borne by the insured must be deducted from the amount of "covered" or "provable" loss, which would require the aggregate amount

¹ Credit Insurance, see notes to *Indemnity Co. v. Wood*, 19 C. C. A. 271, and *American Credit Indemnity Co. v. Athens Woolen Mills*, 34 C. C. A. 165.

of such covered loss to be \$22,000 to authorize a recovery of the full amount of the bond.

3. SAME—APPLICATION OF PAYMENTS.

Under a provision of a bond of indemnity against loss by the insolvency of debtors that "when the amount of a claim against any debtor at the time of insolvency exceeds the amount covered by this bond all amounts realized or secured therefrom shall be deducted pro rata," the insurer is entitled to have credited an amount paid the insured by a third person in settlement of a suit brought to charge him with liability for the debt as a partner as an amount realized upon the claim.

4. SAME—PAYMENT OF PREMIUM.

An insured in an indemnity bond gave a short note for a renewal premium, which was paid by a check payable to the insurer, which cashed the check and retained the money. A renewal policy was issued, reciting the receipt of the premium, and in an action on the two bonds the answer admitted the execution of the second bond. *Held*, that under such circumstances the defendant could not deny to the second bond the same effect as though the premium had been paid in cash at the time the note was given.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Jacob Shroder, for plaintiff.

C. Bentley Matthews, for defendant.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge. This was an action in contract upon two bonds of indemnity against loss by insolvent debtors. The first bond was in effect from December 1, 1895, to November 30, 1896. The second was in effect for one year after expiration of the first, and is a renewal of the first, and differs only in respect to the amount of the initial loss to be borne by the insured, and in the limitation of liability by a loss by a single debtor. Each bond guaranties the insured against loss to the extent of \$20,000 by insolvency of debtors as therein defined, over and above the initial loss to be first borne by the insured upon sale and shipments of merchandise during the period of the bond. Each bond contains a provision requiring notification of claims "on the blanks furnished and in the manner prescribed by it" within 20 days after the indemnified receives information of the insolvency, and that such notice "must be received at the central office of the company at St. Louis, Mo., during the term of this bond; otherwise such claim shall be barred." The claims to be thus proven, within the terms of the bond, are claims for losses, within the meaning of the contract, and are such as are occasioned by insolvency of debtors, as defined by the eleventh condition of the policy.

1. The plaintiff below proved two losses, based on sales and shipments made during the period of the original bond, but the losses, in the sense of insolvency as defined by the contract, did not result until after the expiration of the first bond and during the period of the second or renewal bond. The first claim is for \$1,533.34, lost upon sales to the Louis Snider Paper Company. That company's affairs went into the hands of a receiver July 29, 1896. The fact was notified to the credit company August 1, 1896, but, under condition 11, there

was no provable loss until the plaintiff could and did furnish the insurer with a sworn certificate from the receiver certifying "that it was not possible to so administer the estate as to pay its indebtedness in full." This certificate the receiver could not and did not give until December 21, 1896; and it could not, therefore, be "furnished" during the term of the first bond. The loss did not, therefore, result during the period of the first bond, but did result during the term of the renewal bond. The second loss proven was for a loss upon sale and shipments, during the currency of the first bond, to the Geo. H. Taylor Company. The insolvency of that company, under the facts and terms of the bond, could only be proven by judgment and return of *nulla bona*, and this was not possible until November 13, 1897, and during the life of the renewal bond. A question arose in respect to the *bona fides* of this *nulla bona* return, which was submitted to the jury upon a correct charge, who found for the plaintiff. Both losses proven were, therefore, for losses sustained by sales and shipments made during the term of the first bond, but neither loss became a provable loss until insolvency, within the terms of the contract, had been established in the method prescribed by the bond. Neither loss was provable against the first bond, because "insolvency," within the meaning of the bond, did not result and could not be notified, as required by the fourth condition of the bond, within the period of the bond. Both claims were, therefore, barred, unless they are saved by the eighth condition of the bond. That condition is in these words:

"In case this bond is renewed, and the premium on such renewal is paid at or before the expiration of this bond, loss on sales covered according to the terms, conditions, and limitations hereof, resulting after said date of expiration upon shipments made during the term of this bond, may be proven under and subject also to the terms and conditions of such renewal. In case this bond is a renewal, and the premium has been paid at or before the expiration of the preceding bond, covered losses occurring during the term of this bond on shipments made during the term of the said preceding bond may be proven hereunder, subject also to the terms, conditions, and limitations of said preceding bond."

Both the first and second bonds contain this precise condition, and the terms, conditions, and limitations of each are identical, save in respect to the initial loss and single debtor limitation. The clear purpose and intent of this provision was to carry forward and indemnify the insured against losses which might result from sales and shipments during the period of the first bond, but which would not be provable, under the prescribed terms of the bond, within the period of its life. This extension of the time during which losses might be provable is made dependent upon the issuance of a renewal policy. The purpose of the renewed policy was twofold: First, it was a guaranty against loss upon sales and shipments made during its period; and second, it secured or extended the guaranty of the preceding bond to losses upon sales during its period which did not technically become provable during its term. The controversy turns upon the question as to whether the "initial loss" and "single debtor liability limit" of the first policy or of the renewal are applicable when the losses proven are upon sales and shipments made during the period of the original bond, but which do not result in losses

within the meaning of the policy until after its expiration and during the term of a renewal. The "initial loss" is that loss which the indemnified agrees to bear before any loss shall be recoverable under the bond. What this loss to be first borne by the insured shall be is the subject of agreement, and constitutes a part of the written portion of the policy. By the face of the policy the guaranty is "against loss, not exceeding \$20,000," resulting from insolvency of debtors, "over and above the loss of \$2,000 agreed first to be borne by the said indemnified, on total gross sales, and amounting to \$400,000 or less." By condition 5 this loss to be first borne by the indemnified is to be increased by one-half of 1 per cent. on gross sales in excess of \$400,000. By condition 6 "the claims provable under this bond include only the amount to be first borne by the indemnified and the amount of this bond." Other parts of the bond might be cited to same effect. The initial loss, as we construe the bond, is, therefore, that part of the provable or covered losses which the indemnified must first bear. Thus, to recover the full penalty of the bond in suit, the indemnified would be required to prove losses upon covered risks of \$22,000, for from the aggregate of covered losses there must be deducted \$2,000 as that part of the loss which the indemnified must first bear. By the single debtor limitation is meant that condition of the policy which excludes from the protection of the bond any amount of a claim against a single debtor in excess of an agreed sum or proportion. Thus, by the third condition, it is provided that "the gross amount covered under this bond against any one insolvent debtor is limited to 30 per cent. of the lowest amount of the capital rating" given by the Bradstreet Commercial Agency, and that "no amount against any one such insolvent debtor shall be covered for more than \$10,000." The same condition in another clause provides that "it is agreed that the said percentages and limitations fix the extent of the gross liability of this company at time of insolvency, and on any claim which exceeds the said percentages and limitations all amounts realized or secured shall be applied as hereinafter provided." By condition 9, "when the amount of a claim against any debtor at the time of insolvency exceeds the amount covered by this bond, all amounts realized or secured therefrom shall be deducted pro rata." Again, condition 12B provides that, "should the company be liable for a part only of any claim, the net amount realized therefrom shall be proportionately divided." By these conditions the subject-matter covered by the contract is so limited as to exclude from the protection of the policy that part of a claim against a single debtor which is in excess of \$10,000. Thus, in the case of the claim against the Geo. H. Taylor Company, the claim aggregated something in excess of \$25,000 at time of insolvency. In ascertaining the gross liability of the insurer, no part of this claim should be included in excess of \$10,000. The remainder is not "covered" by the bond. Now, the amount of the initial loss to be first borne by the plaintiff below is fixed by the first or original bond at \$2,000, or one-half of 1 per cent. on gross sales during the period of the bond, if the gross sales exceed \$400,000. In the renewal bond the initial loss is increased to \$6,000, or $1\frac{1}{2}$ per cent. on gross sales,

if sales exceed \$400,000. The single debtor limitation in the first bond is \$10,000, and in the renewal bond this is reduced to \$6,000. The first clause of the eighth condition contemplated that losses might "result," in the sense of the bond, on sales made during its currency after its expiration. By renewal of the bond such losses might be provided for. But the losses intended to be protected by a renewal must be those arising from "sales covered according to the terms, conditions, and limitations" of the bond current when the sales were made. This is the plain meaning of the clause which holds out the inducement to renew the bond. The second clause, which became effective only upon renewal, also provided that, if the bond be a renewal, "losses occurring during the term of this bond on shipments made during the term of the preceding bond may be proven hereunder, subject also to the terms, conditions, and limitations of said preceding bond." Thus, by the promissory terms of the first claim of this condition, the renewal is to be an extension of the protection afforded by the existing bond, and this purpose is equally evident from the words of the second clause, which is the contractual clause of the renewal bond in respect to losses originating under the preceding bond. By the terms of the second clause, "covered losses occurring during the term of this bond on shipments made during the term of the said preceding bond" are provable under and against the renewal bond, subject to "the terms, conditions, and limitations of said preceding bond." The words, "may be proven hereunder," refer to the penalty of the bond, and not to the terms, conditions, and limitations of the bond. For the terms, conditions, and limitations of claims originating during the currency of the preceding bond we are to look to the preceding bond. To say that the "terms, conditions, and limitations" of both bonds must apply, would bring about an irreconcilable conflict, which could only be solved by placing upon the contract that interpretation most favorable to the insured. Under the preceding bond the claim against the Geo. H. Taylor Company was "covered" to the amount of \$10,000. Under the conditions and limitations of the renewal it is "covered" only to the extent of \$6,000. Under the first bond the conditions required the indemnified to first bear a loss of \$2,000. Under the second, the indemnified must first bear a loss of \$6,000. If, therefore, the limitations and conditions of the renewal policy are to control, there could be no recovery whatever in respect to this Taylor loss. The initial loss and single debtor liability of the two bonds are irreconcilable if we construe the conditions of the renewal bond as applicable to losses resulting from sales under the first bond. They are not so if we limit the terms and conditions in respect of the initial loss and single debtor liability, found in the new bond, to sales occurring during its period. This is the most reasonable interpretation, and accords most nearly with the justice of the matter. In the case of *American Credit Indemnity Co. v. Athens Woolen Mills*, a cause decided by this court, and reported in 34 C. C. A. 161, and 92 Fed. 581, we found a difficulty of the same general character arising out of a doubt as to whether the definition of insolvency found in a renewal policy applied to a loss which was provable un-

der the renewal bond, though it arose from sales made during the currency of the preceding bond. The condition by which the renewal bond was made to apply to losses originating under the preceding bond was not in all respects identical with that involved here, though substantially the same. Referring to the promissory clause of the preceding bond, we said:

"We are to consider that by that clause it was clearly intended to extend the benefit of the old bond to cover sales of goods made under that bond, though losses thereon did not accrue during its life; and we ought not to defeat that intention and just expectation of the assured, unless the words of the renewal bond necessarily require it. Do they require it? We think not. In the light of the circumstances and the necessity for reconciling the clauses of the two bonds, the words of the clause 8 of bond No. 2,443 may be reasonably construed to mean merely that the formal proof of loss is to be made under the renewal bond, and during its life; while clauses Nos. 8 and 11 of bond No. 1,540 shall be given effect by holding that the fact of the loss is to be settled by the terms of the old bond."

In the same case we held bonds of this character to be essentially insurance contracts, and that doubtful and ambiguous expressions were to be construed most favorably to be insured. Applying this rule, we have no hesitation in holding that the provisions which determine the amount of the loss to be first borne by the indemnified, and which fix the amount of the single debtor liability applicable to claims resulting from sales during the period of the preceding bond, are those found in the preceding bond.

2. The definition as to the meaning of "initial loss" already given leaves little that need be said in support of the conclusion we reach that the agreed loss to be first borne by the insured, called the "initial loss," must be deducted from the gross amount of provable or "covered" losses. The guaranty is "against loss not exceeding \$20,000 over and above the loss of \$2,000 agreed to be first borne by the said indemnified"; and by condition 6 "the claims provable under this bond include only the amount to be first borne by the indemnified and the amount of the bond." This means that, in order to recover the full indemnity of \$20,000, there must be proof of covered losses equal to the sum of the indemnity and the loss to be borne by the insured. This is the plain meaning of the contract, and accords with the construction placed upon similar provisions in bonds of the same character. *Rice v. Insurance Co.*, 164 Mass. 285, 41 N. E. 276; and *Brierre v. Indemnity Co.*, 67 Mo. App. 385.

3. A question arose as to the amount of the provable loss arising out of sales to the Geo. H. Taylor Company. The gross amount of the claim at date of the insolvency of that debtor was about \$25,500. Subsequently, \$11,616.83 was paid to the plaintiffs by one Newton W. Taylor, in compromise of a suit brought against him by the plaintiff below to hold him liable for the whole debt as a partner. It was claimed that this payment was not a credit against the liability of the Geo. H. Taylor Company, but a price paid for peace. This contention was rightly overruled by the circuit judge, who held that the sum so received was realized upon the claim against the Geo. H. Taylor Company. Only \$10,000 of the gross loss sustained by the indemnified was covered by the policy, and only that amount was a

provable loss. The credit of \$11,616.83 was properly prorated between the provable loss and that part of the claim not covered by the bond. This method of distributing the credit is plainly required by the clause in condition 9, which provides that, "when the amount of a claim against any debtor at the time of insolvency exceeds the amount covered by this bond, all amounts realized or secured therefrom shall be deducted pro rata."

4. On the afternoon of the day upon which the first bond was about to expire it was renewed at the suggestion of the agent of the credit company that such a renewal was necessary that day, in order to preserve the right to prove losses on sales during the period of the bond about to expire. To preserve this right, the agent of the plaintiff in error suggested that the defendant in error should give a short note. This was done, and the note paid December 12, 1896, by a check payable to the order of the plaintiff in error. This note was only given because the president of the paper company, to whom the suggestion was made, had said he had no checks with him at the time. The claim now is that the language of condition 8, that "in case this bond is renewed, and the premium on such renewal is paid, at or before the expiration of this bond," etc., prevents proof of any claims originating under the preceding bond, notwithstanding the issue of the bond and the retention of the premium. The renewal policy was taken out for the purpose of securing protection against impending losses upon sales made during period of first bond, and at the suggestion of the agent of the credit company a short note was accepted as payment. This note was paid by a check payable to the order of the credit company. It has been cashed, and no offer has been made to return the premium so received. There is no evidence as to the limitations upon the power of the agent, who, from all that appears, was a general agent. The renewal policy was issued and bears date as of November 30, 1896, and acknowledges receipt of premium. The answer makes no such defense. Upon the contrary, it expressly admits "that on November 30, 1896, it issued to plaintiff its second bond, No. 8,536, for the period cited in the petition." Under the circumstances we agree with the learned trial judge that the defense was inadmissible and unavailing.

5. Both parties sued out writs of error, and have assigned numerous errors. The court below submitted to the jury only one question,—the bona fides of the nulla bona return to an execution from a judgment upon the Geo. H. Taylor Company claim,—and instructed them, if they found for the plaintiff upon the issue submitted, to return a verdict for \$5,228.58; but, if they found for the defendant upon that issue, to return a verdict for the defendant upon all the issues. The jury found for the plaintiff upon the issue so submitted, and returned a verdict for the plaintiff for \$5,228.58. This sum was arrived at by a construction of the bond in accordance with the conclusion we have herein indicated.

We have not thought it necessary to pass upon each assignment of error separately. The views we have expressed above include an interpretation of those parts of the bond material to the issue upon which the case must turn. The assignments of error as to evidence

admitted over objection have been examined. None of them are well taken or material. The instruction given the jury was inevitable, and the judgment must be affirmed. The costs will be divided.

In re HOUSE.

(District Court, E. D. New York. August 7, 1900.)

BANKRUPTCY—GROUNDS FOR REFUSING DISCHARGE.

It is no ground for refusing a discharge to a bankrupt that he did not include in his schedules a claim against his wife on account of a gift made her several years before his bankruptcy, and which was valid as to him and all his creditors except one, who might have maintained a suit to set it aside as to him.

In Bankruptcy. On application by bankrupt for discharge.

J. Stuart Ross, for bankrupt.

John Henry Hull, for creditor.

THOMAS, District Judge. The bankrupt gave to his wife two checks, one on December 28, 1893, and one on December 30, 1893, amounting to the sum of \$11,491.83. He should have used the money, so far as necessary, to pay one Moore, the creditor now opposing his discharge upon the ground, so far as concerns this item, that he should in some proper form have included this transaction in his schedules. The gift to the wife was in fact in fraud of the right of Moore as creditor, and could have been reached by him in a proper creditor's action. But, subject to satisfaction of Moore's claim, the gift was valid. What asset should the bankrupt have placed in his schedules? A claim against his wife? He could not have recovered the money, whether his gift was made in fraud of his creditors or otherwise. The cause of action for such recovery was in the creditor, and the gift could be avoided only at the instance of the creditor. As to all other persons, including the donor, the gift was valid. For some six years the laws of New York have furnished the creditor a remedy, which he has not made available. While the matter is not beyond doubt, it seems logical that a bankrupt should not be denied a discharge because a gift to his wife might be avoided by a creditor, when the gift was made several years before the enactment of the bankruptcy act, and hence without possible intention to evade its provisions. It may be the duty of the trustee to recover the money, but it will be observed that such recovery could be for the benefit of Moore alone, and only to the extent necessary to extinguish his debts, and not for the purposes of general administration under the bankruptcy act; that is, the trustee may do for Moore's sole benefit what at any time since the time of gift Moore could have done for himself.

In re HYDE & GLOAD MFG. CO., Limited.

(District Court, E. D. New York. June 4, 1900.)

BANKRUPTCY—SUFFICIENCY OF PETITION—UNAUTHORIZED ALTERATION.

An amended petition in bankruptcy, executed as such by a creditor to be filed in proceedings previously instituted, cannot, after such execution, and after the proceedings have been dismissed by the court, be converted into an original petition by striking out the word "amended," and be made the basis of a new and independent proceeding; and where it has been so filed it will be dismissed on the facts being made to appear to the court.

In Bankruptcy.

Belfer & Flash, for certain creditors.

Francis A. McCloskey, for receiver.

Charles De Hart Brower, for petitioning creditors.

THOMAS, District Judge. It is charged that a petition filed May 23, 1900, by Ludwig Lesser and others, to adjudge bankrupt the Hyde & Gload Manufacturing Company, Limited, was altered by striking out certain portions thereof after its execution, by one of the petitioning creditors. Certain of the matter stricken out relates to the names and interests of proposed petitioning creditors, who did not finally join in the petition. While the alteration of the petition in this respect is disapproved, it may not affect its legal existence. But it is also charged that the petition was amendatory of a petition theretofore filed in this court by the same parties, and that the word "amended" was struck out after execution. Nothing in the replying affidavits shows that the word "amended" was struck out before the execution of the petition, and therefore the charge in that regard must be sustained. The result is that a petition executed in an action which the court had dismissed at the time of its execution has been filed, and is of no avail, inasmuch as the striking out of the word "amended" was unlawful, and an attempt was made to change the legal status of the petition so as to make it the basis of a new and independent proceeding, while in fact it was executed as auxiliary to the petition which had been theretofore filed. Therefore the appointment of the receiver under the second petition was void. It cannot stand as an amended petition, because the proceeding in which it was executed has been dismissed. It cannot stand as an original petition, because it was not executed as such, and an attempt to change it to such petition was illegal and unavailing. Therefore the petition must be dismissed. But another, and, so far as appears, valid, petition has been filed. By virtue of the jurisdiction thus acquired, all proceedings upon the part of the assignee are stayed, and he is directed forthwith to report to this court the property now in his hands; and the clerk of the court will prepare and present an order to that effect. This will obviate the necessity of appointing a receiver, but, as the receiver has acted in good faith, the sum paid for procuring his bond should be paid him.

In re STORM et al.

(District Court, E. D. New York. July 27, 1900.)

1. MANUFACTURING CORPORATION—ACT OF BANKRUPTCY—PREFERENCE—DISSOLUTION OF CORPORATION.

A manufacturing corporation, which has permitted three judgments to be taken against it, and executions to be issued thereon, and its property to be advertised for sale thereunder, and which thereafter institutes proceedings for the dissolution of the corporation, is chargeable with having committed an act of bankruptcy, within Bankr. Act, § 3a, subd. 3, providing that an act of bankruptcy may be committed by suffering or permitting, while insolvent, any creditor to obtain a preference through legal proceedings, and not having vacated or discharged the same at least five days before sale.

2. SAME—DISSOLUTION OF CORPORATION.

The commencement of voluntary proceedings for the dissolution of a manufacturing corporation does not have the effect to extinguish the liens of all levies on executions against the corporate property, so as to relieve the corporation from the operation of Bankr. Act, § 3, subd. 3, providing that an act of bankruptcy is committed by permitting a creditor to obtain a preference through legal proceedings, and not having discharged the same at least five days before sale.

Charles De Hart Brower, for petitioner.

Paul Grout, for alleged bankrupt.

THOMAS, District Judge. The question is whether the alleged bankrupt has committed an act of bankruptcy. If so, the act falls under section 3, subd. 3, whereby it must have "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference." Between the months of May and November, 1899, several judgments were recovered against the alleged bankrupt, and executions thereon placed in the hands of the sheriff of the county of Kings. In November such officer advertised certain personal property for sale on December 1st. Two notices of sale were duly posted six days before the sale, but there is a conflict of evidence respecting the third notice, as the person who posted it was not produced by either party. However, the third notice was posted six days previous to December 1st, the day appointed for sale, because the deputy sheriff states that he saw it after it was posted, and that he saw it a day or so after its date. Its date was November 23d; hence he saw it November 24th or 25th. It was delivered to the officer's assistant, for posting, November 23d, and the fact that the deputy sheriff saw it posted on the 24th or 25th is sufficient evidence of due posting. It is contended on the part of the alleged bankrupt that the voluntary proceedings for the dissolution of the corporation vacated the preference, while it is urged on the part of the petitioner that the proceedings confirmed the preference, inasmuch as the lien created by the levy upon personal property would be confirmed. The levy of the execution created a lien, and the attention of the court is called to no statute providing that the voluntary proceedings should discharge the lien. The alleged bankrupt con-

tends that voluntary proceedings taken by a corporation for dissolution extinguish the liens of all levies on executions. But it is not thought that a corporation may in such manner escape the effect of a levy upon its property. Hence it is concluded that the alleged bankrupt suffered numerous judgments to be entered against it, executions to be issued thereon, levy to be made, and property to be advertised for sale, and before the sale took proceedings calculated to continue the benefit of the levy. The act of bankruptcy was committed, and this court has jurisdiction to proceed with the administration of the estate.

TIFFANY v. UNITED STATES.

(Circuit Court, S. D. New York. February 26, 1900.)

No. 2,789.

1. CUSTOMS DUTIES—CONSTRUCTION OF TERMS USED IN STATUTE.

Terms which had no commercial meaning at the time they were used in a tariff statute must be construed in accordance with their plain, natural meaning.

2. SAME—CLASSIFICATION—DRILLED PEARLS.

Pearls which, though not strung, have been drilled or pierced, are not dutiable under paragraph 436 of the tariff act of 1897, as "pearls in their natural state, not strung or set," nor are they within any of the other jewelry paragraphs, but must be classified for duty under the general provisions of section 6, covering manufactured or partly manufactured articles not enumerated.

Appeal from the decision of the board of general appraisers fixing the classification for duty of certain imported merchandise.

W. B. Coughtry, for importer.

Henry C. Platt, Asst. U. S. Atty., for the United States.

LACOMBE, Circuit Judge (orally). The question as to the commercial meaning of the phrase "pearls in their natural state" is of no assistance to the disposition of this case, because with practical unanimity all the witnesses agree that that phrase was not known to the trade when this act was passed. Act July 24, 1897, c. 11. It was a phrase coined by congress, wholly unknown to merchants; and the mere fact that since the passage of the act the merchants engaged in this trade have given a meaning to the words used by congress which seems to them reasonable and fair, and which has been, perhaps, produced somewhat by the influences of their own business, makes no difference. We must take the words in the sense in which congress uses them; and, inasmuch as it appears that they had no commercial meaning at that time, we must take them in their plain, natural meaning. The selection made by congress seems to have been an unfortunate one, for it leaves the situation, as has been pointed out, such as to fix a higher duty on the lower article; but unless, out of the language which congress has used, a meaning other and different from that can be fairly read, the court, within its powers, cannot correct the difficulty. Now, the suggestion which might naturally be made that, paragraph 434 having provided for pearls set or strung,

paragraph 436 provides for pearls that are not strung or set, and that that is the dividing line, will not do. That division, or a similar one, seems to have been quite satisfactory in the past. In the act of 1890, by paragraph 453, pearls were taxed 10 per cent., and the only distinction or only advance beyond that was jewelry. In the act of 1894, pearls, including those that are strung but not set, are taxed at 10 per cent., and pearls set taxed at 30 per cent. Up to that time "set" and "strung" seem to have been the adjectives which marked the point of division. But congress, for some reason or other,—what we cannot tell,—was not satisfied to preserve that division, but added in paragraph 436 a provision that the pearls must be not only unstrung and unset, but also must be pearls in their natural state. Of course, there is no escape from the proposition that a drilled pearl is not a pearl in the natural state. As the witness Benedict put it, it is a pearl with a hole, and nature never made the hole. So that, if these words are to be taken in their natural meaning, according to the grammatical structure of the sentence, we have to find, in order to place pearls within the 10 per cent. clause, that they are not only not strung and not set, but also are actually pearls in their natural state. Now, the result of that undoubtedly is that congress has not, as presumably it intended to do, covered all kinds of pearls in the various jewelry paragraphs, and has left a kind of pearl to be covered by one of the catch-all paragraphs. That the court cannot correct. If the court is satisfied that congress meant to cover all kinds of pearls in some way or other, the fact nevertheless remains that it has failed to do so, and the court cannot correct it. We must take the phrase in the sense in which congress apparently used it. That being so, the decision of the board of general appraisers is affirmed.

In re WILSHIRE.

(Circuit Court, S. D. California. July 19, 1900.)

No. 46.

1. CONSTITUTIONAL LAW—POLICE REGULATIONS—REVIEW BY COURTS.

Laws enacted in the exercise of the police power, whether by a municipal corporation acting in pursuance of the laws of a state, or by a state itself, must be reasonable, and are always subject to the provisions of both the federal and state constitutions and to judicial scrutiny; but the courts will not declare such laws invalid as unconstitutional except in clear cases.

2. CONSTITUTIONAL LAW—POLICE POWERS OF STATE—ORDINANCE REGULATING HEIGHT OF BILLBOARDS.

A municipal corporation may lawfully, in the exercise of general police powers delegated to it by its charter, regulate the height of billboards maintained therein, within reasonable limits, and a city ordinance limiting the height of such structures to six feet from the ground or sidewalk is not so clearly unreasonable as to justify a court in holding it void as in violation of constitutional rights of property.

On Petition by H. G. Wilshire for Writ of Habeas Corpus.

Borden & Carhart, for petitioner.

Walter F. Haas, City Atty.

ROSS, Circuit Judge. Section 11 of article 11 of the constitution of the state of California provides: "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with the general laws." By section 22 of article 1 of the charter of the city of Los Angeles that city is given the power "to make and enforce within its limits such local, police, sanitary and other regulations as are not in conflict with general laws and are deemed expedient to maintain the public peace, protect property, promote the public morals and preserve the health of its inhabitants"; and by subdivision 13 of section 2 of article 1 of its charter the city is empowered to license and regulate the carrying on of any and all professions, trades, callings, and occupations within the limits of the city, to fix the amount of license tax thereon, and to provide the manner of enforcing the payment of the same: provided, that no discrimination shall be made between persons engaged in the same business otherwise than by proportioning the tax upon any business to the amount of business done. On the 13th day of March, 1900, the city, through its council and mayor, adopted an ordinance entitled "An ordinance regulating the height to which any fence, building, or other structure, erected, built, constructed, or maintained for the purpose of painting thereon any sign or advertisement for advertising purposes, or posting thereon or affixing or attaching thereto or thereon any bills, signs, or other advertising matter for advertising purposes, shall be erected, built, constructed, or maintained," the first section of which declares:

"That it shall be unlawful for any person, firm or corporation to erect, build, construct or maintain in the city of Los Angeles any fence, building or other structure of or to a greater height than six feet from the surface of a sidewalk, street, or the ground where the same is erected, built, constructed or maintained, for the purpose of painting thereon any sign or advertisement for advertising purposes or posting thereon or affixing or attaching thereto or thereon any bills or signs, placards, cards, posters or other advertising matter for advertising purposes."

The second section of the ordinance prescribes the punishment to be imposed on those violating its provisions. The petitioner was charged with unlawfully maintaining on certain premises situated within the city of Los Angeles (shown by the case made before the court to have been at the time owned or leased by him) a certain structure of a greater height than six feet from the surface of the ground for the purpose of painting thereon a sign for advertising purposes, upon the trial of which charge he was duly convicted, and adjudged to pay a fine in a sum within the statutory amount, in default of which payment he was adjudged to be, and was in fact, imprisoned, and from which imprisonment he seeks, by the present proceeding, to be discharged. The question in the case, therefore, relates to the validity of the ordinance mentioned; the petitioner contending that it deprives him of rights secured to him by the fourteenth amendment of the constitution of the United States, which declares, among other things, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person with-

in its jurisdiction the equal protection of the laws." These provisions of the constitution secure to every one the right to engage in any lawful business, and to use and enjoy his own property at his will and pleasure, subject to the imposition of lawful licenses, taxes, and other legal regulations, and to the maxim "*Sic utere tuo ut alienum non laedas.*" "Many of the powers exercised by municipalities," says Judge Dillon in his work on Municipal Corporations, "fall within what is known as the 'police power' of the state, and are delegated to them to be exercised for the public good. Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storing of dangerous articles, to establish and control markets, and the like. These and other similar topics will be considered in appropriate places. But it may here be observed that every citizen holds his property subject to the proper exercise of this power, either by the state legislature directly, or by public or municipal corporations to which the legislature may delegate it. Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively styled, 'Police Laws or Regulations.' It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true. It cannot be taken from him for any private use whatever, without his consent, nor can it be taken for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not unreasonably to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally. These regulations rest upon the maxim, '*Salus populi suprema est lex.*' This power to restrain a private injurious use of property is essentially different from the right of eminent domain. It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner, contrary to the maxim, '*Sic utere tuo ut alienum non laedas.*'" 1 Dill. Mun. Corp. (4th Ed.) p. 211, par. 141.

Laws enacted in the exercise of the police power, however, whether by a municipal corporation acting in pursuance of the laws of a state, or by a state itself, must be reasonable, and are always subject to the provisions of both the federal and state constitutions, and they are always subject to judicial scrutiny. *Yick Wo v. Hopkins*, 118 U. S. 372, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Forster v. Scott*, 136 N. Y. 577, 584, 32 N. E. 976, 18 L. R. A. 543; *Toledo, W. & W. Ry. Co. v. City of Jacksonville*, 67 Ill. 37; *Ex parte Whitwell*, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727; *In re Marshall (C. C.)* 102 Fed. 323. And such laws must, as said by the court of appeals of New York in *Re Jacobs*, 98 N. Y. 105, "tend towards the preservation of the lives, health,

morals, or welfare of the community, and the court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and that the latter tend in some plain and appreciable manner towards the accomplishment of the objects for which the legislature may use this power." In *Mugler v. Kansas*, 123 U. S. 661, 8 Sup. Ct. 297, 31 L. Ed. 210, the supreme court said:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, the statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

Authorities to the same effect might be multiplied almost without number, but upon propositions so well settled it is not deemed necessary. While the power of the courts to declare a municipal ordinance or a state statute that contravenes a provision of the fundamental law invalid is undoubted, it is equally well settled that the courts should exercise the power with great caution, and only in cases where the conflict is clear. Bearing in mind these principles of law, let us examine the city ordinance here in question. As has been seen, the thing thereby inhibited is the erection or maintenance anywhere within the city of Los Angeles, for the purpose of painting thereon or attaching thereto any sign, card, placard, poster, or other advertising matter for advertising purposes, of any structure exceeding in height six feet. If the limit of height fixed by the city authorities had been 100 feet, instead of 6, nobody, I apprehend, would doubt that it came within their power to provide for the safety, comfort, and welfare of the inhabitants of the city; just as they may regulate the height of dwelling houses and business blocks, establish fire limits within which no house shall be built except of brick, stone, or iron; prescribe the limits within which slaughter houses, soap factories, etc., shall only be built, etc. Any house or block may be constructed, if not prohibited by proper regulations, of such height as to shut out from the inhabitants of the city light, air, or sunshine, and, when subject to earthquakes or other violent disturbances, otherwise jeopardize the health and safety of its people. The same thing is true in respect to structures built for advertising purposes, commonly called "billboards." It is a matter of common knowledge, and therefore within the notice of the court (*Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304), that these are usually, if not invariably, cheap and flimsy affairs, constructed of wood, and erected on vacant lots of land along or near to the streets, in order to catch the eye of the passers-by. Such structures, if of sufficient height, may be very readily blown over by wind, or shaken down by an earthquake, and in such event (depending upon their height and proximity to the public thoroughfare) may very easily cause injury to persons standing or passing thereon. Moreover, the views in and about a city, if beautiful and unobstructed, constitute one of its chief attractions, and in that

way add to the comfort and well-being of its people. Billboards for advertising purposes, erected to any great height, would undoubtedly be subject to all of these, as well as other, objections, and such structures are, therefore, plainly within the regulating power of the governing body of the city. The matter before the court is, therefore, narrowed to the mere question whether the maximum height to which such structures are permitted by this ordinance to be erected, to wit, six feet, is so unreasonably low as to amount to an invasion of the petitioner's constitutional right to use and enjoy his private property as he chooses. It must be admitted that the limit prescribed approaches very closely, if it does not reach, the point of unreasonableness. But between the line above which the height prescribed would be obviously reasonable and below which it would be obviously unreasonable there is a range concerning which reasonable and fair-minded men may well differ. The action of the municipal authorities, exercised within that range, ought not, in my opinion, to be interfered with by the courts. In a very recent case before Judge Rhodes of the superior court of Santa Clara county, Cal., that learned judge declined to interfere with an ordinance fixing 10 feet as a maximum height for the erection of such structures, saying, in his opinion:

"In this case, if the prohibition were against a height above 50 feet, there could be no question of its validity, any more than there would be in the other cases given as to the height of houses. If they were limited to only 2 feet, it would be equally clear that it would be unreasonable. Now, between those points there is a reasonable limit. The authorities that have passed the ordinance have said that, in their opinion, 10 feet is not an unreasonable limit. Can the court take upon itself to say that it is unreasonable? If they had said 15 feet, I do not think there could be any question about its validity. If they had said 8 feet, or 9 feet, or 10 feet, or 12 feet, it is very difficult to find any point where the court could intervene, and hold that the limitation of the height is not reasonable. I do not think that the court can declare that 10 feet is unreasonable." *Siebe v. City of San José* (recently decided).

I entertain a good deal of doubt in respect to the reasonableness of the maximum limitation placed upon the structures in question by the municipal authorities of the city of Los Angeles, but the fact that this doubt exists is sufficient reason for the court to decline to adjudge the ordinance invalid. It is only in clear cases that such a judgment should be given. It results from what has been said that the petition must be dismissed, and the prisoner remanded to the custody of the officer. It is so ordered.

In re CARVER.

(Circuit Court, D. Maine. August 14, 1900.)

No. 166.

1. HABEAS CORPUS—DETENTION OF MINOR IN MILITARY SERVICE—AGE—EVIDENCE.

Upon application by a parent for a writ of habeas corpus for the release of his minor son, who is unlawfully detained in the military service of the United States, the testimony of the petitioner as to the date of the birth of the son is not sufficient to establish the age of the latter, when it is

evident that it can be supported, if true, by the usual documentary evidence.

2. SAME—MILITARY OFFENSE—CONFLICT OF JURISDICTION.

The federal courts will entertain jurisdiction for writ of habeas corpus for the release of a minor, under the age of 21, who is detained in the military service of the United States under enlistment, in violation of Rev. St. § 1117, although charges have been filed against the minor by an officer of the army for violation of Act July 27, 1892, § 3, making fraudulent enlistment, and the receipt of pay or allowance thereunder, punishable by court-martial, if the charges have not been acted upon by the executive department of the government.

PUTNAM, Circuit Judge (orally). This is a proceeding by writ of habeas corpus issued by order of this court on the petition of James W. Carver, of Auburn, in this state, representing that he is the father of Charles B. Carver, who was born at Lynn, in the state of Massachusetts, on the 5th day of March, 1880, now detained in the military service of the United States under enlistment in violation of section 1117 of the Revised Statutes. The petitioner has testified in support of the allegations of the petition, and he has also testified that both he and his son are citizens of the United States, and that his son formed a part of his family until he enlisted. The court is not willing to take the mere testimony of the petitioner as to the date of the birth of his son, while it is evident to the court that it can be supported, if true, by the usual documentary evidence. We are advised by the testimony of the petitioner that proper return of the birth was made at Lynn by the attending physician, proof of which can be at once obtained.

On the filing of documentary evidence of the date of birth, the case will be entirely clear, and within the precedents, except for a single question which is raised in the return to the writ by Lieut. Barrette, who is the commanding officer to whom it issued. It appears that prior to the filing of the petition for the writ of habeas corpus, and therefore prior to the jurisdiction of this court attaching, charges were filed by Lieut. Barrette against Charles B. Carver for violation of section 3 of the act of July 27, 1892 (27 Stat. 277, 278). That section is as follows:

"That fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared a military offense and made punishable by court-martial, under the sixty-second article of war."

The facts show that the enlistment was fraudulent, and that there have been received pay and allowances thereunder. It may well be doubted whether, under the constitution, fraudulent enlistments can be made offenses punishable by court-martial; but there can be no question that the receipt of pay or allowances after fraudulent enlistment may be made so punishable.

Also, a question arises whether the rights of the parent under section 1117 of the Revised Statutes, so fully recognized by the courts, can be defeated by proceedings under the articles of war based on an enlistment contrary to that section of the statute; and so the further question arises whether or not such proceedings would not, so far as parents are concerned, be an exception to the general rule that civil courts cannot take jurisdiction by habeas corpus pending proceed-

ings before a court-martial. But it is not necessary to enter into that question, because it is clear that the jurisdiction of this court attached, and is not affected by the mere fact that charges were filed. True it is that it seems to be well settled by the decisions, and it is also consonant with the rules of law framed to prevent unseemly conflicts between different judicial tribunals, that, ordinarily, where charges have been preferred and a court-martial having jurisdiction has been ordered, and the person charged has been held to answer, the jurisdiction which attaches in favor of the court-martial will exclude that of a civil tribunal in which proceedings for a writ of habeas corpus may afterwards be commenced. Under such circumstances, the civil tribunal must wait until the court-martial has concluded its proceedings, and even until the sentence, if any, imposed by the court-martial, has been worked out; and this rule might apply even where an arrest had followed in consequence of the charges, although preceding the organization of the military court. But, aside from the peculiar question which we have suggested, and which we do not find it necessary to attempt to answer, the rule has no application merely because charges have been filed which have not been acted on by the executive department, and may never be acted on.

Therefore it is the duty of this court to exercise its jurisdiction, and to order the discharge of Charles B. Carver on the writ which has already issued; and a judgment will be entered accordingly on the filing of a certified copy of the record of the return of his birth already referred to. Meanwhile, having already been brought into court and committed to the custody of the marshal, he will remain in his custody until further order.

(August 15, 1900.)

The court, having considered the writ, the return thereto, the answer to said return, the proofs, and the arguments of counsel, determines that the petitioner, James W. Carver, is entitled to have Charles B. Carver, who has been brought in on the writ, and is now in the custody of the court, discharged from the military service of the United States, and that the said Charles B. Carver should be discharged from such military service, and judgment is entered accordingly, without costs.

In re NEELY.

(Circuit Court, S. D. New York. July 18, 1900.)

1. EXTRADITION—POWER OF CONGRESS TO AUTHORIZE.

It is within the power of congress to provide by statute for the extradition of fugitives from the justice of a foreign country without any reciprocal treaty, but as a matter of international comity, and such power is not affected by the character of the criminal procedure in such country, or by the fact that the alleged offender against its laws may be a citizen of the United States.

2. SAME—CONSTITUTIONALITY OF STATUTE—FOREIGN COUNTRY OCCUPIED BY UNITED STATES.

Act June 6, 1900, amending the extradition laws by authorizing the extradition of persons charged with violation of the criminal laws of any

foreign country or territory which, or any part of which, is occupied by or under the control of the United States, is not unconstitutional, as applied to Cuba, on the ground that under the constitution the United States cannot occupy or exercise control over the island, since its inhabitants are free and independent. The United States was in military occupation of the island as the territory of an enemy at the time it compelled Spain, as the result of the war, to relinquish her sovereignty over it, and may constitutionally continue such occupancy until the political branch of the government shall determine that it is no longer necessary.

8. SAME—PROCEEDINGS—OBJECTIONS TO DOCUMENTS.

Technical objections to documents in extradition proceedings as to matters of form are not entitled to favorable consideration by the courts, and if the certificates, signatures, etc., are in substantial conformity to the requirements of the statute, and give reasonable assurance of authenticity, it is sufficient.

Proceedings for the extradition to Cuba of Charles F. W. Neely.
On preliminary objections.

Henry L. Burnett, U. S. Atty.

John D. Lindsay, for the accused.

LACOMBE, Circuit Judge. Argument was heard on the preliminary objections on June 29th, and the 23d of July was then designated for the presentation of testimony on the question of probable cause in the event of the court's overruling such objections. That date is so near at hand that decision on the objections should be filed forthwith. Counsel have taken so long to prepare briefs (they were only received yesterday) that there is not the time to enter into any elaborate discussion of the points presented; nor, indeed, is any such discussion necessary. Some of the objections advanced on the oral argument appear not now to be pressed, and those still urged do not present any difficult questions. This proceeding is brought under a recent amendment to section 5270 of the United States Revised Statutes, hereinafter referred to as the "Act of June 6, 1900." To the existing provisions as to extradition it adds the following:

"Whenever any foreign country or territory or any part thereof is occupied by or under the control of the United States, any person who shall violate, or who has violated the criminal laws in force therein, by the commission of the following offenses, namely: [Here follows a long enumeration, which includes "embezzlement or criminal malversation of the public funds, committed by public officers, employes, or depositaries,"] and who shall depart or flee, or who has departed or fled, from justice therein to the United States, any territory thereof or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: provided, further, that such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged: and provided further, that no return or surrender shall be made of any person charged with the commission of any offense of a political nature. If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the secretary of state of the United

States, and such authorities shall secure to such a person a fair and impartial trial."

Under the exercise of the treaty-making power, congress has the right to provide for the return of a fugitive criminal to the foreign country from which he has fled; and, waiving any requirement of entire reciprocity from the foreign country, it may, by statute, without treaty, provide for such return. This power has been exercised by the federal government for years without question. It is a power exercised by every sovereign state, sometimes in accordance with the provisions of a treaty, sometimes without any treaty, as a matter of international comity. The mere fact that the individual who has committed a crime in a foreign country is himself a citizen of the United States does not prevent the United States from returning him to the country against whose laws he has offended. Having voluntarily gone into the foreign country to commit his crime, he may involuntarily be returned there for trial and punishment. Nor is it any sound objection against the extradition of the criminal citizen that the courts in the country to which he is returned follow a procedure different from our own. The provisions of articles 4 and 5 of the amendments to the constitution have no relation to the subject of extradition. In *re De Giacomo*, 12 Blatchf. 391, Fed. Cas. No. 3,747. He may be returned to some Latin country, where conviction might follow upon hearsay testimony, or even upon vociferous declarations of belief by more or less credulous individuals. If congress chooses to make such a treaty, he may be sent to Turkey, or Siam, or Zanzibar, where it is safe to assume the procedure bears still less likeness to the common law. Having himself selected the forum for the commission of his crime, he will not be heard to object that the procedure of its courts is not quite what he would prefer when he comes to stand trial. Any other rule would make this country an inviolable asylum for its citizens whenever they may return to it red-handed from crimes committed abroad, for its courts cannot punish for a crime committed in a foreign country. These propositions are elementary, and nothing in the brief or in the oral argument challenges their accuracy. The principal objection advanced on behalf of the prisoner, whose identity is not disputed, is that this particular act of June 6, 1900, is unconstitutional, because it provides for extradition to a foreign country occupied by or under the control of the United States; or possibly, to state the argument more accurately, because under the constitution the United States cannot occupy or exercise control over the Island of Cuba, since its inhabitants are free and independent. The joint resolution of April 19, 1898, declared that "the people of the Island of Cuba are, and of right ought to be, free and independent," and this finding as to their status may be accepted by the courts. Nevertheless it is an historical fact of which the courts will take judicial notice that on that same day the territory of that island was occupied by Spain. Against that power we declared war, we sent our fleets and armies to the island, invaded it, joined battle with our alien enemies therein, and continued the struggle with them until throughout the length and breadth of the island our forces were in full military occupation of

this foreign territory. The declaration of war was in no wise obnoxious to the constitution, nor was the invasion, nor the conflict, nor the result. In the entire sequence of events down to the date of Spain's acquiescence in such result by the ratification of the treaty of Paris, counsel for the prisoner finds nothing to criticise as obnoxious to the federal constitution. On the day that treaty was signed we were indisputably in military occupation of the island. Why, under the constitution, that occupation, legitimately entered upon, may not continue to secure the lives and property of American citizens within that territory, until the political branch of the government shall be satisfied that its further continuance is unnecessary, it is difficult to conceive, and no authority cited in the brief sustains any such proposition. Reference is made to *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281, but that case is not at all in point. There a citizen was tried by a court-martial, not in a foreign country, but in the state of Indiana, a portion of the United States, not at the time a part of the theater of war, with civil courts organized and in full operation, having jurisdiction to hear and determine all questions as to the offense with which he was charged. But there is no suggestion here that, if remanded to Cuba, Neely will be tried by a court-martial or otherwise than by a civil court following the same procedure as that prevailing before the concession of Cuba's independence. And, indeed, if the criminal laws of the island be enforced solely by courts-martial, that circumstance would not be a sufficient answer to request for extradition. Having chosen the country in which to commit the crime, he must accept the tribunals which administer its laws. Moreover, it will be noted that the act of June 6, 1900, is most careful to safeguard the party accused against unsubstantial charges of crime. It provides that before the accused is returned there shall be an inquiry before a judge of a federal court, "who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged." If the evidence fails to establish probable cause, the accused shall not be returned. This means probable cause tested by the practice of our courts, and supported by evidence which we would hold competent. No mere statement of an official that he has caused an examination into the facts to be made, with such and such a result, is of any probative weight; nor is hearsay competent, nor unverified copies of documents. There must be laid before the court sworn statements as to facts (not as to beliefs, or opinions, or deductions), from which the judge may reach the conclusion, despite such explanatory evidence as the accused may offer, that there is a *prima facie* case made out against him. The objection that the act of June 6, 1900, is unconstitutional is unsound.

Various technical objections are urged to the sufficiency (in form) of the various documents presented; as, for instance, that a certain certificate is signed by the military governor, and not by the principal diplomatic or consular officer; and that there is no certification that certain depositions are so authenticated "as to entitle them to be received for similar purposes by the tribunals of the foreign country,"—probably not material when authenticated so as to be received upon

the special independent investigation to be had here under the act of 1900. Objections of this class are not given the weight once accorded to them when the granting of a request for extradition was more jealously regarded by the courts than it is to-day. Originally it seemed to be the theory that the sole foundation of the practice rested in reciprocity; and that, if some particular foreign country were backward about returning our criminals, we would be keen to keep theirs. During this period courts were astute to find flaws in certificates, jurats, seals, and signatures as an excuse for refusing the request of some demanding government. At last, however, it seems to have been discovered that the thief, the ruffian, or the forger was not a particularly valuable acquisition; and that, although it might be highly desirable that offenders against our laws should be brought back here and tried, as a deterrent example, it was possibly more important that this country should not be made a city of refuge for foreign criminals, and that an enlightened public policy would be astute to return them, once we were satisfied that they were criminals. The expression of this public policy is found in the provisions of the act of congress which excludes convicted criminals whose offenses are not political, with those afflicted with contagious diseases and such as are liable to become a public charge. Since then there has not been so much hypercriticism in dealing with objections as to form, and if the certificates, signatures, etc., are in substantial conformity to the requirements of the statute, and give reasonable assurance of authenticity, it is sufficient. Such seems to be the case here, and the documents are admitted for what they may be worth. Some of them are mere declarations of opinion, containing no relevant facts. Their effect, however, will not now be discussed.

Upon the oral argument some question was made as to whether article 401 of the Penal Code of Cuba and Porto Rico or sections 37 and 55 of the Postal Code were in force in Cuba at the time of Neely's alleged offense. It is assumed from the circumstance that this point is not discussed in the briefs that counsel acquiesce in the suggestion made by the court upon the argument, that the question now to be determined is whether there is probable cause that the prisoner committed the offense enumerated in the act of June 9, 1900. If that be shown, it may be left to the trial court to decide which specific provision of these Codes was in force and violated. The description of offense in either Code is clearly within the broad language of the act of June 6, 1900.

Counsel have discussed the evidence. This is premature, and will not be considered by the court until after the hearing on July 23d, when further proofs may be adduced. It will be sufficient now to indicate that the mere presentation of an indictment or its equivalent cannot be held sufficient under this act. The court is to find probable cause on evidence. Witnesses need not be brought from Cuba to testify here, but their sworn statements can certainly be obtained, so that the court's conclusion may be based upon competent proof of facts within the knowledge of the witnesses. The preliminary objections are overruled. The hearing on July 23d is fixed for 1:30 p. m.

In re NEELY.

(Circuit Court, S. D. New York. August 8, 1900.)

1. EXTRADITION—ISSUES IN PROCEEDING—ACT JUNE 6, 1900.

Under Act June 6, 1900, providing for the extradition of persons charged with violation of the criminal laws of any foreign country occupied by or under the control of the United States: "provided, further, that such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged," it is the sole function of the judge before whom such proceedings are had to determine the question of probable cause upon evidence which is competent under our laws, and it is not his province to enter upon the question whether the accused, if surrendered, will be accorded a fair and impartial trial.

2. SAME—PROBABLE CAUSE—SUFFICIENCY OF EVIDENCE.

In proceedings for the extradition of the defendant to Cuba to answer to a charge of embezzling public funds as a public officer, evidence that he was the head of the bureau of finance in the department of posts of the Island of Cuba, which bureau issued stamps to the postmasters of the island, and received the remittances therefor, and deposited the same in bank; that defendant personally received and receipted for such remittances, and directed the amount of each deposit, himself making up the packages therefor; and that during a considerable time the receipts, as shown by the books, uniformly exceeded the deposits,—is sufficient to establish probable cause, and warrant the holding of the defendant for extradition.

Proceedings for the Extradition to Cuba of Charles F. W. Neely.
Hearing upon the merits.

Henry L. Burnett, U. S. Atty.

John D. Lindsay, for the accused.

LACOMBE, Circuit Judge. The various preliminary objections have been disposed of in the former opinion. Upon the hearing counsel for the prisoner offered to prove by witnesses that a fair and impartial trial cannot be secured to the prisoner in the Island of Cuba. Reliance is placed upon the report of the judiciary committee of the senate recommending the passage of the act of June 6, 1900, the concluding paragraph of which reads as follows:

"In order that there may be no vexatious exercise of the power of extradition under this act, it is provided that there shall be shown probable cause before a judge of the appropriate court who shall order the returns and surrender, but no such order shall be made until the judge shall be satisfied that the accused will have a speedy and fair trial."

If the statute had passed in the language recommended by the judiciary committee, there would be force in this argument; but the history of the enactment is conclusive against the conducting of any such investigation by this court. When the bill came from the house of representatives, the concluding sentences read as follows:

"Provided further, that such proceedings shall be had before a judge or a justice of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged. If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the secretary of state of the United States, and such authorities shall guarantee to such person a fair and impartial trial."

The judiciary committee of the senate reported in favor of "striking out all after the enacting clause," and substituting an enactment which should contain, inter alia, the following:

"Provided further, that before making such order of surrender and return the judge shall be satisfied that proper provision exists for securing to the accused a speedy and fair trial for such offense, where he will be informed of the nature and cause of the accusation, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defense."

Congress, however, rejected this amendment proposed by the judiciary committee, and passed the act in substantially the language above quoted from the house bill. Manifestly, therefore, this court should not enter upon the investigation proposed. Its sole function is to determine whether there is probable cause that the prisoner is guilty of the offense charged, such offense being one of those enumerated in the act. It will not be necessary to discuss the testimony covering the entire period of the prisoner's incumbency. Touching the six weeks from January 1, 1900, to February 10, 1900, the evidence is more compact and specific than it is for the other months. It appears that Neely was the head of the bureau of finance in the department of posts of the Island of Cuba. That bureau issued "stamped paper" (i. e. stamps, postal cards, stamped envelopes, etc.) to the bonded postmasters of the island, upon their requisitions, and received the remittances made by them to pay for the same. Such remittances came by registered mail usually, in the shape of drafts, warrants, cash, or money orders. The unbonded postmasters received stamps and paid cash. To the bonded postmasters there were sent receipts for their remittances, such receipts being torn out of a book containing stubs. Entries of such remittances were also made in a book called "Small Cash Book, Exhibit A." In this cash book were also entered the items of cash payments by unbonded postmasters. Deposits of these funds were made every 10 days in the North American Trust Company, the payments accumulating meanwhile in the safe. When a deposit was made, a deposit slip in the usual form was made out and turned in with the funds. Now, for the period from January 1, 1900, to February 10, 1900, we have the small cash book—Exhibit A—showing receipts of money from postmasters. George W. Marshall, who has been employed in the bureau continuously since February, 1899, testified under oath before the court that every entry in the book for that period is in his own handwriting; that he knew of the transaction at the time, having himself prepared the receipt for the postmaster, which Neely signed, and that his entry was accurately made. It is, of course, possible that, through error or oversight, or otherwise, other money may have been received and not entered; but that such amounts as are entered were received is sworn to positively by a witness having personal knowledge of the facts, and is wholly uncontradicted. These items aggregate \$38,967.29. The teller or clerk in charge at the North American Trust Company testified to the deposits made during the same period, and that none others than those he swore to were made during that period. He produced the original deposit slips. The

witness Marshall, being shown these slips when on the stand, identified them, and swore that, except for a memorandum in Neely's handwriting on the slip of January 6, 1900, they were entirely in his own handwriting, and accurately represented the deposits made by him on the dates given. They are as follows: January 6, 1900, \$4,000; January 10, 1900, \$3,000; January 20, 1900, \$5,700; January 30, 1900, \$4,830; February 10, 1900, \$6,907.57,—total, \$24,437.57. The difference between receipts and deposits is \$14,529.72. Some slight discrepancy by difference of time between receipt and deposit on the same day is, of course, to be expected; but the evidence of Marshall, direct and positive, not contradicted, or impeached, or qualified, or shaken on cross-examination, should satisfy any jury beyond reasonable doubt that \$14,000, or thereabouts, of funds received from the sale of stamped paper was lost, stolen, or embezzled after it reached the bureau. It further appears that Neely was in charge of the bureau, and directed its business methods; that he himself opened the mail containing the money, and either wrote the receipts himself or signed those which Marshall prepared, and which were sent to postmasters; that he had constant access to the books, and examined them; that he frequently—almost daily—looked over the accumulating funds in the safe, doing them up in bundles for convenience of counting and deposit; that he himself directed what should be the amount of each deposit, after Marshall had reported how much loose silver there was in the drawer, and himself handed to Marshall sufficient currency or drafts to make up, with such loose silver, the amount he thus directed to be deposited; that, except for himself and Marshall (who has testified here to the correctness of his own transactions), there were changes in the personnel of the bureau, but that, as its records show, there was a uniform deficiency of deposits as compared with receipts from the beginning of Neely's administration until he left the island on leave April 28, 1900. It is, of course, possible that, while he was himself opening the mail, receiving the money, signing the receipts, handling the funds, counting them, moving them from drawer to drawer of the safe, and making them up for deposit, others, in the bureau or out of it, could have made away, during six weeks, with \$14,000—over 35 per cent. of the total receipts—under his eyes, and almost out of his hands, without his knowledge or consent; but it is highly improbable. In the opinion of this court the government has abundantly shown that there is probable cause to believe that Neely is guilty of the offense of "embezzlement or criminal malversation of the public funds," he being at the time a "public officer" or "employé" or "depository." Such an offense is obnoxious to the Penal Code in force in Cuba, article 401 of which provides that "the public employé who, by reason of his office, has in his charge public funds or property, and who should take (or consent that others should take) any part therefrom, shall be punished," etc. There is no merit in the contention that this article applies only to persons in the public employ of Spain. Spain having withdrawn from the island, its successor has become the "public" to which the Code, remaining unrepealed, now refers. The suggestion that under this Penal Code no public employé could be prose-

cuted or punished until his superior had heard the case, and turned the offender over to the criminal law for trial, is matter of defense, and need not be considered here. The evidence shows probable cause to believe that the prisoner is guilty of an offense defined in the act of June 9, 1900, and which is also a violation of the criminal laws in force in Cuba, and upon such evidence he will be held for extradition.

Two obstacles to his extradition now exist. He has been held to bail in this court upon a criminal charge of bringing into this district government funds embezzled in another district. He has also been arrested in a civil action brought in this court to recover \$45,000, which, it is alleged, he has converted. When both of these proceedings shall have been discontinued, the order in extradition will be signed. This may be done on August 13th, at 11 a. m.

MATTHEWS & WILLARD MFG. CO. v. AMERICAN LAMP & BRASS CO.
et al. (three cases).

(Circuit Court, D. New Jersey. July 18, 1900.)

1. PATENTS—ORIGINALITY OF DESIGN—LAMP BASE.

The Miller design patent, No. 23,672, for a new design for bases for lamps, is void for want of originality.

2. SAME—DESIGNS—PATENTABILITY.

A patented design must be viewed and considered as a whole, and originality and novelty will not be denied it because elements or component parts of the design are old, if as a whole it produces a new and pleasing impression on the aesthetic sense.

3. SAME—DESIGN FOR LAMP BASE.

The Miller design patent, No. 23,673, for a new design for bases for lamps, *was* not anticipated, valid, and infringed.

4. SAME.

The Miller design patent, No. 23,674, for a new design for bases for lamps, is void for want of originality and prior use.

In Equity. These were three suits between the same parties for infringement of three several design patents. On final hearing.

Charles L. Burdett, for complainant.

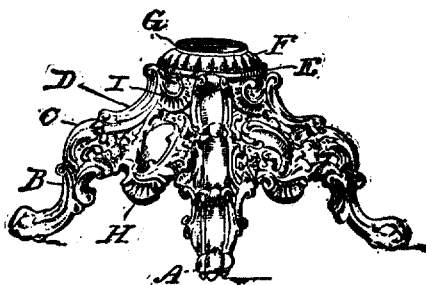
John Dane, Jr., for defendants.

GRAY, Circuit Judge. These suits are based on the alleged infringements of United States letters patent for new designs for bases for lamps, Nos. 23,672, 23,673, and 23,674, granted October 2, 1894, on applications filed August 24, 1894, to John C. Miller, assignor of entire interest to the Matthews & Willard Manufacturing Company, of Waterbury, Conn., the complainant herein. The defendants are the American Lamp & Brass Company, W. R. Whitehead, F. B. Clark, Charles Clark, and Peter K. Clark, of Trenton, N. J. These suits were brought at the same time, and, by stipulation of counsel, testimony in them all was taken at the same time, as most of that taken in one suit was applicable to the others. They have been argued together, but will now be considered and disposed of separately.

First, as to case marked "A" in the record; the patent in suit being

No. 23,672. The organization of the complainant corporation in Connecticut in 1890, its subsequent existence under charter obtained in 1893, and the assignment of the patent in suit to complainant have been proved by testimony of witnesses. The answer filed in the case sets up the usual defenses, but the greatest stress has been put upon the defense of prior use. The Miller patent, No. 23,672, in suit, is for a design for a lamp base, which is a complete structure, although commonly used in the art as a part only of a lamp of a style which includes a base, a column or standard, and a font holder, as the support for the oil font which carries the burner, chimney, and shade. The specifications and claim are as follows:

"To All Whom It may Concern: Be it known that I, John C. Miller, of Waterbury, in the county of New Haven and state of Connecticut, have invented a new design for bases for lamps; and I do hereby declare the following, when taken in connection with the accompanying drawing and the letters of reference marked thereon, to be a full, clear, and exact description of the same, and which said drawing constitutes part of this specification: The figure is a perspective view of a base for lamps, embodying my design. My invention relates to a design for bases for lamps, and consists in the configuration and ornamentation as hereinafter described and shown in the accompanying illustration. The base consists of four legs, terminating in claw feet, A, from which rise reversely curved scrolls, B, C, D, which are united at their tops by a plain band, E, from which arises a contracted ribbed surface, F, which terminates in a plain band, G. Between each of the legs is a shield-like ornamentation, H, surrounded by scroll and floral ornamentations, which merge into legs on either side, and above each shield is an ornamental scroll, I. I claim the design for a base for lamps, as herein described and shown."



The defendants allege the prior use of the design in controversy by the Clark Bros. Lamp, Brass & Copper Company, the predecessors of the defendant company, as early as April or May, 1892. This is the principal issue in the suit in relation to patent No. 23,672. The testimony relating to it adduced on either side is absolutely contradictory of and opposed to that adduced on the other, and entirely irreconcilable. Complainants, in addition to their prima facie proofs, adduce the testimony of John C. Miller, the patentee of patent No. 23,672, and designer and superintendent of the complainant company in the early part of the year 1893. Miller had then had about 17 years' experience as a designer in this line. He testifies that: He first "made a drawing of the design on paper"; then gave Edward Schmitz, modeler for the company, "instructions as to the execution of the design." The modeler "carved the design in plaster," and the original model is in evidence as Complainant's Exhibit Plaster Model No. 1. This model "was sent to the foundry, and a metal casting made of it"; this cast-

ing being filed and fitted to have both sides correspond in outline correctly for to take duplicate casts of. Four castings in duplicate were then made and sent to the pattern department, where "they were brazed together, making a complete base. They were then sent to the model maker [Henry Stevens, in Hoboken, N. J.], to have mold made of same. When the mold was finished, they were then cast in the spelter foundry in spelter." "Q. 17. What did Mr. Stevens do about making of a mold of a lamp base of that design? A. He made the plaster sections with caps and gate,—a complete mold. It was then cast in bronze, and afterwards chased by him, and shipped to the Matthews & Willard Manufacturing Company, at Waterbury, finished." Miller further testifies that the sample lamp base of the patented design in evidence as Complainant's Exhibit Specimen of Lamp Base of Patent No. 23,672 is of complainant's make, and is from the regular stock. Edward Schmitz says: He is a designer and molder for complainant company, of 40 years' experience. Identifies the plaster model No. 1 as of his make. That he made it in the spring of 1893 from a drawing which he saw Miller at work on at his desk, within six feet of where Schmitz was at work; and, further, that when Miller made the drawing he did not have before him any lamp base or any other drawing. Thomas H. Omer, a brass finisher in the employ of the complainant company for 18 years, identifies the plaster model No. 1 as one he saw Schmitz working on in the early part of 1893, and that he saw Miller sketching. He also testifies that lamp bases of this design were made by "hundreds, thousands, perhaps," at the Matthews & Willard Manufacturing Company factory; that he knew of it, because "it was my business to order the castings, see that they were finished in the different departments until the thing was finally constructed and finished, and ready for finish." John F. Murden, foreman of the lamp and table department for complainant, identifies the plaster model No. 1 as one he saw Schmitz working on in the designing room of the Matthews & Willard Manufacturing Company in the early part of 1893. He testifies that the lamp bases of this design were known at the factory as "No. 490"; that he shipped lamp bases of this design from the factory first about the middle of April, 1893; that his regular occupation took him to the designing room. Charles H. Skilton, a clerk for about eight years in the employ of complainant, testifies that he recognized Complainant's Exhibit Plaster Model No. 1 as a design for "a quarter section of a lamp base" which he first saw in the early part of 1893; that he made an estimate of the cost of this, "No. 490, banquet lamp," as shown by his estimate sheet in evidence, as "Complainant's Exhibit Skilton Estimate Sheet, No. 490, Lamp." Henry Stevens, the mold maker, who in 1893 resided in Hoboken, N. J., testifies that he first saw this design of lamp base of patent No. 23,672 in the early part of 1893, when the pattern was sent to him by Mr. Miller, designer and superintendent of the Matthews & Willard Manufacturing Company; that he made a plaster mold of it, and returned that to the company, to have one cast in metal, which was sent to him afterwards, to be chased, fitted, and returned.

On the other hand, defendants produce a photograph of a lamp, the base of which is so precisely similar to that of the base of the patent

in suit that it is impossible to believe that they were made after independent and original designs, or that the fact is otherwise than that the one was copied from or suggested by the other. The impression made upon the ordinary observer is that the two designs are precisely alike,—the only exception, and that hardly one to be made by an ordinary observer, is the absence of the fluted or ribbed collar, F, which crowns the top of the design. Other differences which could be pointed out by an expert are so minute as to elude ordinary observation. This photograph, defendants allege, as made as early as April or May, 1892,—a full year before Miller, the patentee of the patent in suit, according to his own statement, made the design of his lamp base, two years and a half before the patent was granted, and two years and four months before application for the same was made. If this allegation of defendants be true, it is charitable to say that Miller is mistaken in his testimony as to his originating the design in question, and that the patent must be declared void for want of the originality required by the statute.

The defendant company was incorporated about January, 1893, becoming the successor of, and composing or embracing, the Clark Bros. Lamp, Brass & Copper Company, which had previously absorbed the McLewee Manufacturing Company, an old lamp-manufacturing concern of New York, about or prior to the year 1891. Just prior to the incorporation of defendant company, the Clark Bros. Lamp, Brass & Copper Company took in the Swann-Whitehead Manufacturing Company, of Trenton, N. J., another lamp-manufacturing company; and the companies, thus combined, reorganized as, and adopted the title of, the American Lamp & Brass Company, which is the defendant in this suit. In support of the allegation referred to, defendants produced as witnesses P. K. Clark (vice president of defendant company), Charles Clark (a merchant and dealer in lamps for 29 years), W. S. McLewee (of the Swann & McLewee Manufacturing Company), Peter K. Clark, C. M. Sheridan, and Edgar Woolston, all of whom testified that lamps with bases like Fig. 691, shown upon Defendant's Exhibit Illustrated Sheet No. 1, were made by defendants and sold in quantities in 1892, about a year before Miller claims to have made the design shown in patent No. 23,672; and they all recognized the photograph in question, marked, "Defendant's Exhibit Illustrated Sheet No. 1," as correctly representing the base of the lamp so testified to by them, and two of the Clarks, Swann, and Woolston testified positively to their knowledge of the fact that this colored photograph, No. 691, on Defendant's Exhibit Illustrated Sheet No. 1, was taken by a photographer, in the rooms of the Clark Bros. Lamp, Brass & Copper Company, prior to May, 1892, and they give reasons for so specifying the time. Among these reasons is the fact testified to by them that these photographs, with others of their stock in hand, were taken in the spring, prior to the formation of the defendant company, and that they were taken early enough in that spring to allow the photographs to be used by the traveling salesmen who went out on the road prior to May 15th each year. Complainant seeks to break the force of this testimony by three witnesses,—Swann, Amelia, and Ginder. It is not worth while to allude more particularly to the testimony of

these witnesses, than to say that in some respects they do not directly contradict the testimony of the witnesses produced by defendant, and that, so far as they do, they have been so impeached by the disclosure of hostile feelings towards the defendant, and by contradictory statements, that their testimony in this regard is deprived of any weight when opposed to that of the unimpeached witnesses of the defendants on this point. The testimony on both sides is somewhat voluminous, and all the witnesses were subjected to rigid cross-examination by the able counsel who represented the respective parties litigant at the hearing. The question is altogether one of fact, resting upon this testimony, and must be determined as such. No useful purpose would be accomplished by quoting this testimony at length. It will suffice to say that the court, after a careful reading and examination of all the testimony, has come to the conclusion that the largely preponderant weight thereof is upon the side of the defendants, and that the defense has been established by them that the design of the patent in suit had been displayed and in use in the lamp trade as early as May, 1892. As this was at least a year before it is claimed by complainant that the design of the Miller patent was originated, and more than two years before the application for the patent in suit was filed, said patent No. 23,672 must be declared void for want of novelty and originality, and the bill of complainant in respect thereto must be dismissed.

Case B.

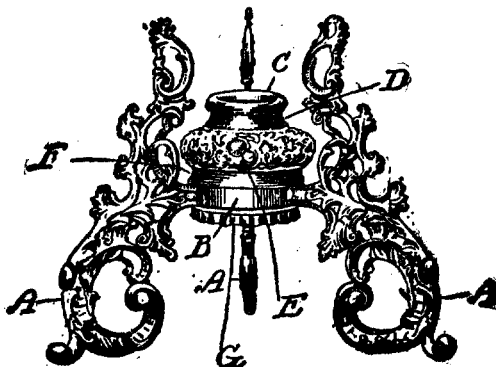
In the second of the cases above stated, the same complainant charges the same defendants of infringement of letters patent No. 23,673, of October 2, 1894, for a design for lamp bases. The defendants, by their answer, deny infringement, deny the validity of the patent, deny novelty, and allege anticipation by numerous prior designs for lamp bases and illustrations, containing all of the substantial and material parts of the supposed invention for which the patent in suit was granted. Defendants, also, by their answer, admit the manufacture and sale of lamps provided with bases similar to those patented by Miller, the assignor of the complainant, and allege that they made and sold lamps, with bases substantially like those of the patent upon which the present suit is based, as early as May, 1892. The witnesses on both sides were the same as those produced in Case A, just considered, in regard to patent 23,672. Complainant has produced in evidence an exhibit of the lamp base manufactured by them under the patent in suit; also, a lamp base bought at defendants' store in New York in December, 1894, which is admitted to be exactly similar to the lamp base of the patent in suit. Defendants, on their side, have produced a number of photographs and drawings which illustrate lamp bases alleged by them to be similar to that of the patent in suit, or at least suggestive of the design of that patent. The witnesses in their behalf testified that lamps with bases like those illustrated by the drawings, and shown in the lamp-base exhibits, were manufactured and in use by the Clark Bros. Lamp, Brass & Copper Company prior to May, 1892, and largely sold by them to the trade; but they do not clearly tes-

tify, much less prove, that a lamp base such as the one put in evidence by complainant, and marked "Complainant's Exhibit Specimen of Defendants' Manufacture," and admitted to be exactly similar to the design of the patent in suit, was ever manufactured, sold, or in use prior to the date of the complainant's patent. A careful examination of defendants' exhibits, and the testimony adduced relating thereto, has not convinced the court that the assignor of the complainant did not, in the patent in suit, by his own genius, produce an original design, or that the state of the art as shown by defendants deprives said design of novelty. A patented design must be viewed and considered as a whole, and originality and novelty will not be denied to it because elements or component parts of the design are old. The philosophy of the rules applicable to a patent for a combination in the mechanical art applies to a patent for a design. A combination of elements that are old is patentable, if it produce a new and useful result as the product of the combination; and a design which avails itself of suggestions old in art is patentable if, as a whole, it produce a new and pleasing impression on the æsthetic sense. Lack of novelty or originality in a design cannot be successfully alleged, unless, to an intelligent general observer interested in the subject, it has the same appearance as that of some design previously produced. We can find no such design in this case, after a careful examination of the exhibits in evidence on the part of the defendants. In this view of the case, the design of the patent in suit must be declared valid, and the infringement thereof established. A decree as prayed for in the bill will be entered.

Case C.

The assignor and patentee is the same as in the other two cases, A and B, and the date of the patent is the same,—October 2, 1894. The specifications and claim are as follows:

"My invention relates to a design for bases for lamps, and consists in the configuration and ornamentation as hereinafter described and shown in the accompanying illustration. The base of this design is of tripod character; each of the three legs, A, consisting of large scroll ornamentations, which near the center extend inward, and are united by a band, D, which supports the body proper; the ornamentation of the body consisting of a plain ring, C, and a concave plain band, D, at the top, below which the body is expanded,



forming a convex surface, which is ornamented by a series of scroll and leaf-like ornamentations, interspersed by plain surfaces or shields, E. Between the ornamented portion of the body and the band, B, is a plain concave band, F, and below the band, B, the body terminates in an ornamental flange, G. I claim the design for a base for lamps, as herein described and shown."

Complainant made the same prima facie proofs as in the former cases, producing as an exhibit a lamp base bought from defendants in 1894, which is admitted to be substantially the same design as that of complainant's patent. The same proofs as in the other cases are submitted by complainant, as to the design being original with Miller, and it being made in the early part of the year 1893. To support their defense that a lamp base substantially like that of the design of the patent in suit was made, used, and sold by them more than two years prior to the date of the application for the patent in suit, defendants produce the same witnesses as in Case A. P. K. Clark, Edgar Woolston, Frank B. Clark, and Charles Clark all testify positively, and as of their own knowledge, that the lamp bases alleged to be infringements of design patent No. 23,674 were made and sold by the Clark Bros. Lamp, Brass & Copper Company in 1891 and 1892, and that the Clark Bros. Company also had them in their wholesale store in Trenton in 1892. These witnesses were all subjected to a rigid cross-examination, which failed to weaken their testimony in any respect. Their recollection as to the years 1891 and 1892, in which they say they saw the lamps with bases similar to the exhibit of defendants' manufacture, was fixed, naturally enough, by the fact that in 1891, or just prior thereto, the McLewee Lamp Company was absorbed into the Clark Bros. Lamp, Brass & Copper Company, and that in 1893 the latter company was merged in the defendant company. Their recollection was also fixed by other circumstances naturally tending to do so, and severally testified to by them. It is also in testimony that McLewee brought legs of a lamp base exactly similar to those of the patent in suit, from New York, from the effects of the McLewee Manufacturing Company, early in 1891. An exhibit of one of these legs said to have been so brought is in the case. On inspection, it is identical with the legs of the patent in suit. It does not detract from the identity, so far as the question before the court is concerned, that the legs in the defendants' structure are attached to the base in a position exactly the reverse of that of complainant's. The design is the same. As in Case A, so in this case, there can be no doubt that one of these designs was copied from the other. Having a common origin, the ownership of the original idea is to be determined. A careful consideration of the testimony pro and con has brought the court to the conclusion, as in Case A, that the defendants' testimony, positive and direct as it is, has not been successfully controverted by the complainant, and therefore that patent 23,674 is void, because of the manufacture, use, and sale of like lamp bases by the Clark Bros. Lamp, Brass & Copper Company in 1891 and 1892,—more than two years prior to the date of the application upon which Miller secured his patent. The bill in this case must therefore be dismissed, with costs.

THOMSON-HOUSTON ELECTRIC CO. v. LORAIN STEEL CO.

(Circuit Court, S. D. New York. July 11, 1900.)

1. PATENTS—INVENTION—ESTOPPEL OF IMPROVER.

Where the device of a patent is workable, and embodies a novel and important principle in the art, a subsequent inventor who has adopted the principle and has improved the device in its details after it has been tested by practical use cannot deny patentability to the original invention on the ground that it was inoperative and crude.

2. SAME—INFRINGEMENT—ELECTRIC MOTOR REGULATORS.

The Knight patent, No. 428,169, for an improved electric motor regulator, the principal feature of which is a locking device which prevents the movement of either the regulating lever or the reversing lever, except when the other is in a predetermined position, was not anticipated and is valid. Claims 1, 2, 3, and 4 also held infringed by an electric controller made in accordance with the Harris patent, No. 587,733, which is within the letter of the claims, and the same as the device of the Knight patent in its main operative features, although some of the minor details are neither the same nor equivalents.

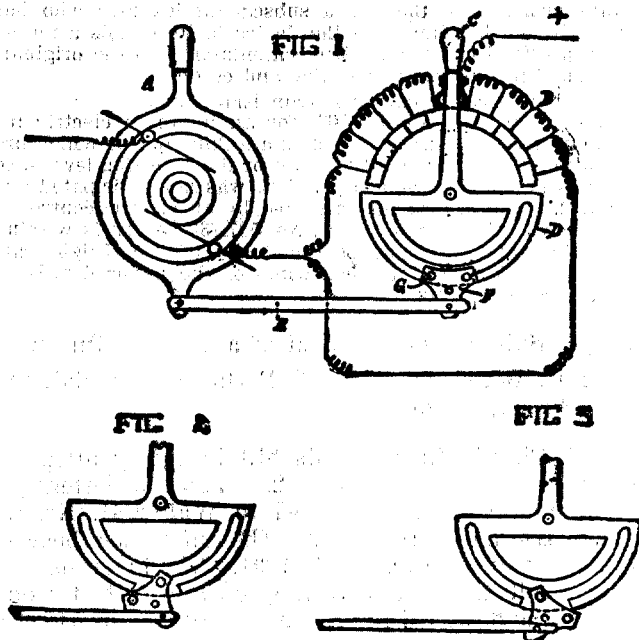
In Equity. Suit for infringement of a patent. On final hearing.
Frederick H. Betts and L. F. H. Betts, for complainant.
Frank S. Busser, for defendant.

SHIPMAN, Circuit Judge. This bill in equity alleges infringement by the defendant of claims 1, 2, 3, and 4 of letters patent No. 428,169, dated May 20, 1890, issued to Walter H. Knight for an improved electric motor regulator. The patent has been owned by the complainant since November 7, 1891. The invention was adapted to electric railway motors working on a circuit of "constant potential," and was designed to prevent the sudden overloading of the motor. The patentee says in his specification:

"In motors on a circuit of this character, it is essential that a resistance or other device for opposing the electro-motive force should be inserted in the circuit whenever the motor is at rest, or its counter-electro-motive force substantially diminished. Since a reversal of the motor, of course, reverses its counter-electro-motive force, it is essential that it should only be reversed when the motor is at rest, and when there is substantially no current passing through it. A sudden reversal of the motor when in operation so affects the counter-electro-motive force that, unless a resistance is inserted, the sudden flow of current which ensues is so great as to burn out the machine. Moreover, when the reversing device is a switch controlling the direction of current in either the field magnet or armature, it is apt to be injured by operating it while the current is passing."

When the motor is suddenly reversed, and the counter-electro-motive force is also reversed in consequence, if the motor cannot instantly get up speed in the opposite direction, it is in danger of being burned out; and, if the car is reversed very suddenly, pedestrians or carriages in the rear are in danger of accident. In the pre-existing motors, a single handle was used, which was moved each way from a central position upon the regulator. A forward movement sent the car forward, a reverse movement to the central position stopped it, and it was reversed by a continuation beyond that point. The danger was that in a sudden, not anticipated emergency, the motorman would lose his presence of mind, and send the

car whirling backward, or that he would move his handle too far and reverse when he merely wished to stop. Separate handles were also provided, but, unless a definite stop was interposed, both the difficulty of ascertaining the precise point when the movement of the handle was to be stayed, and the danger, continued.



The patentee described in his specification his invention, as follows:.

"My invention consists in providing a reversing mechanism for the motor, with a stop or lock, so that it can be operated only when there is a sufficient amount of resistance inserted to prevent injury, and it, furthermore, consists in providing a stop or lock for the resistance-controller or regulator of the machine, by which, when the reversing mechanism is at the neutral point, the resistance cannot be cut out. These devices absolutely prevent reversal of the motor at an improper time, and also the operation of the regulator, unless the reversing mechanism is set in one direction or the other."

The locking device or "stop" is described as follows by the complainant's expert:

"There is shown in Fig. 1 a reversing device, with the lever or handle, A, and a controlling or regulating device, with the handle or lever, C. The reverser is indicated as an old-fashioned brush-shifter, but the inventor contemplates also the use of a reversing switch for changing the direction of current flow in the field magnet or armature, and so states in the specification, it being an immaterial matter what form the reversing device may take. The controller is shown as an old rheostatic controller, such as was the standard at that date; it being remembered that the application was filed March 13, 1886, a very early date in the practical development of electric railway apparatus. To the lever, A, is jointed a connecting-rod, E, which is in turn pivoted to a triangular-shaped block, F, having two projecting-pins, G, standing, when the lever is in its central position, in a gap in a flange formed on a sector on the

lower side of the regulating lever, C. Thus, when the reversing device is in its central position, the motor having no tendency either forward or backward, it is impossible to move the controller or regulator by reason of the flange, D, striking the pin, G. This is the condition shown in Fig. 1 of the patent. When, however, the reverser, A, is thrown to one side or the other, the block, F, is turned into the position shown in Fig. 2, or into the position shown in Fig. 3, according to whether the reverser is moved to the left or to the right; but in either case one of the pins, G, is turned to the inside of the flange, D, and the other to the outside of the flange, so that the regulator can be turned, the flange passing between the two pins without interference. Conversely, when the regulating lever, C, has been turned as just mentioned, so as to interpose the flange, D, between the two pins, G, it is impossible to move the reversing-lever, A, since the pins, G, by their engagement with the flange, D, will not allow the block, F, to turn by a push or pull on the connecting-rod, E, and consequently the reversing lever is locked."

It will thus be seen that the reversing and regulating devices act independently, but each device is used to lock the other, and the reversal of the motor cannot take place until the motorman unlocks it, and he cannot unlock it until he has brought the regulator to its "off" position; neither can he turn the current on and operate the regulator until the reverser is in its proper position. This stop locks one device or the other, and thus "compels the alternate operation of reverser and regulator by the operator," but when either is in operation it is unaffected by the other. The invention is the combination of the other elements with a novel and positive stop, which compels the motorman to an observance of its check upon the movements of the handle of both regulator and reverser, and is described in the four claims which are in controversy as follows:

"(1) The combination, with an electric motor, of a reversing device and regulator therefor, means for operating the same, and a stop for the reversing device, controlled by the regulator, whereby the reversing device can be operated only when the regulator is in a predetermined position. (2) The combination, with an electric motor, of a reversing device therefor, a regulator, a stop for the reversing device, controlled by the regulator for locking the reversing device, so as to prevent its being operated, except when the regulator is substantially at the point of maximum control. (3) The combination, with an electric motor, of a regulator therefor, a stop or lock for the regulator, and a reversing device for the motor connected to said stop, whereby the said stop is operated by the reversing device to lock the regulator against movement, except when the reversing device is in a predetermined position. (4) The combination, with an electric motor, on a constant-potential circuit, of a regulator and reversing device therefor, operated independently of one another, and an intermediate stop or lock connection, whereby the regulator and reversing device each controls the movement of the other."

The defendant, in attempting the defense of lack of novelty in the invention of the patent in suit, presents letters patent for electric motors to Edward Weston, No. 264,982, dated September 26, 1882; to Ernest W. Siemens, No. 322,859, dated July 21, 1885; and to Joseph Weis, No. 335,863, dated February 9, 1886. Each of the devices described in these patents has a single handle, which regulates and reverses in succession; and neither has a stop or lock, or any mechanism which can properly be called interlocking. Each has a bar which connects the regulator to the reverser, and which the defendant's expert designates as interlocking; but in either device a movement of the reversing lever also moves the regulating lever, and the regulator cannot be moved from one of its extreme

positions to the other extreme position without operating the reverser, and by one continuous movement of the handle the operator can go from full speed ahead to full speed in the opposite direction. Letters patent No. 273,490, of 1883, to Edison; No. 321,149, of 1885, to Sprague; No. 338,023, of 1886, to Bentley; No. 384,447, of 1888, to Julien,—were also referred to by Dr. Kennelly, one of the defendant's experts, as having a bearing upon the question of novelty. In these motors the regulating and reversing devices were separate and distinct, but neither had a stop whereby either device was stopped from movement. The Reckenzaun British patent, No. 5,375, of 1883, like the Weis, Weston, and Siemens patents, had no intermediate stops.

The next and remaining class of references alleged to be anticipatory contained the steam railway signal devices in patents to Buchanan, Finch & Moore, Toucey, Smith & Buchanan, and to Cummings. These patents relate to the interlocking of two levers in such manner that neither could be moved, except at a predetermined position of the other, and do not seem to be of importance in this connection. These various patents of all classes were also introduced to show that the improvement of Knight was an obvious one and devoid of invention; but the patents in regard to electric railroad motors not only show nothing of the kind, but show that the improvement in question was neither anticipated nor suggested in the prior art, was important, was a new departure from the previous methods of constructing railway electric motors, and other testimony shows that, in one form or another, it has been universally adopted.

The alleged inoperative character of the invention in suit is also dwelt upon by the defendant. It is true that the drawings in the specification were diagrammatic, were not working drawings, and that, after the principle of the invention was shown, subsequent mechanics could develop it in a better form or more perfect details than were used by the inventor before the test of actual and practical use had been applied to it; but in this case, as in many others, it is vain for a subsequent inventor, after having taken the new principle of a prior invention, and having worked improved details into his mode of operation, to decry the original invention as inoperative and crude. The original invention was workable, and, while it has been improved, it has been used abundantly.

The question of infringement is of the most importance. The defendant's motors are made upon the general plan shown in letters patent to Samuel Harris, No. 587,733, dated August 10, 1897, for an electric controller; one object of the invention being, as the patentee said in his specification, to produce automatically the "step by step" result of preventing "the reversing and cut-out switch from being moved except when the operating switch is at the 'off' position," and of preventing "the operating switch from being moved when the reversing and cut-out switch is at the 'off' position." The object of this part of his invention and its result were the same as the object and the result of Knight, and the defendant's mechanism contained the combination and each element of the first

four claims of the Knight patent, arranged as therein described. Harris wanted to use and did use Knight's method of locking, but he wanted to use it so as to lock the reversing switch in six different positions, whereas the Knight structure was made to lock the brush-reversing lever in two positions only. Furthermore, the defendant wanted to use locking mechanism in a double controller equipment, one at each end of the car, so that at the end of the route the mechanism at one end could be locked at an inoperative position, the handles could be taken off, and the motorman could go to the other end of the car, and use the controller at that end during the return trip. This was an additional reason and object for the employment of locking mechanism. As a matter of course, the details by which the stop was to be manipulated had to be changed, and the question is whether they were so changed as to bring them outside the sphere of equivalents. The fact that each device is within the letter of the claims, and each produced and was intended to produce the same result by a method of locking, is not decisive upon the question of infringement, because the alleged infringer must have reached the result by substantially the same means, and Knight cannot successfully monopolize the function of locking. *Westinghouse v. Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136. We must look further, and see whether substantially the same means were adopted; and upon this point the question of equivalency becomes somewhat complicated by the fact that Harris improved the Knight locking system so as to adapt it to a larger number of positions, and to a controller at each end of the car. The necessities of locking had increased since the date of the Knight patent in 1890, and therefore a larger locking arrangement was provided, which compelled a modification of the mechanical details of cams, levers, pins, springs, and the like, but the same general system is preserved in each device. The case, in its modification of the means of the pioneer patent for the purpose of an improved result, is like *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715, in which Justice Blatchford was not deterred by apparent and showy changes of means from the conclusion that both the principle and substantially the means of the pioneer patent had been used. In this case it cannot be found that each detail of the locking mechanism of Harris is an equivalent of each detail of the locking mechanism of Knight; and if that is a necessity the patent in suit would be worthless, because, after the practical electrician had been told to lock, a large variety of locking mechanism was open to him from which to make a choice of minor details. It is, however, true that "the main operative features of both machines are the same." *Machine Co. v. Lancaster*, *supra*. Let there be a decree, with costs, for an injunction against the infringement of claims 1, 2, 3, and 4 of the patent, and for an accounting.

NORTH BROS. MFG. CO. v. McCARTY.

(Circuit Court, S. D. New York. July 23, 1900.)

PATENTS—INFRINGEMENT—ICE PICK.

The Albrecht patent, No. 296,501, for an ice-chipping tool, was not anticipated, and is valid. Also *held* infringed as to claim 2.

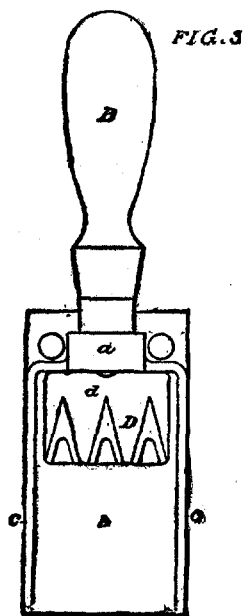
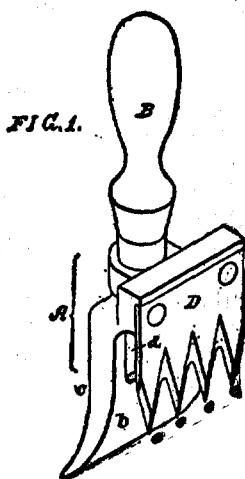
In Equity. Final hearing upon pleadings and proofs of a suit for infringement of United States letters patent No. 296,501, to Hermann Albrecht, April 8, 1884, for an ice-chipping tool.

Chas. Howson, for complainant.

Clarence E. Mehlhof, for defendant.

LACOMBE, Circuit Judge. The object of the invention is the production of an implement, operated by hand, to chip small pieces from blocks of ice, without pulverizing the same, the fragments broken off approximating to uniformity in size. Its principal utility, as shown by the evidence, is in connection with the freezing of ice cream, it being desirable that the ice should be broken into lumps of a size which will fit conveniently between the metal freezer and the tub, and that such breaking be accomplished with as little waste as possible. Prior to the invention of this tool the ordinary plan of preparing ice for such use was to pound the mass of ice with a hatchet or similar implement, the ice being within a bag, or in a box, or the like. The result of this operation was the pounding of the ice into a great many fragments, large and small, and a great waste of material.

The patentee's ice pick, which is shown in the accompanying diagrams, consists of three main parts, "namely, the guard, A, preferably



made of cast iron, and the handle, B, and blade, D, secured to the guard, the latter being composed of the bar, a, and the pendent flange, b, which, for economical reasons, is generally cast in one piece with the bar. An opening, d, of the character best observed in Fig. 3, extends through this flange, which is strengthened at the edges by ribs, c, c, and the flange is preferably curved outward at and near its lower edge, as shown in Fig. 1. The blade is secured to the front edge of the bar, a, and has a number of sharp cutting teeth, e,—four in the present instance. In using the implement it is grasped by the handle, and struck forcibly downward, so that the chipping teeth will be brought into violent contact with the block of ice at a distance from the edge of the block determined by the distance between the flange, b, of the guard, and the blade, D, fragments approximating to uniformity in size being thus chipped from the block without pulverizing the ice; and these fragments, or the greater portion of them, passing through the opening, d, of the guard, and being directed by the flange, b, onto a tray or into a bowl or other suitable receptacle."

The claims are:

"(1) An ice pick in which a guard, A, handle, B, and blade, D, provided with one or more chipping teeth, are combined substantially in the manner set forth, (2) The combination of the guard, A, having an opening, d, and curved flange, b, with the handle, B, and blade, D, attached to the guard substantially as set forth."

The evidence shows that the so-called "guard" not only acts as a gauge to measure the sizes of the pieces removed, but also that part of it which extends below the blade, and, as the tool descends, bears against the side or edge of the block of ice, serves an important purpose as a guide to direct the blow, so that it shall be delivered at the desired distance from the edge of the block of ice with certainty, and without requiring any special care or skill on the part of the operator, or interfering with the freedom and force of the blow. In a general way the principle of the tool is that of the carpenter's plane, but it is arranged to strip off pieces of comparative thickness, instead of mere shavings; and it is operated in a different manner, so that the depending flange, operating as a guide, makes its manipulation successful, whereas in the plane no such guide is needed or found. A number of prior patents are presented,—ice planes, ice shaver, vegetable cutters, and an ice pick. None of them anticipate, nor do they disclose such a state of the art as to deprive the device of all claim to patentable invention. The device is simple, and the invention narrow, but, in view of the fact that it is manifestly useful, and that defendant, a newcomer, is apparently the only infringer during 16 years of the life of this patent, I am inclined to sustain the validity of the second claim. The first is too broad, unless elements are read into it which will make it substantially the same as the second. The defendant's tool is a lighter implement, more cheaply made, with its blade set at a slightly different angle. Apparently it is not so efficient, but it copies the patent so closely that infringement seems clear. Complainant may take the usual decree.

McCULLY et al. v. KNY-SCHEERER CO.

(Circuit Court, E. D. New York. March 30, 1900.)

PATENTS—INFRINGEMENT—SPECULUM.

The McCully patent, No. 430,350, for a speculum, is limited in scope to certain improvements on the prior and well-known Graves speculum, a single feature of which, if any, discloses patentable novelty, and is not infringed by a speculum which is also essentially the Graves instrument, improved by the substitution of parts taken from others antedating the patent.

In Equity. Suit for infringement of patent. On final hearing.

Wilton C. Donn, for complainants.

William Raimond Baird, for defendant.

THOMAS, District Judge. The complainants' invention relates to an alleged new and improved speculum. The claimed desideratum in the art was an instrument that admitted of ready and complete dismemberment and reassemblage of parts, for the purpose of quick and thorough cleansing under aseptic conditions. Each of the complainants' claims involves a combination. The specification describes a speculum (1) whose two jaws are of the ordinary form. (2) The stem of the inferior jaw is joined by means of a screw with the stem of a forked piece, which in turn is connected with, and is an extension of, the upper jaw. This screw holds the stem of the lower jaw and the stem of the forked piece in position, and by loosening the screw the jaws may be expanded or contracted. (3) A front arm or finger lever which has a hole, receiving loosely a set screw, whose inferior end, by means of an eye, engages a detent, in the form of a hook or pin, let into one side of the forked piece or lower jaw. The screw carries a nut, which, when set upon the finger lever, holds the jaws apart, or, if loosened from that position, permits the same to close. (4) A connection of the arms or limbs of the fork to the upper plate or jaw by means of pins. (5) Preferably the pins are provided by "means of a curved wire or rod, forming a yoke," whose extremities are bent to form pins, which enter holes in the upper and lower jaws, or in the upper jaw and forked piece. (6) As suggested, the jaws may be pivoted together without the fork piece. So far as described, no part of the complainants' instrument is new for the purpose of a speculum, save the pivot yoke, and also the pin or hook detent on the side of the yoke piece or lower jaw. The Graves speculum, older and well known in the art, had each feature of the complainants' instruments, save the pivot yoke or equivalent pivots, and also the hook detent, in the place of which was a removable screw. In the place of the pivot yoke or pivots of any kind was a screw, the inner ends of which, in certain cases, were riveted, and in other cases were not. Hence a hook detent, and also pins on which the jaws, or upper jaw and forked piece, turned, preferably in the form of a bail with inturned ends, take the place, in the complainants' patent, of screws performing the same function in the Graves speculum. In fact, the complainants call their instrument the Graves speculum. The defendant's device is precisely the Graves instrument, save that he uses a pin, let into the inner side

of one arm of the forked piece, which pin engages that side of the upper jaw, while a removable screw is employed in the place of a pin on the opposite side. In addition, the detent on the fork or jaw to hold the screw is a pin, rather than a screw, as in Graves' patent. But the precise manner of connecting the jaws employed by the defendant is shown in Brewer's speculum, which anticipates in time the complainants' patent. There would have been no invention in combining Brewer's manner of fastening the jaws with the Graves device. Such an instrument would show neither invention nor novelty. It would be the combination of old parts in such way as to perform no new function, or to provide no new mode of operation. The use of the pivot yoke or springing bail, with intumed ends to form pins, was new in a speculum. Such yoke was a useful method of springing pins through the jaws or the upper jaw and the fork piece. Whether it indicates invention need not be decided, as the defendant does not use the same nor any equivalent not old in the art. The defendant combines the Brewer pivot and screw for connecting the parts with the Graves instrument to perform an old function. Clearly, the complainants were not entitled to such combination. In fact, they did not describe such combination in the first, second, third, and fifth claims alleged to be infringed. The claims describe the union of the jaws or upper jaw and forked piece, as follows: In the first claim, "a curved yoke having bent ends forming pivots detachably connecting the jaws"; in the second claim, by "a curved yoke, having bent ends forming pins or journals, by which the other jaw is detachably pivoted to the extremities of the forked piece"; in the fifth claim, by "a yoke, H [referring to figures], having bent ends forming journals adapted to bearings in the jaw, B, and forked piece, C." The third claim makes no mention of such fastening, unless in the use of the words "substantially as herein set forth," which expression is common to the claims, but supplies nothing valuable. As Brewer had used a pin on one side and a screw on the other, there was nothing new in a provision for a fastening by pins, and, as the patentees confined themselves to a special form of such pins, they must be limited to that. Hence the defendant did not infringe the claims, 1, 2, or 5, unless the use of a hook detent modifies or changes the conclusion. But the hook detent is not mentioned in claims 1 and 2, while claim 5 mentions a detent, "F, on the part C." This claim is either too broad in claiming any form of detent, as it would be anticipated by the Graves instrument, or it is too narrow to cover one form of the defendant's hook, called the "French lock detent," which is not new, although not used in a speculum. But it is considered that the change of form from a screw detent to a pin detent, such changed form being a well-known manner of fastening, although not before used in a speculum for that purpose, indicates nothing of invention. The head of the screw is cut off, and the end of the detent is bent down. A screw removable is changed to a hook immovable, and each performs the same office, save that in dismembering the instrument the eye of the screw slips off the hook or pin in the one case, while the screw must be removed in the other. What has just been stated is applicable to claim 3, which reads: "In a speculum, the combination with one pivoted jaw of a pin or hook detent fixed

thereto, and a fastening device detachably engaging the detent, and also engaging the other jaw of the instrument, substantially as herein set forth." One of the figures literally shows this arrangement; that is, the hook or pin is on the side of the lower jaw, rather than on the forked piece, as shown in other figures. The forked piece is always described separately. In any case it is not a part of the lower jaw, as it is fastened to the upper jaw, and there seems to be no propriety in broadening the claim. The defendant's device does not infringe the letter and obvious intention of claim 3. It appears to the court that the complainants' combination is very serviceable, in that it permits speed in the disconnection and marshaling of parts, but this convenience seems chiefly due to the curved yoke, which the defendant does not use. The defendant should have a decree, with costs.

GOSS PRINTING-PRESS CO. v. SCOTT.

(Circuit Court, D. New Jersey. August 4, 1900.)

1. PATENTS—INVENTION—NEW COMBINATION OF OLD ELEMENTS.

To render a combination of old elements patentable, it must produce a new and useful result, or an old result in a new and useful manner; and furthermore the conception and embodiment of the combination must involve the exercise of the inventive faculty, and not merely the skill of a mechanic familiar with the art.

2. SAME—EVIDENCE OF NOVELTY—EXTENSIVE USE.

The fact of the popularity and extensive use of a patented mechanism is entitled to consideration on the question of invention only when that question is in doubt on the other evidence. It cannot sustain a patent for an alleged invention which is clearly without patentable novelty.

3. SAME—INVENTION—DUPLICATION OF PARTS.

Invention cannot be predicated of the mere duplication or multiplication of well-known mechanisms.

4. SAME—PRINTING MACHINES.

The Firm patents, No. 410,271, claim 6, No. 415,321, claim 7, and No. 529,680, claims 11, 12, and 13, all of which relate to improvements in printing machines, are void for lack of patentable novelty in view of the prior art.

In Equity. Suit for infringement of patents. On final hearing.

L. L. Bond, M. B. Philipp, and C. E. Pickard, for complainant.

B. F. Lee and W. H. L. Lee, for defendant.

BRADFORD, District Judge. The bill in this case charges infringement of certain letters patent of the United States relating to multi-roll printing presses, being Nos. 410,271 and 415,321 dated respectively September 3, 1889, and November 19, 1889, issued to Joseph L. Firm, and also No. 529,680 dated November 20, 1894, issued to Joseph L. Firm, assignor to the complainant. Patent No. 410,271 is for an improvement in "Rotary Printing-Machines," the application therefor having been filed October 27, 1888. Patent No. 415,321 is also for an improvement in "Rotary Printing-Machines," the application therefor having been filed January 17, 1888. Patent No. 529,680 is for an improvement in "Printing Machines," the application

therefor having been filed November 9, 1889, and renewed September 1, 1893. The complainant, the Goss Printing Press Company, claims title to these several patents as follows: As to patent No. 410,271, by an assignment by Firm to the Firm Printing Press Company September 7, 1889, an assignment by that company to Firm July 24, 1891, and an assignment by Firm to the complainant January 30, 1892; as to patent No. 415,321, by an assignment by Firm to the Firm Printing Press Company November 22, 1889, an assignment by that company to Firm July 24, 1891, and an assignment by Firm to the complainant January 30, 1892; and as to patent No. 529,680, by the original grant thereof to the complainant by virtue of an assignment by Firm before the patent was issued. The charge of infringement has been restricted to claim 6 of patent No. 410,271, claim 7 of patent No. 415,321, and claims 11, 12 and 13 of patent No. 529,680. Claim 6 of patent No. 410,271 is as follows:

"(6) In combination, the form and impression cylinders adapted for printing a plurality of webs, the rollers by which said webs are collected one upon another, the rollers by which said collected webs are folded longitudinally, and a knife by which the same are severed transversely, the said folding-rollers and transversely-severing knife being located at right angles with the printing-rollers, whereby the webs, having been printed and collected, make only one change in the direction of feed while being printed, folded, and cut, substantially as described."

Claim 7 of patent No. 415,321 is as follows:

"(7) In a rotary printing-machine in which the several pages of a book or newspaper are printed upon a plurality of webs, in combination, the impression-cylinders, the form-cylinders, page-forms, the rolls whereby the webs after being printed are guided into position on top of one another, and cutters by which said webs are severed transversely between the succeeding rows of pages, the page-forms being arranged upon the several form-cylinders with their heads pointing all in the same direction around the cylinder, the forms for those pages to constitute the first half of the book being located upon corresponding zones of the various form-cylinders and the forms for those pages to constitute the last half of the book being arranged upon other corresponding zones on the various cylinders side by side with the zones in which the forms for the pages of the first half of the book are located, whereby when the webs are run out over one another without turning or reversing the several pages belonging to the first half of the book will arrange themselves above each other and the several pages belonging to the last half of the book will arrange themselves above each other side by side with those belonging to the first half, substantially as described."

Claims 11, 12 and 13 of patent No. 529,680 are as follows:

"(11) In combination, a web printing mechanism adapted to perfect a web containing four pages abreast, a guide *f* substantially parallel with the cylinders of said printing mechanism, two pairs of longitudinally folding rollers substantially at right angles with guide *f*, one pair being arranged in the path of each division of the split web, means for guiding the web to said folding rollers, transversely cutting mechanism substantially parallel with said folding rollers, guides substantially parallel with said folding rollers whereby one folded strip is brought over the other folded strip and mechanism whereby the cuts are folded together; whereby the web may be split, then each half folded longitudinally, then cut transversely, and brought together, then folded together, while moving substantially parallel with one plane before longitudinal folding and parallel with a plane substantially at right angles therewith after longitudinal folding, substantially as described.

(12) A web printing mechanism adapted to perfect a web containing four pages abreast, a guide *f* substantially parallel with the cylinders of said

printing mechanism, two pairs of longitudinally folding rollers substantially at right angles with guide f, one pair being arranged in the path of each division of the split web, means for guiding the web to said folding rollers, transversely perforating mechanism substantially parallel with said folding rollers, guides substantially parallel with said folding rollers whereby one folded strip is brought over the other folded strip, retarding mechanism whereby the strips are torn apart on the transverse perforations and mechanisms whereby the cuts are folded together, substantially as described, whereby the two halves of the web may be folded longitudinally, perforated transversely, and brought together and torn apart, then folded together, while moving substantially parallel with one plane before longitudinal folding and parallel with a plane substantially at right angles therewith after longitudinal folding, substantially as described.

(13) In combination a web printing mechanism adapted to perfect a web containing a plurality of pages abreast, longitudinally splitting mechanism, a plurality of frames for folding longitudinally, a folding roll at the apex of each frame, guides whereby the paper from one frame is caused to travel in the same direction with and associated with the paper coming from the other frame and mechanism whereby said associated papers are folded inside of each other, substantially as described; whereby the two parts of said web receive their primary fold separately and their final fold inside of each other."

The answer sets up among other defences lack of title in the complainant. The defendant claims that the complainant has not title, legal or equitable, to either of the patents Nos. 410,271 and 415,321, and as to patent No. 529,680 has, not an equitable, but only a legal title. Assuming for the present that the objection of want of title is not well taken, the case will now be considered on other grounds. Patents Nos. 415,321 and 410,271 relate to the class of rotary printing machines commonly known as "straight line" or "straight run" printing presses, in which the plates or page forms are so imposed on the form or type cylinders that the column rules of the printed matter are parallel to the edges of the webs or strips of web, as the case may be, and such webs or strips of web while running between, over and under the form and impression cylinders and rollers in the printing press proper and until they have been associated in register, move in the same vertical plane without lateral turning or deflection. The defendant contends, among other things, that in view of the prior art the combinations covered by claim 7 of patent No. 415,321, and claim 6 of patent No. 410,271, respectively, were not patentable, and were in fact anticipated. The complainant assigns as the date of Firm's invention of the combinations now under consideration the early part of 1878 or, at the latest, February 19, 1879. On the question of date of invention there is much evidence, not altogether satisfactory when taken as a whole. The defendant claims that no date of invention can be assigned earlier than the dates of making application for the two earlier patents in suit. Claim 7 of patent No. 415,321, covers, in a rotary printing machine in which the several pages of a book or newspaper are printed upon a plurality of webs, a combination of, (1) impression-cylinders, (2) form-cylinders, (3) page-forms thereon for such book or newspaper arranged with their heads all pointing in the same direction around their cylinders, (4) rolls whereby the webs after being printed are without turning or reversing guided into position on top of one another, and (5) cutters by which the webs are severed transversely between the succeeding rows of

pages; whereby, the page-forms having been located on the form-cylinders as stated in the claim, "when the webs are run out over one another without turning or reversing the several pages belonging to the first half of the book will arrange themselves above each other and the several pages belonging to the last half of the book will arrange themselves above each other side by side with those belonging to the first half." Claim 6 of patent No. 410,271 covers a combination of (1) form and impression-cylinders adapted to print a plurality of webs, (2) rollers by which the webs are collected one upon another, (3) rollers at right angles with the printing rollers by which the collected webs are folded longitudinally, and (4) a knife at right angles with the printing-rollers by which the collected and longitudinally folded webs are transversely severed; "whereby the webs, having been printed and collected, make only one change in the direction of feed while being printed, folded and cut." The drawings and description of each of the patents Nos. 415,321 and 410,271 disclose a double width web perfecting press using three rolls of web and a corresponding number of printing mechanisms with a slit in the center designed to split the webs longitudinally into two strips or halves as the webs run through the machine, and with folding and delivery mechanism. Each of the three printing mechanisms is adapted to print on both sides of the web coming from its roll and includes, among other things, two pairs of cylinders, each pair consisting of a form or type-cylinder and an impression-cylinder. Each form-cylinder being of double width is adapted to receive on each semi-circumference four plates or page-forms abreast, the column rules being at right angles with the axis of the cylinder and extending circumferentially around it and parallel to the edges of the web or strip of web. There being two form-cylinders in each printing mechanism included in the press, each such mechanism has a maximum capacity of printing at each complete revolution of the cylinders sixteen pages or eight leaves. With three rolls and their respective printing mechanisms, the maximum capacity of the entire press is forty-eight pages or twenty-four leaves at each such revolution. Each of the three double width printing mechanisms included in the machine covered by patent No. 415,321, or by patent No. 410,271, is provided with its web roll, and is in its principle of construction and operation the same as either of the other two, save for the variation in the paging and typographical matter of the stereotype page plates arranged on the different form-cylinders. In neither of the multi-roll presses covered by the two earlier patents in suit is there any cross-association of webs or halves or strips of web, as there may be in the printing machines shown in patent No. 529,680. In neither of them, where association of webs or strips of web occurs, is any web or strip of web deflected laterally until after association. A vertical plane bisecting the several form and impression-cylinders is in line with the central margin of the four-page wide web and with the slit. On each side of this line there can at most be only two pages abreast. The half of the press dealing with the strip or strips of web on the right of the central longitudinal line has no functional relation to the other half of the press dealing with the strip or strips of web on

the left of that line. Each half of the machine has a complete printing, folding and delivery mechanism and acts at all times independently of the other. The products of the two halves of the machine do not form component parts of the same newspaper. Each half prints, folds and delivers its product unaided by the other half. One half of the machine may be used to print, fold and deliver a complete newspaper, and the other half to print, fold and deliver a different and complete publication, or each half may print, fold and deliver a mere duplicate of the newspaper or other publication coming from the other half. Each press is the exact mechanical equivalent of two single width printing machines, fed from three rolls, placed side by side, each having a complete printing, folding and delivery mechanism. And so in each of the three printing mechanisms included in a press covered by either one or other of the two earlier patents one half or side of the mechanism does not in any manner co-act or co-operate with the other half or side to produce any joint result, but acts independently of the other. In printing the web each of the three printing mechanisms included in the press is the mechanical equivalent of two "straight line" single width rotary printing presses placed side by side, each fed from its own roll of web. One half or side of the complete press is merely a mechanical duplication of the other half or side and one half or side of any one of the three printing mechanisms included in the press is also a mere mechanical duplication of the other half or side. And so far as printing the web is concerned, the three printing mechanisms are but a mechanical triplication of any one of them. Patent No. 529,680 also relates to a "straight-line" rotary printing press. The defendant contends that in view of the prior art the combinations covered by claims 11, 12 and 13 respectively were not patentable. The complainant assigns as the date of Firm's alleged invention of the combinations covered by the last named claims the earlier part of 1885. The defendant claims that no date of invention can be assigned earlier than the date of the application for the patent. Claim 13, which is broader than either claim 11 or claim 12, covers a combination of (1) a web printing mechanism adapted to perfect a web containing a plurality of pages abreast, (2) longitudinal splitting mechanism, (3) a plurality of frames for folding longitudinally, (4) a folding roll at the apex of each frame, (5) guides whereby the paper from one frame is caused to travel in the same direction and associate with the paper coming from the other frame, and (6) mechanism whereby the associated papers are folded inside of each other; "whereby the two parts of said web receive their primary fold separately and their final fold inside of each other." Claim 11 covers a combination of (1) a web printing mechanism adapted to perfect a web containing four pages abreast, (2) the guide f, substantially parallel with the cylinders of the printing mechanism, (3) two pairs of longitudinally folding rollers substantially at right angles with the guide f, one pair being arranged in the path of each division of the split web, (4) means for guiding the web to the folding rollers, (5) transversely cutting mechanism substantially parallel with the folding rollers, (6) guides substantially parallel with the folding rollers whereby one folded strip is brought over the other

folded strip, and (7) mechanism whereby the cuts are folded together; "whereby the web may be split, then one half folded longitudinally, then cut transversely and brought together, then folded together while moving substantially parallel with one plane before longitudinal folding and parallel with a plane substantially at right angles therewith after longitudinal folding." Claim 12 covers a combination of (1) a web printing mechanism adapted to perfect a web containing four pages abreast, (2) the guide f, substantially parallel with the cylinders of the printing mechanism, (3) two pairs of longitudinally folding rollers substantially at right angles with the guide f, one pair being arranged in the path of each division of the split web, (4) means for guiding the web to the folding rollers, (5) transversely perforating mechanism substantially parallel with the folding rollers, (6) guides substantially parallel with the folding rollers whereby one folded strip is brought over the other folded strip, (7) retarding mechanism whereby the strips are torn apart on the transverse perforations, and (8) mechanism whereby the cuts are folded together; "whereby the two halves of the web may be folded longitudinally, perforated transversely and brought together and torn apart, then folded together, while moving substantially parallel with one plane before longitudinal folding and parallel with a plane substantially at right angles therewith after longitudinal folding." In the description Firm says:

"This invention relates to improvements on the letters patent issued to me September 3, 1889, No. 410,271. In said patent is described a printing machine in which a plurality of webs after being printed upon are split longitudinally and severed transversely between the pages and all conducted to one double folding device located at right angles with the printing machine proper. In my present machine, I employ three double folding devices and various improvements in the details of construction by which I am enabled to facilitate the work and to increase the capacity of the machine so far as the range of page combination is concerned."

The drawings and description of patent No. 529,680 disclose a double width web perfecting press using three rolls of web and a corresponding number of printing mechanisms with a slit in the center for splitting the webs longitudinally in the middle while running through the machine, and with folding and delivery mechanism. The maximum page capacity for each complete revolution of the cylinder is the same as in printing machines covered by patent No. 415,321, or patent No. 410,271. The distinctive feature of the later printing machine as compared with the two earlier is its adaptation to cross-associate the perfected strips of web, if so desired, and thereby increase "the range of page combination." The three double feeding devices are substantially similar to each other. Firm says in the description:

"A description of one folder, B, will suffice for all. * * * Since now the two halves of each folder are alike, a further description of one half will suffice for an understanding of both."

The three double width printing mechanisms in the printing press proper are substantially the same as the corresponding mechanism in the presses covered by patents Nos. 415,321 and 410,271, respectively. Each side of the complete press has its own folding and delivery mechanism and, as in the two earlier presses, prints, folds and

delivers its own product independently of the other side of the press, except when the cross-associating mechanism is brought into operation. By means of the later mechanism the perfected web or strips of web produced on one side of the machine can be transferred to and associated with the product of the other side of the machine, and the two can then be folded into each other and form one product. This is the only instance where in any of the presses covered by any of the patents in suit one half or side of a double width machine co-operates with the other half or side for any purpose. Aside from the feature of cross-association, when it occurs, the same remarks touching duplication and triplication of parts, are applicable to the printing press covered by patent No. 529,680 as were applied to the presses covered by the other two patents in suit respectively. Careful examination of the evidence has failed to show that any one of the press combinations alleged to have been infringed was anticipated. The Nichols provisional specifications filed in the British patent office July 14, 1870, and January 12, 1871, while strongly suggestive of the combinations of claim 7 of patent No. 415,321, and claim 6 of patent No. 410,271, cannot be held to have anticipated them; whatever may have been the effect of those specifications on the state of the prior art. But on full consideration of the case I am satisfied that the devising of the combinations of mechanism represented by the several claims alleged to have been infringed did not, in view of the prior art, involve patentable novelty or invention. Every element included in the combination of claim 7 of patent No. 415,321 and in that of claim 6 of patent No. 410,271, was before the date of invention assigned by the complainant, namely, 1878, well known and used in the prior art. Every element included in the combinations of claims 11, 12 and 13 of patent No. 529,680, with the exception of the retarding mechanism mentioned in claim 12, was also prior to the date of invention assigned by the complainant, namely, 1885, well known and used in the prior art. If claim 12 could be sustained at all it would be necessary, in view of the prior art, to give it such a narrow construction as to limit it to the mechanism shown and described in the drawings and description and specifically claimed, thereby avoiding the charge of infringement. Among the old and well known devices and mechanism used in rotary printing machines prior to 1878 were form and impression-cylinders, rollers for collecting webs one upon another, folding rollers adapted to make a longitudinal fold, cutting and perforating cylinders or rollers adapted to sever transversely a web or strip of web between succeeding rows of pages, breaking rollers adapted to tear apart printed sheets along the line of perforations, page forms with their heads pointing around the form-cylinder, rolls and other devices adapted to associate webs or strips of web in correct register, longitudinally splitting mechanism, triangular forms adapted to fold the perfected webs, devices for guiding the same to folding rollers, tapes for conducting the printed sheets to the point of delivery or to mechanism for further treatment or manipulation of the same, and many other familiar devices. Imposing on the art of so placing page-forms or stereotype plates in proper relation to each other as to cause the pages of the printed sheets to succeed each other in proper numerical

order in the finished product, and the printed matter to be so arranged as to be read in the proper direction, was very old. There was in 1878 no room for invention in the distribution of stereotype page plates on form-cylinders in such manner as to produce orderly sequence or an odd or even number of leaves in the product. It is undoubtedly true that the mere fact that all the elements entering into a mechanical combination are old and well known does not negative patentability. Patentability may exist where a combination of old elements produces a new and useful result or an old result in a new and useful manner, provided always, however, that the conception and embodiment of the combination involve an exercise of the inventive faculty, and not merely the skill of a mechanic familiar with the art. Invention must exist in every case. Novelty and utility standing alone are not enough. The proposition that because one is the first to devise a useful improvement he should be treated as an inventor and entitled to the benefit of the patent laws is obviously unsound. It is true that where the question of invention is doubtful on the other evidence in the case the fact that the patented mechanism is in large demand and has gone into extensive use is evidence of invention by him who devised it, and may turn the scale in his favor. But this rule applies only to a doubtful case. *Duer v. Lock Co.*, 149 U. S. 216, 13 Sup. Ct. 850, 37 L. Ed. 707, recognizes the well settled rule that the mere fact that a patented article is popular and meets with large and increasing sales is unimportant when the alleged invention is clearly without patentable novelty. Here, I am satisfied that the prior art clearly negatives invention. Not only were the parts of the several combinations old and well known, but the principle and operation of prior rotary printing machines were such as to bring the combinations alleged to have been infringed within the skill of an ordinarily intelligent mechanic familiar with the printing art. Invention cannot be predicated of the mere duplication or multiplication of well known mechanisms. "Straight line" presses fed from a single roll and provided with cutters, folding and delivery mechanism, were old. So the association or cross-association of a plurality of webs or strips of web was old. In the description of letters patent No. 195,115, dated September 11, 1877, issued to Edward L. Ford, assignor to R. Hoe & Co., the patentee says:

"It is also obvious that the products of two or more printing machines, whether of the same or varying sizes, may each be carried into the same folding-machine, whereby the products of the printing mechanisms are automatically carried into the folding apparatus and simultaneously doubled or folded, as in Fig. 3, by which machine they will be doubled or folded one within the other, and delivered as a single product."

Claim 2 in the Ford patent is as follows:

"(2) The combination of a folding apparatus with two independent printing mechanisms, whereby the products of the printing mechanisms are automatically carried into the folding apparatus and simultaneously doubled or folded, all substantially as described."

But it is unnecessary further to particularize. A careful examination of the testimony, patents, and other printed publications in the case, shows, in my judgment, that the art prior to the first date of alleged invention assigned by the complainant was such as wholly

to negative patentable novelty in any of the combinations embodied in the claims alleged to have been infringed. Firm merely duplicated or multiplied well known printing mechanisms, brought the webs or strips of web coming from the several rolls into association by old and familiar means and severed the sheets of the webs or strips of web and folded and delivered them by old and well known apparatus. Even were this a case in which the question of invention was in doubt, the evidence is not of such a character as to bring it within the rule which turns the scale in favor of the alleged inventor where a patented device has supplied a long-felt want in the art and supplanted or superseded former devices adapted to produce the same result. There is evidence tending to show that "straight line" printing presses of the class to which the several claims alleged to have been infringed relate occupy less space, require less power and labor to operate them, and are less liable to stoppages through the breaking or tearing of the web, than the printing presses containing angle bars used or devised prior to or since the alleged date of invention by Firm, and capable of turning out approximately the same product. There is also evidence on the part of the defendant to the contrary. No printing machine containing the combinations of claims 11, 12 and 13 of patent No. 529,680, or any of them, was used or built by Firm or the complainant before the taking of testimony in this case. It further appears that since 1885 inclusive to the time of taking testimony in this case there were 117 angle bar presses and only 63 "straight line" presses sold and delivered. I may add that I have considerable doubt whether the complainant has not assigned too early a date for the alleged invention by Firm of the combinations of claim 7 of patent No. 415,321, and claim 6 of patent No. 410,271. There is much evidence on each side of this question. If Firm in fact devised and had a full and complete conception of those combinations in the early part of 1878 or by February 19, 1879, it is somewhat remarkable, in view of his alleged appreciation of their importance, that he should have waited nine years before making application to the patent office, and nearly nine years before consulting a patent attorney. The plea of poverty affords no explanation, for during that period he secured from the patent office a number of patents relating to printing mechanism. The evidence does not disclose any sufficient reason for such delay, and it is difficult to reconcile it with the date of alleged invention assigned by the complainant. The conclusion already reached renders it unnecessary to discuss other grounds of defence, some of which present grave questions.

The bill must be dismissed, with costs.

HUBER PRINTING-PRESS CO. v. ALUMINUM PLATE & PRESS CO. et al.

(Circuit Court, S. D. New York. June 4, 1900.)

PATENTS—ANTICIPATION—GUIDE FOR PRINTING PRESS.

The Hodgman patent, No. 340,785, for an under-guide for printing machines having a continuously rotating impression cylinder, is not rendered invalid for want of patentable novelty by the McElroy device, covered by patent No. 285,826, which relates to improvements in a stop cylinder press,

and contains no part which could perform the function of the Hodgman invention in a continuously rotating cylinder press.

In Equity. Suit for infringement of a patent. On final hearing.

Frederick L. Emery and Edward C. Davidson, for complainant.
Edmund Wetmore, for defendants.

WALLACE, Circuit Judge. At the hearing of this cause the question reserved for further consideration was whether the patent in suit (No. 340,785, granted to Willis K. Hodgman April 27, 1886) was invalid for want of patentable novelty, in view of the prior patent to McElroy (No. 285,826); the court being of the opinion that, except for that patent, there was nothing in the prior art to negative patentable novelty, and that the first claim was unquestionably infringed by the machine of the defendants.

What Hodgman did was to substitute in a printing press of the type having a continuously rotating impression cylinder, for the under-guides fastened to and projecting from the feed board, under-guides consisting of raised ribs encircling the cylinder except at the impression surface. The office of the under-guides is, in combination with front-guides, to support the front edge of the sheet of paper being fed to the machine until it is clamped to the cylinder by the grippers at the front edge of the impression surface. The front-guides rest upon the under-guides, and hold the sheet from slipping forward until at the proper moment the front-guides are raised by other mechanism out of the way, and the sheet is allowed to slide onto the cylinder, and be seized by the grippers. The grippers act at points between the under-guides, and begin to press down upon the clamping surface the portions of the sheet lying between the under-guides, while the intervening portions rest upon the under-guides. In such presses, prior to Hodgman's improvement, the under-guides were tongues projecting from the feed board, and supported the paper at a distance above the clamping surface at least equal to the thickness of the under-guides; and when the paper was clamped by the grippers a slight puff or slack would occur, forming wrinkles, which were objectionable in the printing operation. Hodgman's improvement was designed to obviate this objection. He discarded the under-guides projecting from the feed board, and provided that portion of the cylinder which is not occupied by the impression surface with channels or ribs, making the surface of the ribs coincident with the periphery of the impression surface. The ribs thus constituted traveling under-guides, and supported the edge of the sheet at exactly the level of the clamping surface. These under-guides were a new departure in presses of the type mentioned, and accomplished the designed object.

McElroy's invention, as disclosed by his patent, consisted in dispensing with the supports for the front-guides in a stop cylinder press, which, like the under-guides in a continuously rotating cylinder press, projected from the feed board, and providing in lieu supports spanning the gripper recess in the cylinder. These supports, which are called "tongues" in his patent, are in no true sense under-guides, although they are treated as such by the disclaimer inserted in the specification

of Hodgman's patent, and may incidentally support the front edge of the sheet. In a stop cylinder press there is no necessary occasion for under-guides, as the sheet is not fed until the cylinder has come to rest; and it may be fed without them directly to the clamping surface, the cylinder itself serving to support it properly for engagement with the front-guides, and the front-guides serving to prevent it from slipping forward before the proper moment arrives. They have been actually dispensed with in practice in such presses. The expert for the defendants concedes that when the front edge of the impression surface is used as the supporting surface for the front edge of the sheet, without any under-guides, the press still operates successfully, and wrinkles are not formed in the paper. He concedes also that a press having a continuously rotating impression cylinder could not be operated successfully without the presence of under-guides during the feeding operation. McElroy was the first to discover the advantage of dispensing with the tongues which had previously projected from the feed board to obviate the wrinkling of the paper; and it is undoubtedly true that his statement to that effect in the description of his patent suggested to Hodgman the idea which he embodied in his improvements. Nevertheless, what Hodgman had to do was to provide under-guides which were essential in presses of his type, and nonessential in stop cylinder presses, and to provide such as would do their work while the cylinder is in motion, whereas the supports of McElroy do theirs while the cylinder is at rest.

In both types of printing press the grippers which clasp the sheet of paper upon the leading edge of the impression surface are located in a longitudinal recess in the face of the cylinder. McElroy removed the tongues from the feed board, and spanned this recess with them. Hodgman removed the tongues from the feed board, and spanned this recess by his raised ribs. If the tongues of McElroy and the ribs of Hodgman are both regarded as under-guides, to this extent they both did the same thing, and there is an approximate identity in one of the parts of the combination of each patent. But the substitution by Hodgman in his machine of the tongues of McElroy would not have solved the problem with which he had to deal, and it would have been useless if he had not conceived the feasibility of channeling the cylinder, and extending the ribs across the gripper gap. The modifications of structure made by him in order to constitute the guide support of McElroy a traveling under-guide in a continuously rotating cylinder press would seem to have been something more than mere mechanical adaptation, and the conclusion is reached that they involved invention.

A decree is ordered for an injunction and an accounting as respects the first claim of the patent, with costs.

MCCAULLEY v. CITY OF PHILADELPHIA.

(District Court, E. D. Pennsylvania. August 20, 1900.)

NAVIGABLE WATERS—OBSTRUCTIONS—LIABILITY OF CITY.

A city, although charged by statute with the duty of keeping the channels of navigable streams within its limits free from obstructions, cannot be held liable for injuries caused by a sunken wreck, on the ground of negligence, where the owners had contracted with a wrecking company to raise the vessel, and it is not shown that such company was not prosecuting the work with ordinary diligence and reasonable efficiency.

In Admiralty. Suit to recover damages on the ground of the negligence of the defendant city in failing to remove an obstruction from a navigable stream.

Horace L. Cheyney and John F. Lewis, for libellant.

John L. Kinsey, City Sol., for respondent.

McPHERSON, District Judge. The libellant, who is the managing owner of the tugs Rescue and John C. Bradley, brings this action as bailee of the ship Windsor Park to recover damages for injury to the ship, caused by collision with the sunken wreck of the steamer Maryland. The collision occurred in December, 1893, while the ship was being towed by the tugs up the channel of the Schuylkill river, within the municipal limits of the city of Philadelphia, and the cause of action is alleged to be the negligence of the city in failing to remove the wreck, which had been obstructing the channel to some extent since November of the year preceding.

The duty of the city to keep the channel clear is said to rest upon section 28 of the consolidation act of 1854 (P. L. 37), which provides in part as follows:

"It shall be the duty of the said councils, after the requisite surveys and soundings shall have been made, to fix the lines, beyond which no wharf or pier shall be constructed, and to keep the navigable waters within said city forever open and free from obstructions. The city councils shall authorize the construction of wharves upon a plan and scale to meet the demands of commerce, keep the same and the avenues leading thereto open and free from obstruction."

The city denies its liability upon the following grounds:

(1) Because the act of 1859 (P. L. 643) has impliedly repealed section 28 of the act of 1854, by transferring the duty to remove obstructions from the channel of the river to the master warden, who is said to be an officer of the state, and not of the city. The act is as follows:

"That from and after the passage of this act, it shall be the duty of the master warden of the port of Philadelphia, immediately upon information of the sinking of any canal boat, barge, or other vessel in the channel way of the tide waters of the river Delaware or river Schuylkill, within the limits of the port of Philadelphia, to give notice to the owner, master or other agent having charge thereof, to raise and remove such obstruction within ten days after the date of said notice, under penalty of one hundred dollars, to be sued for and recovered before any alderman or justice of the peace within the limits aforesaid, as by law such sums are recoverable from the owner, master or other agent having control of the same, to and for the use of the board of wardens of the port of Philadelphia, subject, nevertheless, to an appeal to the court of common pleas of the proper city or county; which said sum or

sums so recovered shall be appropriated towards the payment of salaries and contingent expenses of the warden's office; and in case of the refusal or neglect of the parties interested as aforesaid, to raise and remove any obstruction within the time specified in said notice, it shall be the further duty of said master warden to have raised and removed at the expense of the owner, master or agent; and the said canal boat, barge or other vessel, together with the cargo thereof, shall be subject to a lien in the hands of the said master warden until the expenses of raising and removing such shall be fully paid to him; and the said master warden is hereby authorized to sell at public auction to the highest bidder, for cash, all such property, or so much thereof as is necessary to pay all the expenses of raising and removing, together with the penalty aforesaid, and shall return the surplus, if any, of such sale to such person or persons as shall be legally entitled to receive the same: provided, that the master warden before proceeding to sell any such property as aforesaid, shall give five days' notice by at least twenty handbills (printed), to be posted in conspicuous places along Delaware avenue, setting forth a full description of the property to be sold, together with time and place of selling the same."

(2) Because, even if the act of 1854 was not affected by the act of 1859, the duty of the city has been suspended by section 4 of the act of congress of June 14, 1880 (1 Supp. Rev. St. 296), which reads as follows:

"Whenever hereafter the navigation of any river, lake or harbor or bay, or other navigable water of the United States shall be obstructed or endangered by any sunken vessel or water craft, it shall be the duty of the secretary of war, upon satisfactory information thereof, to cause reasonable notice, of not less than thirty days, to be given, personally or by publication, at least once a week in the newspaper published nearest the locality of such sunken vessel or craft, to all persons interested in such vessel or craft, or in the cargo thereof, of the purpose of said secretary, unless such vessel shall be removed as soon thereafter as practicable by the parties interested therein, to cause the same to be removed. If such sunken vessel or craft and cargo shall not be removed by the parties interested therein as soon as practicable after the date of the giving of such notice by publication, or after such personal service of notice, as the case may be, such sunken vessel shall be treated as abandoned and derelict, and the secretary of war shall proceed to remove the same."

(3) Because, in any event, the facts in proof fail to show negligence on the part of the city.

I do not find it necessary to consider the first two grounds of defense, the third being a sufficient reply to the action. The undisputed facts are as follows: In November, 1892, a destructive fire occurred at Point Breeze, in the course of which the steamer Maryland was partially consumed. She was run aground upon the east bank of the Schuylkill river, and sank in such a position that 50 or 60 feet of her length projected obliquely into the channel. In this position she was an obstruction to the safe navigation of the river, as the channel at this point is narrow and winding. The wreck was abandoned to the underwriters, and was sold on December 23d. The purchaser immediately contracted with a wrecking company to raise and remove her, but, owing to the season and the weather, no work could be done until March of the following year. Early in that month the company began the effort to lift and move the wreck, and continued the work with diligence, but without success, for about eight months. In November, 1893, the United States government, moved by complaints that the obstruction still existed, took action

under the federal statute heretofore cited, and gave notice as therein provided. On December 19th, the government awarded the contract for removing the wreck, and work was begun in January, 1894. It does not appear in evidence when the obstruction was finally removed from the channel, but the report of the government's engineer in charge, to the effect that the wreck had been cleared away to the line of low water, was not made until March 27, 1895.

Upon these facts, I do not think that the charge of negligence against the city has been made out. Assuming that the city was bound to remove obstructions, and assuming also that it knew of this particular obstruction, it is clear that its duty was no greater than this: to exercise ordinary diligence under all the circumstances of the case. I am unable to sustain the position that the city was bound to step in and displace the agency that had been set in operation by the owner of the wreck, in the absence of evidence that the work was being done improperly or inefficiently. It nowhere appears that the wrecking company was either incompetent or negligent. On the contrary, the undisputed testimony on this point is that the company prosecuted the work with diligence, but failed to succeed because of the difficulty of the enterprise. "Every time we took it out of the river," one of the witnesses said, "she slid back again." But the libellant made no attempt to prove that the failure was due to a lack of proper appliances, or to want of skill or diligence. I do not feel satisfied to draw an inference of the company's negligence merely from its failure to remove the obstruction within eight months, especially in the face of the uncontradicted testimony that proper skill and diligence were used. This being so, it seems to me impossible to hold that the city was negligent because it did not take into its own hands the prosecution of a work which, so far as appears, it could have done no better than the agent of the owner was doing.

The libel is dismissed, with costs.

TYGERT-ALLEN FERTILIZER CO. v. HAGAN.

(District Court, E. D. Pennsylvania. August 20, 1900.)

No. 67.

SHIPPING—UNSEAWORTHINESS OF LIGHTER—LIABILITY OF OWNER.

Evidence *held* to establish the unseaworthiness of a barge let by its owner to perform lighterage service, and to render its owner liable for the loss resulting to the hirer by its sinking at the dock after being loaded.

In Admiralty. Suit for damages resulting from unseaworthiness of lighter.

Horace L. Cheyney and John F. Lewis, for libellant.
John A. Toomey, for respondent.

McPHERSON, District Judge. Early in July, 1898, the steamship *Scotia* brought to the port of Philadelphia a cargo of kainit,—a min-

eral used in the manufacture of fertilizers,—consigned to the libelant, and deliverable from the ship's side. The ship was moored at pier 43, and in order to move the cargo to the libelant's factory it was necessary to employ barges, and among these the Samuel F. Houseman, a barge belonging to the respondent, was hired by the libelant on July 3d. Loading was begun on the afternoon of that day, and finished about 10 o'clock at night. The following day was the 4th, and the barge remained alongside the ship until late in the evening,—perhaps 10 or 11 o'clock,—when she sank in her berth, thus causing a total loss of the mineral. The libelant avers that the barge was unseaworthy, and brings the action upon this ground.

The first defense is that the barge was not hired to the libelant, but to the Philadelphia Lighterage Company, from whom the libelant had hired two or three other barges to carry a part of the cargo. I do not think that the testimony establishes this defense. It is true that Mr. Brown, with whom the contract of hiring was made by the respondent, was an employé of the lighterage company, but he did not make the contract in this capacity. On the contrary, he was acting for the libelant at the express request of its shipping clerk, and, in my opinion, he disclosed his agency to the respondent, and hired the barge, not for the lighterage company, but for the libelant. Upon this point—the disclosure of his agency—the testimony is in conflict, but I find the fact to be as just stated.

A second defense is that the libelant expressly agreed to take the barge at its own risk. This position is based upon a misunderstanding of the testimony. The libelant did agree with Mr. Brown that, if he would hire the barge from the respondent, the libelant would take the boat at its own risk; but this agreement was only intended to relieve, and only did relieve, the lighterage company from liability. It was not made with the respondent, nor intended to affect him, and therefore has no bearing on the present controversy.

The third and principal defense is that the libelant, whose duty it was to furnish a tug to move the barge, was negligent in permitting the boat to remain in a comparatively narrow dock for more than a day after loading had been finished; and that, in consequence of such negligence, the barge was injured and sunk by being squeezed between the Scotia and another steamship on the opposite side of the dock during a violent windstorm on the afternoon of the 4th. It is true that a severe storm of wind and rain passed over the vessels at this time, but I have a good deal of doubt whether, in the sheltered position of the steamships and of the barge, any serious injury could have been done to either by the wind. It is not necessary, however, to decide this point, for it is abundantly clear to my mind that the storm had nothing to do with the sinking of the barge. The testimony of her captain, without which the squeezing theory must fail, is so contradicted that I can give it no credit. Without stopping to detail the evidence, it is enough to say that the decided weight of the testimony shows that the barge was leaking badly the whole day of the 4th, certainly for several hours before the storm began, and that continuous pumping without avail had been going on from some hour in the morning. What caused the leak does not appear. The

boat had been repaired not long before, but since then she had made three voyages, and what may have happened to her on these occasions is not disclosed. The important matter is that she was plainly not fit to receive the cargo of mineral when she was hired to the libellant.

There is not sufficient evidence to enable me to find the value of the kainit. If the parties can agree upon the sum, a decree for that amount may be entered, with costs; otherwise, a commissioner must be appointed.

THE GRACE DOLLAR.

(District Court, N. D. California. August 2, 1900.)

No. 11,616.

1. SALVAGE—CONDUCT OF SALVORS—PROXIMATE CAUSE OF DANGER—EVIDENCE.

As the claimant was crossing the bar at the entrance of a harbor she received a signal of one whistle from libelants' tug, responded with a single whistle, immediately ported her helm, and, after proceeding two or three minutes on her course, struck a shoal in rough water, by reason of which her rudder post was broken, and she signaled for assistance. After getting off the bar, the claimant, being in a helpless condition, was washed on the bar a second time, before the tug went to her assistance, and the latter even then did not come nearer than 400 feet, because of the shallowness of the water. Thereupon the claimant launched her own boat, and carried a line to the tug, whereby the latter was able to give her hawser to the claimant, and to tow her to a place of safety and for repairs; the service lasting about two hours. *Held*, that the channel being wide enough for two vessels to pass, and the claimant, in any event, having the right of way, because of her having commenced to cross the bar first, her deviation from her course was an error of navigation, which, rather than the signal of the tug, was the proximate cause of her stranding, and that therefore the service rendered by the tug was a salvage service, for which the libelants were entitled to compensation.

2. SAME—AMOUNT OF RECOVERY.

A steamer of the value of \$40,000, being without rudder, and aground in shoal water in a rough sea, was towed by libelants' tug to a place of safety; but neither the tug nor any of her crew was exposed to the slightest danger in performing such service, and the ordinary charge for the towage of the vessel would have been \$175. *Held*, that the libelants were entitled to recover \$1,000 as salvage, three-fourths of which sum should go to the tug, and the balance to her master and crew, in proportion to their wages.¹

Chas. A. Naylor, for libelants.
Andros & Frank, for claimant.

DE HAVEN, District Judge. This action was brought by the owner and master of the steam tug Columbia, in behalf of themselves "and all others entitled," to recover compensation for an alleged salvage service rendered to the steamer Grace Dollar. The case is this: On the 31st of August, 1898, the Grace Dollar, bound for Coos Bay, was crossing the bar of that harbor, and while so proceeding received a signal of one whistle from the Columbia, then coming out,

¹ Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

but still in smooth water, near the end of the jetty, and about one-third of a mile distant from the Grace Dollar. The latter responded with a single whistle, immediately ported her helm, and, after proceeding two or three minutes on her course, struck a shoal in rough water outside of the end of the jetty. There was not much wind, but the sea was breaking on the bar; that is, was breaking in the channel forming the entrance to the harbor. The tide was about flood, and the Grace Dollar was coming in with a following sea. The Columbia, after having given her first signal, slowed down, reversed her engines, and stopped before she reached the end of the jetty, but did not give any signal to indicate this change of movement on her part. When the Grace Dollar struck, her rudder post was broken, and her master at once signaled for assistance. The Columbia passed out over the bar, and immediately returned. The Grace Dollar by this time had gotten off of the sand bar, and was anchored in the channel. She was, of course, in a somewhat helpless condition, on account of the loss of her rudder. The Columbia did not come near enough to pass her a line, and the Grace Dollar went on the shoal a second time. The Columbia then backed up to within about 400 feet of the stranded steamer, and, finding only 12 feet of water, stopped; and her master, deeming it dangerous to launch a boat, blew a signal for the life-saving crew, stationed about $3\frac{1}{4}$ miles distant. The crew of the Grace Dollar, without waiting for assistance from the life-saving station, immediately launched their own boat and carried a line to the Columbia. The latter vessel was thus enabled to give her hawser to the Grace Dollar, and, with the assistance of the latter's engines, succeeded in getting her into the channel, and then towed her to Marshfield, where she was put on the mud flats. This service occupied about two hours. After this the Columbia towed her to another part of the harbor for repairs, and, when these were made, back to the flats for the purpose of having her rudder shipped, and then towed her off of the flats again. This latter service was of little value, and cannot be regarded as a salvage service, or as anything different from the ordinary work of a tugboat.

The right of the libelants to recover in this action is opposed by the claimant mainly upon the ground that the stranding of the Grace Dollar was occasioned by the fault of the master of the Columbia in signaling his intention to go out over the bar while the Grace Dollar was coming in, thus making it necessary for the latter, in order to avoid the possible chance of collision on the bar, to make the change of course which resulted in her going upon the shoal, on which she grounded. The argument in support of this proposition is, in substance, that the entrance to Coos Bay is a narrow and dangerous channel, in which it is not safe for two vessels to attempt to pass when the sea is breaking as it was upon that day; that, as the Grace Dollar commenced to cross the bar first, she had the right of way, and was entitled to the entire channel in which to navigate, and the Columbia should have refrained from giving the signal which in effect deprived her of this right, by leading the master of the Grace Dollar to believe that it was necessary for him to change his course in order to give the Columbia room to pass; that upon the facts the case is precisely the

same as if the Columbia had actually kept on as indicated by her signal, and thus compelled the Grace Dollar to change her course so as to avoid collision in the narrow channel. The answer to this argument is that the main fact upon which it depends for support is not established by the evidence. The great preponderance of evidence is to the effect that the entrance to Coos Bay was not, at the time referred to, in such condition that the two vessels could not have passed each other in safety. It is true that the Columbia, after giving the signal referred to, did actually slow down so as not to meet the Grace Dollar in rough water, or, in seaman's phrase, "on the bar"; but this fact, while showing great caution upon the part of the master of the Columbia, is not sufficient to overcome the evidence tending to show that the channel was wide enough to have permitted the passage of both vessels without danger to either. The channel which forms the entrance to Coos Bay is not long, and is about one-eighth of a mile wide; and it is reasonably clear from the testimony that two vessels can pass each other at all times without the slightest danger of collision, except under most unusual conditions of wind and sea,—conditions not present at the time referred to. In any event, when the master of the Grace Dollar heard the signal of the Columbia, he was not required to so far deviate from his course as to get out of the channel and into the shoal water where his steamer struck, and his doing so was an error of navigation. This error of navigation on his part, and not the signal given by the master of the tug Columbia, was the proximate cause of the stranding of the Grace Dollar. This conclusion reached, it is clear that the service rendered by the Columbia in assisting the Grace Dollar off the shoal on which she grounded, and in towing her to Marshfield for repairs, was a salvage service, for which the libelants are entitled to receive proper compensation. The only question of difficulty in the case is to determine the amount to be allowed. The Grace Dollar, without rudder and aground as she was in shoal water at the mouth of the entrance to Coos Bay, with the sea breaking, was in a position of peril, from which she might not, unaided, have been able to escape, and it is admitted that she was of the value of \$40,000. The libelants claim that they are entitled to an award of at least one-third of the value of the Grace Dollar, and the court has been referred to numerous cases in which a proportionate amount as large, and in some instances greater, has been awarded to the salvors of rescued property. Each case must, however, be decided in view of its own peculiar facts, and the only aid to be derived from adjudged cases is by a consideration of the general principles upon which they were decided. These principles appear to be well settled. It may be stated as the general rule in fixing salvage compensation that:

"The value of the property saved, the degree of peril from which it was delivered, the risk of the property, and especially of the persons of the salvors, * * * the severity and duration of their labor, the promptness of their interposition, and the skill exhibited by them, are all to be considered." *The Versailles*, 1 Curt. 353, Fed. Cas. No. 6,365.

See, also, *The Blackwall*, 10 Wall. 1, 19 L. Ed. 870; *The Clifton*, 3 Hagg. Adm. 118; *Pope v. Sapphire*, Fed. Cas. No. 11,276; *Hand v. The Elvira*, Gilp. 60, Fed. Cas. No. 6,015.

These cases also show that the compensation to be allowed the salvor is measured by a liberal scale, so as to encourage others to incur danger to themselves and property in going to the relief of vessels in distress, and surrounded by perils from which they might not be able to escape without assistance from others. But, while the compensation is to be liberal, it must not be extravagant, in view of the actual service rendered and the actual danger encountered. In the language of Judge Hopkinson in the case of *Hand v. The Elvira*, above cited:

"We must not teach a salvor that he may stand ready to devour what the ocean may spare. He must not be permitted to believe that he brings in a prize of war, and not a friend in distress. If he has afforded his assistance to the distressed in a proper spirit, he will be satisfied with a just and fair remuneration for the labor, hazard, and expense he has encountered in the service; and it is only a proper spirit that we should seek or desire to satisfy. To this measure of compensation the judge, governed by a liberal policy, will add a reasonable encouragement, which the generous and humane will hardly need, to prompt men to exertions to relieve their fellow men in danger and distress. But we must remember that the policy of the law is not to provoke or satisfy the appetite of avarice, but to hold an inducement, to such as require it, to make extraordinary efforts to save those who may be encompassed with perils beyond their own strength to subdue."

In rendering the service for which salvage is claimed in the present case, no extraordinary effort was put forth by the *Columbia*, and neither the tug nor any of her crew was exposed to the slightest danger in making fast to the *Grace Dollar* and towing her to a place of safety. In fact, the master of the *Columbia* declined to permit his crew to incur the risk of launching a boat for the purpose of carrying a line to the distressed steamer. The evidence also shows that the ordinary charge for towing a vessel of the size of the *Grace Dollar*, and loaded as she was, from the place where she went aground to Marshfield, was about \$175. In view of all the facts, and governed by the general principles declared in the cases above cited, the judgment of the court will be that libelants are entitled to recover the sum of \$1,000, to be divided as follows: Three-fourths of that sum to the tug *Columbia*, and the remaining one-fourth to her master for himself and crew, and to be divided between them in proportion to their wages; the libelants to recover costs. The cross libel will be dismissed.

THE RAVENSCOURT.

THE TYEE.

THE COLUMBIA.

(District Court, D. Washington, N. D. August 10, 1900.)

1. TOWAGE—IMPLIED CONTRACT.

The captain of the *C.*, having applied to the manager of a tug for the towage of his vessel to sea, was informed that the tug was under contract to tow the vessel *R.* the next day, and that, if the latter was not ready, it would take the *C.*, but that, if the two vessels were ready, it would tow both. The next day, the *R.* being ready, the captain of the *C.* was informed of the orders of the tug to take both vessels, and, although he expressed dissatisfaction, he signed an order for the payment of the towage money, and voluntarily took on board the tug's hawser, and made

it fast to the C.'s foremast. *Held*, that there was an implied agreement that the C. was to be towed in company with the R.

2. **SAME—NEGLIGENCE—COLLISION—EVIDENCE.**

It appearing that the hawser by which the C. was towed was comparatively new; that it had been thoroughly tested, and found sufficient to sustain a strain many times greater than that required to tow the C.; that it was carefully inspected at the time of being passed to the C.; and that, aside from the fact that the towline broke, there was an entire failure of proof of any fault on the part of the tug in furnishing a defective hawser, —the owners of the tug are not liable for damages sustained by the C. in a collision with another vessel being towed by the same tug, which occurred through the breaking of the hawser.

3. **SAME.**

The only evidence of the bad steering of the R. being that of the mate of the C., who was in bed at the time of the maneuvers which caused the collision, that the R. was steering wildly, because she was sometimes astern of the C. and sometimes well off her port quarter, while the officers of the R. testified positively that they were alert, and constantly observing the tug ahead of them, and following her, and that they observed the signals given by the tug when she changed her course, the evidence is insufficient to show that the collision of the two vessels was caused by the negligence and bad steering of the R.

4. **SAME.**

The tug towing the vessels in question, having occasion to change her course to starboard because of a light ahead, signaled the vessels that she was about to change, and for them to follow, and after a few minutes made an irregular signal, and changed back to her regular course. The officer in charge of the C., not understanding the signals, ordered the helmsman to port the wheel, as he went forward to see what was going on, and on his return assisted in setting the wheel hard a-starboard, with the result that the vessel sheered to starboard in a manner to cross the towline of the R., and then took a sheer to port, immediately after which a jar was felt on the tug, the towline of the C. parted, and within a minute or two the bow of the R., which was on the longer hawser, struck the C.'s port quarter near her mizzen rigging, causing serious damage to both vessels. *Held* that, the bad steering of the C. being the only charge of negligence that was sustained by the evidence, that vessel was liable for the damage done to the R.

In Admiralty. Suits in rem to recover damages for injuries to the American ship *Columbia* and to the British bark *Ravenscourt*, caused by a collision between the two vessels while both were being towed to sea by the steam tug *Tyee*, owned and operated by the Puget Sound Tugboat Company. Hearing on the merits. Decree in favor of the *Ravenscourt*.

Metcalf & Jurey, for the *Columbia*.

Preston, Carr & Gilman, for the *Ravenscourt*.

Struve, Allen, Hughes & McMicken, for the *Tyee*.

HANFORD, District Judge. In the first of these cases the owners of the American ship *Columbia* claim damages for injuries to their ship, sustained in a collision with the *Ravenscourt*, while the two colliding vessels were being towed out by the steam tug *Tyee*, and their suit is in rem against both the *Ravenscourt* and the tug. Their libel charges that a contract for towing the *Columbia* singly was violated by the captain of the tugboat in attempting to tow two vessels. As to this first disputed question in the case, I find from the evidence that the terms of the agreement for the towage of the *Columbia*

were not reduced to writing, and the only contract between the parties arises by implication from the previous dealings between the captain of the ship and the tugboat company, the knowledge of each party as to the different vessels, the rates of towage, the rules and regulations of the tugboat company, the customs on Puget Sound relating to the towage of vessels, a short conversation between Capt. Nelson, master of the Columbia, and Capt. Libby, manager of the tugboat company, the conduct of Capt. Nelson in voluntarily permitting his ship to be towed in company with the Ravenscourt, and in giving to the captain of the Tyee a written order for the payment of the price of the towage services, and the acts of the master of the tug in taking the two vessels in the harbor of Tacoma, and proceeding with them towards the sea. The conversation between Nelson and Libby was too vague and indefinite to constitute a contract. According to a preponderance of the evidence, Capt. Nelson sought Capt. Libby, and requested to have a tug tow his ship to sea the following day if she finished loading in time. He stated that he expected to be ready by noon, but could not be certain that a sufficient quantity of coal to complete her cargo could be obtained in time. Libby informed him that the Tyee was being held to tow the Ravenscourt the next day. Nelson asserted that the Ravenscourt would not be ready, and to that Libby responded that, if the Ravenscourt were not ready, the Tyee would go to sea with the Columbia if she were ready, and he would send for another tug to take the Ravenscourt; but, in case both vessels were ready to be towed, as expected, the Tyee would take them both. The next day after this conversation both vessels were ready to go to sea, and the captain of the Tyee received orders from Capt. Libby to tow them both, and he informed Capt. Nelson what his orders were before taking the Columbia from her moorings. Capt. Nelson expressed dissatisfaction, but nevertheless signed and gave to Capt. Bailey a draft or order for the payment of the towage money, and voluntarily took on board the Tyee's hawser, and made it fast to the Columbia's foremast. The Tyee had ample power to tow two vessels of the size and class of the Columbia and Ravenscourt in Puget Sound, and it has been a common practice for tugboats to tow two or more vessels together. Capt. Nelson, knowing that the Ravenscourt had a prior claim to the service of the Tyee, was put to his election to be towed at that time in company with the Ravenscourt, or to wait until another tug could be obtained; and by accepting the service that was offered he voluntarily encountered the additional hazard obviously involved in the towage of his vessel in company with another ship. From the facts and circumstances there arises by necessary implication an agreement by the terms of which the Columbia was to be towed in company with the Ravenscourt. The vessels were towed by separate hawsers, the Columbia's towline being about 120 fathoms in length, and the Ravenscourt was towed by a hawser 180 fathoms in length, so that the two ships could not possibly have come in collision with each other while both towlines were intact and the tug was under way. The Columbia's towline, however, was broken, and the collision occurred while she was adrift; and the second ground of complaint against the steam tug is that the hawser

furnished by the tug, and with which she was towing the Columbia, "by reason of its defectiveness" parted, and left the Columbia adrift and helpless, immediately in the course of the Ravenscourt. Except the fact that the towline did break, there is an entire failure to prove any fault on the part of the tugboat company in furnishing a defective hawser. On the contrary, the evidence shows that the hawser was comparatively new, having been in use for a period of time not exceeding one-fourth the ordinary lifetime of such a hawser when subjected to usage common with Puget Sound tugboats. It had been subjected to a most thorough test, and found sufficient to sustain a strain many times greater than the strain it would have to bear in towing the Columbia in the waters of Puget Sound in ordinary weather if the Columbia were properly steered, and it was carefully and thoroughly inspected by the first mate and a quartermaster on board the Tyee at the time of being passed out to the Columbia, so that if it were cut or chafed or unduly worn in any place the defect should have been discovered; but no defect was observed or known.

The next charge in the Columbia's libel is that the Ravenscourt was steered badly, and that immediately before the collision, by reason of negligence and bad steering on board the Ravenscourt, that vessel veered from her true course so as to cross the wake of the tug, and bring her hawser afoul of the Columbia's rudder, so interfering with the navigation of the Columbia that she could not be steered properly; and the libel charges that, if the master of the tug had been attentive to his duties, he should have known that the Ravenscourt was out of her course, and should have prevented the bad steering on her part. This part of the libel charges both the tug and the Ravenscourt with a fault in permitting the Ravenscourt to veer from her course, which fault was the direct cause of the disaster. This particular ground of complaint must be considered in connection with the counter charge contained in the libel filed by the owner of the Ravenscourt. The owner of the Ravenscourt has made no complaint against the tug, her master, or her owner. His suit is in rem against the Columbia, and in his libel he charges that the accident was due entirely to bad steering on the part of the Columbia. The main controversy in the case, therefore, is with reference to the particular movements of the colliding vessels immediately before the collision. The general facts as to which all witnesses agree substantially are that the tug started with the vessels in tow from Tacoma Harbor, at 3 o'clock p. m. on the 22d day of January of this year, the Columbia being towed by a line leading from the stern of the Tyee through a chock on the starboard side of her bow to her foremast, the length of the line between the stern of the Tyee and the bow of the Columbia being a little more than 100 fathoms. The Ravenscourt was towed by a line 180 fathoms in length, all of which was paid out, leading from the stern of the Tyee to a chock on the port bow of the Ravenscourt, and made fast to her towing bitts forward of the foremast. The towlines being so arranged, the vessels, when steered to follow the tug, would have kept a safe distance from each other. The Columbia, being on the port side, would have kept the tug in view over the starboard side of her bow with the Ravenscourt astern, and off her starboard quarter; and the Ravens-

court, being on the starboard side of the Columbia, with her topline leading through the port chock, should have kept the tug in view over her port bow. The vessels proceeded without any occurrence worthy of notice until after 6 o'clock p. m. they had proceeded nearly 25 miles, and were off Alki Point. It was then dark and raining, with a fresh southerly breeze and an ebb tide, the wind and tide being favorable to the progress of the vessels on their course. At that time a bright light was seen off the port bow of the tug, and immediately after one or more other lights were seen, which the captain of the tug at first supposed were the lights of a tug having a tow, and, not being able to make her out exactly, he blew several blasts of his whistle as a warning to the ships in his wake that he was about to change his course, and for them to follow. At the same time the tug changed her course, going to starboard. After a few minutes the light ahead was discovered to be on a sailboat going in the same general direction, and thereupon the tug again made an irregular signal by blowing several blasts of her whistle, and changed back to her regular course. Within a very few minutes after the tug came back on her course the Columbia's topline parted, and within a minute or two afterwards the Ravenscourt came in collision with her, the stem of the Ravenscourt striking the Columbia's port quarter somewhere near her mizzen rigging, causing serious damages to both vessels. The tug signaled the Ravenscourt to drop her topline, and, as soon as both toelines could be drawn in and taken aboard the tug, she went to the relief of the disabled vessels, and, after extricating them from each other, the Ravenscourt was first taken in hand, and towed to an anchorage, during which time the Columbia drifted a distance of five or six miles, and had passed West Point lighthouse when she was picked up by the Tyee, and towed to an anchorage at Port Blakely. The only evidence of bad steering or faulty management on the part of the Ravenscourt comes from the officers and men on board of the Columbia, who were not in the best position to observe the handling of the Ravenscourt, and the evidence convinces me that they paid very little attention to her before the time of imminent peril. The principal witness against her is Mr. Wilson, mate of the Columbia, who was in bed at the time of the maneuvers which caused the collision. The testimony of this witness appears to have been given in a free and good-natured manner, with very little regard to accuracy. He stated that he noticed that the Ravenscourt was steering wildly, because she was sometimes astern of the Columbia, and sometimes well off her port quarter. This might be true if, in fact, the Ravenscourt had been kept on her course in the wake of the tug, and the Columbia had been permitted to veer. The officers and mate on the tug give no evidence of bad steering or negligence on the part of the Ravenscourt, while the captain and officers of the latter vessel show by their positive testimony that they were alert, and constantly observing the tug ahead of them, and following her. They observed the signals given by the tug, and when she changed her course to starboard the Ravenscourt went to starboard, and came back on her course immediately after the tug came back. I reject the testimony of Capt. Scott and the witnesses for the Ravenscourt with reference to the movements and positions

of the Columbia, for the reason that they appear to me to be improbable. As an illustration of the unreliable character of this evidence, I refer to the statement of Capt. Scott that before the collision he observed by the phosphorus at the stern of the Columbia that she was drifting astern. This I regard as impossible, because without any strain upon her towline her momentum and the wind and tide combined would carry her forward on her course, as in fact she drifted after the collision. Capt. Bailey and the other witnesses who were in the tug appear to be candid and careful in their statements, and they agree that after the maneuver of the tug above referred to the Columbia sheered to starboard in a manner to cross the towline of the Ravenscourt, and then took a sheer to port, and immediately after a jar was felt on the tug, and the captain found that the Columbia's towline had parted. This testimony in regard to the conduct of the Columbia in going off to starboard and swinging back again after the tug had come back on her course is corroborated by the lookout on board the Columbia, and several others of the Columbia's crew, and they attribute these extraordinary movements of the Columbia to the bad steering of their ship. Against this strong evidence condemning the Columbia there is practically nothing. Capt. Nelson was in his cabin until he became aware that his vessel was in peril by hearing the sound of the Ravenscourt's hawser striking or scraping on the starboard side of his ship. He did not hear the tug whistle, and when he came on deck he was told by the second mate and the man at the wheel that the wheel was hard a-starboard, but the vessel would not respond to her helm, because the rudder was held rigid by the strain of the Ravenscourt's hawser against it. Of course, being in the cabin at the time the vessel sheered from her true course to starboard and then to port, he does not attempt to testify as to how the vessel had been steered. The second mate was in command of the deck from 6 o'clock until the captain came out immediately before the collision. He heard the tug whistle, and, not knowing what was meant, went from his station aft to the forward part of the ship, to observe what might be going on, and then returned, and was standing by the man at the wheel when the captain appeared. During his movement from aft to forward he ordered the helmsman to port the wheel, which order was possibly executed in a manner to cause the vessel to sheer off at an angle from her course. He does not show, nor does the man at the wheel state, what was the effect of his order. That the effect was to cause the ship to veer from her course to starboard, and put her in a bad position, may be fairly inferred from the action of the second officer on returning to his station aft, for by his testimony he shows that he then assisted the helmsman to set the wheel hard a-starboard, in which position it was being held when the captain came on deck. The most convincing evidence of the Columbia's fault is in the manner in which the vessels came together. She must have lain across the path of the Ravenscourt, with her port side towards the Ravenscourt, because her port quarter was struck by the bow of the Ravenscourt. That is just the position she would be in after running away to starboard and being brought around quickly. On the other hand, if the Columbia kept her position, and followed the tug, the

Ravenscourt could not have struck as she did without going out of her course, to port, a much greater distance than the Columbia would have to go to cross the topline, and then changing to a course at right angles to the course of the tug, or nearly so, with her bow towards the port side of the Columbia. These lateral movements would necessarily have caused some loss of headway and widened the distance between her and the tug, which would have increased the strain upon her topline, and eased the strain on the Columbia's hawser correspondingly; and, even if it were defective, it should not have been pulled apart at that particular moment. The bad steering of the Columbia was undoubtedly the cause of her being under foot of the Ravenscourt when her hawser parted, and probably by swinging as she did she fouled the topline of the Ravenscourt, and made it impossible for her to avoid the collision. It is impossible from the testimony to decide with any degree of certainty as to the cause of the breaking of the Columbia's topline. Whether there was a fault on the part of any one in that connection, and, if so, whose fault, cannot be ascertained. There being no evidence of negligence in that regard on the part of the officers, crew, or owners of the tug, she is not to be condemned. The rule settled by the supreme court places the onus probandi on a party complaining of negligence on the part of a towing vessel. *The Webb*, 14 Wall. 414, 20 L. Ed. 774. The only charge of negligence or fault which could have caused the accident sustained by evidence is bad steering on the part of the Columbia. I am therefore obliged to render a decree against her for the full amount of damages sustained by the Ravenscourt, which, from the testimony, I find amounts to \$7,288.35, including demurrage at the rate of \$100 per day for a period of 32 days. The suit against the Ravenscourt and the Tyee will be dismissed, with costs.

PLYMER v. HARTFORD & N. Y. TRANSP. CO.

(Circuit Court, E. D. New York. July 9, 1900.)

BROKERS—EMPLOYMENT TO SELL VESSEL—COMMISSION—EVIDENCE—NEW TRIAL.

Plaintiff, having been authorized by defendant's superintendent, acting under orders from the general manager of the company, to sell one of defendant's vessels, subject to 5 per cent. commission, called the attention of the purchasing officer of the United States government to the vessel, and the superintendent, knowing of plaintiff's action, offered the vessel to the government at a price fixed by the general manager. The latter thereupon summoned defendant's trustees, who ordered the sale made, and the general manager ordered its consummation through the superintendent. Defendant's officers disclaimed any knowledge of plaintiff's connection with the sale, but there was evidence of frequent interviews between plaintiff and the superintendent, and communications made by the latter to the home office of the company, respecting the sale of the vessel, and the authority to sell subject to a commission. *Held*, that the evidence of plaintiff's employment to make a sale at the commission named justified the submission of the question to the jury, and supported a verdict in his behalf.

Foley & Wray, for plaintiff.

Wilcox, Adams & Green, for defendant.

THOMAS, District Judge. The defendant desired or was willing to sell one of its vessels. The general manager and substantial head of the business ordered the superintendent at New York to sell her to Flint & Co. at \$150,000, subject to a definitely stated 5 per cent. commission. The superintendent, Noble, offered her to Flint & Co. as directed, and, as the jury found, also authorized the plaintiff to sell her. Through the procurement of the plaintiff, the vessel was sold to the United States government, and the superintendent, as the verdict establishes, knew that the plaintiff called the attention of the purchasing officer to her. The superintendent repeated the offer of the government to the general manager. The latter summoned the trustees, and the sale was ordered through the nominal president, who remitted the matter to the general manager, who in turn ordered the superintendent to consummate the sale. The officers of the company disclaim knowledge or notice of the plaintiff's connection with the matter, but the plaintiff's effective connection with the sale is manifest. The employment of a broker to sell was within the implied power of the general manager, and it may be presumed that the board acted upon the assumption that such usual power had been or would be exercised. Hence, if the general manager empowered the superintendent to act through a broker, such action of the superintendent was binding. That question was left to the jury in a manner quite as favorable to the defendant as it could demand, and the jury found that the superintendent did have authority to sell through the instrumentality of a broker, and that he did so act. The jury were not bound to accept the denials of the company's officers, and did not do so, and, taking into consideration the frequent interviews and explicit conversations between the plaintiff and Noble; the agreement between them, as the jury found; the communications made to and received from the home office respecting the sale of the vessel; the authority given the superintendent to sell to Flint & Co., subject to a commission; his testimony that in what transactions he had with reference to the sale of the vessel he was acting under the instructions of the general manager, and that his authority came from the home office; the fact that the general manager, who, as the superintendent testified, did "about all the business of the company," acted through the superintendent in the whole transaction,—furnished sufficient evidence to justify the submission of the case to the jury. The fact is that the sale was made through the intervention of the plaintiff. At the final moment another person attempted to intervene, to obtain the benefit of the sale, and to reap the reward of the plaintiff's services. The plaintiff incontrovertibly brought the matter to the attention of the government. The sale was effected through him, to the exclusion of the other claimant. The plaintiff earned the commissions, and the justice of his demand should not be defeated by the merest technicalities, such as a corporation may raise always, if it so inclines, by denying power to those to whom it customarily confides its business. The transaction shows a desire to sell the vessel, and direction of the superintendent to sell it, and willingness that the sale should be subject to a 5 per cent. commission; and there was ample evidence of the authorization

to the plaintiff by the superintendent, provided the plaintiff's evidence be preferred; and there is evidence, gatherable from the entire transaction, of authority to the superintendent to employ the plaintiff. If, then, the ruling be correct that the resolution of the board of directors assumed that the usual agency of a broker might be involved, a new trial should not be granted. The proposition is believed to be correct, and the motion is denied accordingly.

THE ASIATIC PRINCE.

(District Court, E. D. New York. July 9, 1900.)

1. SHIPPING—LIEN FOR FREIGHT.

Where the consignee and owner of a cargo fails to pay or tender the freight due on the discharge of the cargo, the carrier, to preserve its lien, is authorized to retain and store sufficient of the cargo to pay such freight, and the expense of storage and loss of use of the commodity must be borne by the owner.

2. SAME—LIABILITY OF CARRIER FOR INJURY TO CARGO—NEGLIGENCE IN HANDLING.

The breaking of a greatly unusual number of the bags in which a cargo of sugar was shipped in discharging raises a presumption of negligence on the part of the ship in handling, and, if unexplained, renders the carrier liable to the shipper for the loss and expense resulting.

3. ADMIRALTY—RECOVERY OF COSTS—UNNECESSARY LITIGATION.

Where litigation between a carrier and shipper over the payment of freight was wholly unnecessary, and was caused by the unreasonable conduct of both parties, a court of admiralty will require each party to pay its own costs.

In Admiralty. Suit to recover freight and to enforce a lien therefor.

Convers & Kirlin, for libelant.

Forster & Speir, for claimants.

THOMAS, District Judge. On May 26, 1899, the Asiatic Prince, laden with sugar, from Maceio, Brazil, arrived at the port of New York. She began discharging her cargo on May 29th, and finished such discharge on June 3d. Hitch, the claimant, had become the consignee. The sugar was in bags, and was subject to peculiar depreciation from the drainage of molasses, breaking of bags, and from evaporation. The decrease in weight from these causes frequently amounts to 16 or 18 per cent. on cargoes of this nature, and, as it ultimately appeared, the loss in the present case was about 12 or 13 per cent. One of the claimants testified that he expected cargoes of this nature to fall short 12 or 15 per cent. If the freight were computed upon the bills of lading, the libelant might have demanded justly the sum of \$4,119.27, which would make no allowance for any depreciation arising from the causes stated. He in fact did demand this sum on or about June 2d, and again on June 3d, and still later, on June 6th, he demanded his freight upon the basis of a loss of 10 per cent. in weight of the sugar. At the time of the libelant's demand of the whole amount, the claimant refused to pay the same, and suggested the payment of about \$3,000, but did not tender the same. Upon the

libellant refusing to accept less than the whole amount demanded, the claimant made a formal tender of £1. 17s. 6d., which tender was based upon the bills of lading, which provided that the freight on certain bags should be 13s. 9d., and the freight on other bags should be 10s. The intention of the contract of carriage was that these should be the rates per ton, but by an oversight the blank which should contain the word "ton" had not been filled. Therefore the claimant, standing upon the unjust proposition that he was called upon to pay only the sum of £1.17s.6d., tendered the same, and never thereafter increased the tender; while the libellant, equally disregarding of the certain knowledge that there had been a loss on the sugar, demanded payment at the outstart upon the assumption that such loss did not exist. The irritation caused by this action on either side has resulted in annoying and unnecessary litigation, and this court is asked to ascertain and state the equities between the parties, although the conduct of each party indicates an absence of effort in good faith to discharge the customary duties of merchants. After the arrival of the vessel a controversy arose respecting the obligation of one party or the other to mend the bags. It was not the duty of the carrier to mend the bags, which were out of order from some cause for which he was not liable; but the claimant insisted otherwise, at least to the extent that the carrier should bear one-half of the expense. The claimant finally placed his own menders on the ship, for whose services he presents a claim of \$284.45. Pending all these controversies, the discharge of the sugar was begun at Woodruff's Stores, either into lighters provided by the claimant, or upon the dock, from which place it was also taken by the lighters; but the carrier refused to deliver 1,028 bags of sugar until the freight was paid, and, upon such freight not being paid, the 1,028 bags were stored. The libellant, according to the final weights of the sugar, was entitled to recover \$3,602.81, provided no allowance was made for loss and injury due to his actionable negligence. No tender of that amount, nor of any amount save the pounds, shillings, and pence above stated, was made; and as the libellant had a lien for his freight he was authorized to store the sugar to maintain his lien. It was the claimant's duty to tender the due freight money, or whatever sum the libellant was entitled to receive, and, as he did not do this, the storage was technically authorized, and the expense thereof, and the loss of the use of the commodity, must fall upon the claimant. The claimant's demand that the libellant should pay for the mending cannot be sustained, save so far as such mending was caused by the carrier's negligence in discharging. An examination of the case shows that an unusual number of new bags were required, and the excess is so extraordinary that it leads inevitably to the conclusion of a lack of care on the part of the carrier in the handling of the cargo, in the absence of other adequate causes. The claimant was obliged to pay the sum of \$284.45 for such mending, and it is concluded that at least one-half of such expenditure was occasioned by the libellant's culpable negligence. In addition to the items of which disposition is made by the foregoing holdings, the claimant demands payment for the loss of sugar wasted by the carrier's negligence in discharging. As the sugar did not show a shrinkage below the usual

average, or the expectation of the libelant in the present case, it must be concluded that no sugar was lost by the negligence of the carrier, although it may be that certain sweepings did not bring the full price. All the sugar delivered was sold at full price, save a certain amount, which the claimant places at about 800 pounds. It is impossible to determine what portion of these sweepings bringing a decreased price became such by reason of carelessness of the carrier in handling, as sufficient data is not furnished by the claimant for the court to make the determination. The loss arising from this cause is small, and, for the reason just stated, must be borne by the claimant. The claimant seeks to recover for the loss of sugar. The count showed the absence of 36 bags, but this does not indicate that 36 bags of sugar were lost, as the sugar was undoubtedly delivered in new bags, and the damage, if any, was caused by the deterioration in quality, and is included in the 800 pounds which were sold at half price. Under the circumstances it seems a just disposition of the case to require the claimants to pay the sum of \$3,602.81, less \$142.22, one-half of the total cost of mending the bags, which was made necessary by the carrier's negligence in handling. On the amount thus recovered by the libelant it should have interest from the date of the last delivery, which is understood to be June 6, 1899. The libelant tried to coerce the claimant to pay a sum that was not due nor reasonable, and the claimant, in irritation, failed in legal duty. The result has been an unnecessary and troublesome litigation, and the court emphasizes its disapproval by withholding costs from the libelant, and compelling each party to pay the costs incurred by it.

THE WILLOWDENE.

(District Court, E. D. New York. July 9, 1900.)

SHIPPING—INJURY OF STEVEDORE—LIABILITY OF SHIP.

A ship which was being navigated by the owners under a time charter entered port, and was taken possession of by the charterers, to be by them discharged and reloaded. She was discharged by employes of the charterers, and was directed to proceed to another wharf at no great distance for reloading. While on the way, libelant, who was a stevedore in the employ of the charterers, with others, was directed by them to wash the holds preparatory to reloading. In removing the cover from a hatchway, libelant stepped upon another part of the cover, which gave way by reason of its having been improperly replaced by the stevedores after discharging, and libelant fell through the hatchway, and was injured. The hatch cover was in sufficiently good condition, and was safe to stand upon if properly placed. *Held*, that the ship, being, under the charter, under the sole control of the charterers while in port, for the purposes of being discharged and reloaded, was under no duty with respect to the placing of the hatch covers during such time, and could not be held liable for the injury.

In Admiralty. Suit in rem to recover for a personal injury.

McBarron & Kaven and Martin A. Ryan, for libelant.
Convers & Kirlin and J. Parker Kirlin, for claimant.

THOMAS, District Judge. On the 9th day of May, 1899, at about 4 o'clock p. m., the libelant fell through No. 3 hatchway of the steamship Willowdene, while the vessel was shifting from the American Sugar Refinery, in the East river, New York, to pier 47 in the North river. The vessel had brought in a cargo of sugar to New York, which was discharged at the sugar refinery by the American Sugar-Refining Company, whose charges therefor were adjusted by the charterers of the vessel. After such discharge, the charterers sent the libelant and other of their stevedores to wash the holds of the ship in preparation for cargo. For the purpose of entering the hold, the libelant was removing some of the covers of the No. 3 hatch, and upon stepping upon one of the covers, while lifting another, the cover upon which he was standing tilted under his weight, and he fell into the hold. No. 3 hatch is about 12 feet square, and had 15 covers arranged in three tiers, with 5 covers in each tier. These hatch covers and their supports were in sufficiently good condition, and, if the cover which caused the injury had been suitably adjusted to the space for which it was intended, it would have been reasonably safe to stand upon. In the present instance the cover either was not placed upon a proper section or opening, or, if so placed, it had not been properly adjusted. The covers had all been removed by the stevedores of the sugar-refining company, and had been replaced by them, and were so fairly adjusted that neither the libelant nor his fellow workmen, who were engaged at that point, observed any improper replacement of the covers. Yet it must be concluded that there had been an improper replacement, and the question is whether this imputed negligence to the ship. The ship was under a time charter, and all matters relating to its navigation were imposed upon the owners. The discharge or loading of the cargo fell upon the charterers, and for such purposes the ship was at the entire and sole disposal of the charterers. Therefore when the ship was at the dock of the American Sugar-Refining Company it was the privilege of the charterers to remove the covers of the hatches, and, after such removal, either to leave the hatches open or to replace the covers; and whatever was done in that regard was done at the instance and in behalf of the charterers, and not at all in behalf or under the direction of the ship; nor might the ship interfere therewith. The ship was to be taken from the sugar-refining company's dock in the East river to pier 47, North river, for the purpose of reloading it in the interest of the charterers, and in preparation therefor the charterers' servants were directed to wash the holds; and while attempting to do so the libelant, trusting to the proper replacement of the hatch covers, stepped on the same, as he had a right to do, and from the tipping of the cover received the injury. Now, the improper fitting in fact was made by the sugar-refining company's servants, and therefore by the sugar-refining company itself, and hence it was done by a person whom the charterers had employed to assist in the discharge of the vessel; and the question is whether the ship is liable for the negligence of the refining company, acting for the charterers, in replacing the hatch cover. That is, considering that the ship was in port, was at the dock to be unloaded, that the hatch covers had been taken off by the charterers, that the vessel was being

moved for the purpose of taking her to another dock, not distant, for the purpose of reloading, and the charterers were undertaking to prepare the ship for such reloading, and the charterers' stevedore was injured thereby, may it be said that the ship should have followed up the action of the discharging agents of the charterers, and have discovered whether the covers had been properly replaced? It is clear enough, both in reason and authority, that if the hatches had not been put on at all the ship would not have been liable had the libellant fallen through, and it would not have been the duty of the servants of the ship to exercise any care whatsoever under such circumstances to protect the libellant from any danger attending the open hatches. But, if there was an entire absence of duty if the covers were left off, upon what theory can it be claimed that it was the duty of the ship to keep track of the condition of the hatches, and see to it that, if any attempt was made to replace the covers, such attempt should be properly and successfully carried out? The holding in such case would be that the ship was under no obligation to see to it that the covers were replaced at all, but was obliged to use care, provided an attempt was made to replace them. Such position is illogical. The evidence preponderatingly shows that the arrangements for covering the hatches were suitable. The ship was in the course of unloading and reloading. The charterers were in the entire charge of that work. They had procured the removal of the hatch covers. They had procured the replacement of the hatch covers. The replacement was for the brief time which should elapse while the vessel was shifted to the point of reloading. Upon such state of facts it is concluded that the ship was in no way responsible for what may have been done in or about the replacement of the covers, nor was it the ship's duty to police the decks for the purpose of inspecting the work of the charterers and their stevedores or agents. A contrary rule would place under the necessary surveillance of the officers of the ship the duty of unloading and reloading, and all the other incidents attending the same. The whole theory of the law is that the ship belongs to the charterers in the matter of the cargo and its reception and removal, unless there be stipulations modifying the usual duty. The stevedores had a right to leave the covers off, or partly off, or to put them on temporarily for the purpose of going from one dock to another, where they were to be removed again, or, as in the present case, to replace them after the hold was discharged for the purpose of taking them off at an early time to wash the holds. This work was entirely that of the charterers, with which the ship had nothing to do whatever. The fault follows the possession and right of use of the holds, and such right was vested in the charterers alone, and they alone were exercising the right, and no vigilance was required of the ship to protect the charterers' servants against a negligent exercise of that exclusive right. The libellant was injured. It may be that the charterers are liable therefor, but the ship is not. The libel should be dismissed, with costs.

THE KENNEBEC.

(District Court, E. D. New York. July 16, 1900.)

ADMIRALTY—CLAIM FOR SINKING VESSEL.—NEGLECT TO DISPLAY LIGHTS.

In a channel from 400 to 450 feet wide, eight vessels were moored abreast off a coal dock on a dark and foggy night, occupying nearly 190 feet of the channel, at a distance of 350 feet from a steamboat dock. The masters of the vessels went to bed, knowing of the fog, and, if any lights at all were displayed outside the cabin, they were only those of ordinary lanterns. When about five-eighths of a mile from the coal dock, the claimant, which was approaching the steamboat dock, reduced her speed to one bell, blew fog signals, and, before the collision in question, had stopped her engines, so that the vessel was being carried by the tide. The pilot in charge of the wheel of the claimant was a man of long experience, and the compass course pursued by him carried his steamer about 100 feet off the face of the coal dock, which course was approved by previous experience. Although three men besides the captain were in the bow of the claimant on the lookout, the vessels at the coal dock were not discovered until within about 50 feet, when the pilot gave the signal to back, but the forward movement was not stopped before the steamboat struck a barge belonging to the libelant, which was driven forward up the river and sunk, and for which damages are claimed. *Held*, that common prudence demanded that vessels appropriating so large a portion of the channel should employ adequate means to make their presence known, and that, the course of the claimant's pilot being a fair navigation of the channel, in the absence of any warning apprising him of interruption the libel should be dismissed.

Robinson, Biddle & Ward and Mr. Hough, for libelant.
William J. Kelly, for claimant.

THOMAS, District Judge. At the entrance of the Quinnipiac river flowing into the harbor of New Haven are three docks,—the coal dock, the water dock, and the steamboat dock. The total distance from the coal dock to the steamboat dock is about 350 feet. On the night of October 26, 1899, there were lying off the coal dock a schooner and two barges, and at about half past 8 on such night a tug added five barges; making in all eight vessels abreast said dock with their bows pointing upstream. The outside barge—No. 1—belonged to the libelant; next inside was the barge called the "shell boat"; next lay barge No. 11, which is involved in this action, such barge being 91 feet long and 22 feet wide. At the time the five barges were added the night was dark, and somewhat foggy. The channel at this point is about 500 feet wide from the face of the pier, and was understood by the persons having occasion to use it to be 400 or 450 feet wide. Of this space nearly 190 feet were occupied by the boats lying off the pier, and past such coal dock and boats and through such interrupted channel the steamboats plying from Providence to New Haven, and from New Haven to New York, and from New York to New Haven and Providence, necessarily went in order to reach the steamboat dock, where they received and discharged passengers and freight. The coal dock and water dock belonged to the New York & New Haven Railroad Company, and vessels were accustomed to tie up to the coal dock by implied contract with the owners. The practice of so tying up was of long

standing, and it was not an extraordinary event for a larger number of vessels to lie off said dock than those in such position on the night in question. About half past 9 or quarter of 10 the master of barge No. 11, the only person aboard of her, went to bed, knowing of the fog, and, as he claims, he left as the only signal a white light in a six-inch lantern standing on the galley, which was about eight feet above the deck. He states that the shell boat next outside of him also had a lantern on her house, and that No. 1, the outside boat, carried a lantern on her flagstaff. The captain of the shell boat, the captain of No. 1, and the master of No. 6 confirmed this statement. About 10 o'clock the Richard Peck, a steamboat about 315 feet over all, passed the coal dock bound for the steamboat dock. Then the fog was such that the captain saw the barges 700 or 800 feet away, and was obliged to go further to the eastward in the channel to avoid them. He states that at this time there were no lights burning on any of the barges. Charles French, the agent of the steamboat company, states that he was at the end of the steamboat dock when the Peck came in, and that he saw the boats at the end of the coal dock; that he thought their presence was dangerous to the incoming steamers, inasmuch as there was no light displayed upon them, and no sound came from them to warn approaching vessels. Redman, the watchman on the steamboat dock, states that when the Peck came in he was at the end of the dock, blowing a fog horn; that from his position he could make out the Peck about the time she got to the coal dock, by her form; and that there was no light on the boats, the number of which he places at 12. His distance from them was about 350 feet. He states that he went to the water dock, and complained to the servant of the owner of the coal dock that there were too many vessels lying off the pier, and he states the number of vessels was extraordinary. Coleman, foreman of the steamboat dock, states that he could see the boats when the Peck came in, and that there were no lights on the flotilla of boats; that when the Peck came in she sounded a fog whistle far away, and that he made out her form and light about the same time.

Such seems to be the evidence relating to the conditions existing at the time of the arrival of the Peck. She remained at the steamboat dock about an hour and a half or two hours, and then went on her way to Providence. About 1:30 a. m., the Kennebec, 260 feet long and 58 feet wide, bound from Providence to New York, attempted to go to the steamboat dock. Aboard her was a pilot, McMullen, a man of long experience in connection with the New Haven Harbor. Such pilot took charge of the wheel, and devoted himself entirely to steering his vessel upon a compass course which, passing the dock, was N. E. by E. $\frac{1}{2}$ E., a course approved by previous experience. He states that he could take the vessel to such dock by reliance upon his compass, without reference to objects on the shore, and that such course, adopted and pursued by him, would carry him about 100 feet off the face of the coal dock. At this time the fog had greatly increased, hanging heavily over the boats at the end of the coal dock. This pilot states that the Kennebec came up

the harbor at about half speed, or at the rate of five or six knots per hour; and at Long wharf, which was about five-eighths of a mile below the coal dock, there was a red light, and that a man was also stationed there with a horn, which he used to aid the navigation of the steamers in the fog; that at this point the speed was reduced to one bell, which was about sufficient to give steerageway, the tide being then flood; and that before the collision about to be mentioned the engines were stopped, and the vessel was carried by the tide. The evidence on the part of this pilot and others makes it clear that the Kennebec continued to blow fog signals as she came up the harbor and approached the coal dock. The pilot states that he saw suddenly the masts of the schooner a trifle on his port bow, his vessel meanwhile moving with the tide, and the engines shut off; that he saw the masts of the schooner less than 50 feet away from the bow of his vessel, and at once gave a signal to back; that this forward motion could have been stopped within 125 feet, but that his headway was not entirely arrested, and therefore the bow of the Kennebec struck the starboard quarter of No. 11. The tide aided the forward movement. Barge No. 11, although tied with four lines, was driven forward up the river, where she sank. She was afterwards raised about opposite the water dock, and 40 feet away from the face thereof. For the damages thus arising the present libel is filed. The pilot states that as he approached there were no lights on any of the vessels, and that he saw no lights until after the accident, when he states, "I see right down under us—whether it was lights in the cabin or where they were—I see one or two lights on our port side." He does not know whether there were lights on the starboard side, because he claims that it was not his duty to be looking for lights, but to steer according to his compass. He also states that the lights were of no consequence in such a fog, as sounds were alone available. He testified that his compass course was adopted in the expectation that nothing would be found outside the coal dock, and that notice of any vessels lying there would be given in some proper manner. He testified that after the accident he saw four barges, a schooner, which, together with the No. 11, which sank, and the two vessels which floated away, make eight vessels. Joseph Collins, the captain of the Kennebec, does not entirely agree with the pilot. He states that there was a watchman on the lookout until the Kennebec reached Long wharf, and that at such point the second pilot joined such watchman on the bow of the vessel. He confirms the pilot's evidence as to the speed and caution with which the Kennebec approached the coal dock, adding, however, that the Kennebec stopped twice between Long wharf and the coal dock to get bearings; that he saw the masts of the schooner about 300 feet away, and three points on his port bow. He first stated that he thereupon backed strong, but, upon it being suggested that he would hardly back on account of an obstacle so far away and so far on his port bow, he stated that he did not go back at that time, and not until the barges were reported to him by the watch on the bow. He states that he received a hail respecting such barges, and further that he could have stopped in less than half a minute. He is positive that there were

no lights on any of the barges. McDonald testified that he was on lookout at the extreme bow of the Kennebec, and that the regular watchman and the second pilot were there with him; that, after passing Long dock, he saw and reported, 200 or 300 feet away, and about 2½ points on his port bow, the topmasts of a schooner, but that the fog was so dense below that he could not see the lower masts; that he saw the barges only about 40 feet away, when he reported "Dark object ahead"; and stated that there were no lights on the barges, and no signals came therefrom. Marson, the second pilot, states that at Long wharf he went to the bow on the port side, and saw what he took to be a mast or coal derrick at the coal dock, and that McDonald, the watchman, reported the same; that he next saw "two little lights—very dim lights, like a tallow candle—right down forward close to the bows"; that he hollered "Stop and back!" and then the collision came. He judged that the lights were in the cabin. He states that the lookout reported a "vessel on the port bow," but does not remember that he reported the dark objects. The engineer of the Kennebec gives evidence tending to show that the vessel was navigated cautiously in approaching the coal dock, although his evidence does not accord entirely with that of the pilot. Such is the testimony of the persons engaged in the navigation of the Kennebec. Redman, the watchman on the steamboat dock, states that he heard the fog whistles from the Kennebec; that he blew the horn, and that he could see the outline of the boats lying off the coal dock, "not very plain. I could see them plain enough to see the boat"; that there were no lights on the boats at that time, and that he saw the mast light on the Kennebec about the time that she struck. Bannon, assistant foreman, stated that he went to the end of the dock before the Kennebec came up at about 1:30 a.m.; that there were no lights; that he could see the form of the boats at the end of the dock; that he heard the fog signals, heard the watchman blowing his horn; that he saw the Kennebec's light before she struck. Coleman, the foreman of the steamboat dock, states that he saw the two outside boats that drifted away after the collision, going out to them in a rowboat, and that they had no lights. He states that he saw the light of the Kennebec slightly after the crash.

Upon this evidence the conclusion is preferred that the Kennebec approached the coal dock well piloted, at proper speed, with sufficient men on lookout, and capable of being stopped within 125 feet. But why did not the lookouts, or any of them, see the boats so as to enable the Kennebec to stop within that distance? Redman and Bannon on the steamboat dock saw them 350 feet away. But such persons had been watching them, accustomed their eyes to locating them, and therefore had superior opportunity, and at last they saw dimly their outline. The captain and the three men in the bow were keeping lookout. They were obviously vigilant, and it is easily inferable that they, or some of them, would have discovered the boats earlier if the conditions permitted. But, with a channel 400 or 500 feet wide, by what right did the steamer lay her course by compass so that she would necessarily pass within about 100 feet of the dock,

knowing that such place was frequently occupied by vessels? The pilot's explanation is that he believed that he had a right to lay his course as he did, as it was a fair navigation of the channel, and that he expected that, if the channel were interrupted, there would be some sound or warning apprising him of the interruption, to the same extent as if a vessel were anchored in the channel. Such statement is logical; for, while it was customary for vessels to lie off the dock, it does not appear that they were accustomed to lie there with a total width of 187 feet, in a dense fog, without sufficient lights or warnings. Moreover, if a vessel may not anchor in the channel 100 or 175 feet from the pier without taking due measures, in the midst of a fog, to give notice of her presence, by what right may she tie up outside other boats, in the whole occupying nearly half of the channel? Her position is the same. In one case she is held by her anchor, in the other by her connection with the other boats. The occupation of a main part of a water way for anchorage without prudent warnings is highly dangerous and inexcusable. It is objected that the statute does not require lights or signals. Even so, common prudence demands that ships appropriating a quarter or third of a channel should use care to employ adequate means to make their presence known. But were the lights sufficient? The masters of these vessels went to bed, leaving only ordinary lanterns to apprise incoming steamers that they lay in the very way of navigating vessels. It is doubtful whether even such lights were displayed outside the cabin, but, if they were there, they were utterly powerless to give warning in a dense fog. But what shall be said of the steamboat company's knowledge of the fact that these boats were lying off the coal dock in an extraordinary number, as the watchman states,—a dangerous obstruction to navigation, as the agent of the line testifies,—and yet that condition be allowed to continue without giving warning to incoming steamers? If it were dangerous for boats to lie in this position, the agent in charge had knowledge of the fact, and was it not his duty to take some measure to protect incoming steamers? But such fault was that of the owner, and it is doubtful whether such negligence can be imputed to the ship in an action in rem. If the ship did her whole duty, such nonfeasance of the owner on shore as here appears would not seem to be imputable to the res. But it is not necessary to determine this question, as such culpability is not specifically urged against the Kennebec. It follows from the foregoing views that the libel should be dismissed, with costs.

SMITH et al. v. ELMER E. WOOD TRANSP. CO.
(Circuit Court of Appeals, Fifth Circuit. May 8, 1900.)
No. 908.

ADMIRALTY—APPEAL—REQUIRING AMENDMENT OF PLEADINGS.

Where the pleadings in a suit in admiralty are so deficient that the court on an appeal cannot properly apply the evidence in the record, or justly determine the rights of the parties, but there is apparently no design to suppress the facts, the decree below will be set aside, and the case remanded for the filing of new pleadings.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

John D. Grace, for appellants.

Chas. S. Rice (R. B. Montgomery, on the brief), for appellee.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. The pleadings and proof in the record are such that we cannot, we think, justly make a final disposition of the case. The libel does not state the case with such fullness as to conform to the rules. This failure, however, to fully state the case, in the absence of a design to suppress material facts, should not be fatal to the right to relief. The *Syracuse*, 12 Wall. 167, 173, 20 L. Ed. 382. The respondent, in the evidence offered, relies on the fact that the alleged salvage services were rendered under a contract; but the contract is not fully stated in the answer, nor does the evidence clearly show the terms of the contract. Before making a final disposition of the case, we have concluded that it would be proper to require the libelants to amend their libel, and the respondent will be permitted to amend the answer, and both parties will be allowed to take additional evidence. The decree of the district court dismissing the libel is vacated and set aside, and the case is remanded to that court for further proceedings in conformity to this opinion. One-half of the costs in this court will be paid by each of the parties.

THE THORNLEY.

(District Court, E. D. New York. July 16, 1900.)

MARITIME LIEN—DAMAGES FOR BREACH OF CHARTER—ESTOPPEL BY SETTLEMENT.

While a steamship was under a time charter to the libelant, she became stranded, and received injuries which subsequently made it necessary for her to be docked for repairs, after which libelant resumed his use of her under the charter. In the next settlement he claimed and was allowed a deduction for the time lost in making the repairs. He made subsequent payments from time to time under the charter, and on its termination made a final settlement with the owners, no claim for further damages having been made on account of the injury. *Held*, that he was estopped by such settlements from subsequently asserting a lien upon the vessel for such further damages after her sale to a bona fide purchaser with no notice of libelant's claim.

In Admiralty. Suit in rem to recover damages for breach of charter.

Wheeler & Cortis, for libelant.

Convers & Kirlin, for claimant.

THOMAS, District Judge. The steamship *Thornley*, under a time charter to the libelant, during a voyage from Philadelphia to Tampico, stranded at Elbow Reef, on the coast of Florida. A part of the cargo was jettisoned, whereby she was floated, and taken to Key West,

where a diver examined her bottom, and reported absence of serious injury, but a thorough examination of her bottom was impracticable before she went on dry dock. A consular survey was had at the same port, and a certificate of seaworthiness was given. Accordingly the vessel, with her cargo, went to Tampico, where the discharge of the cargo was finished on or about the 29th day of December. The charterer, having no return cargo, paid the port charges, and ordered the vessel to Baltimore, to take on another cargo for Tampico. During the voyage to Baltimore the vessel met with heavy weather off Cape Hatteras, and during and after such storm she leaked in one of her tanks. Upon her arrival at Baltimore on January 13th, the vessel was placed on dry dock, and her bottom was found to have been indented and injured at Elbow Reef, and proper repair was made. The charterer, on February 25th, resumed his use of the vessel, and continued her employment until May 12th, when he delivered her to the owners, and the charter party was ended by mutual consent. In the latter part of May the vessel was sold to the claimants, who purchased in good faith, and without knowledge of the libellant's present claim. This action in rem was begun on the 7th day of December following, and is based upon the claim that when the vessel left Tampico she was not in fact seaworthy to carry a return cargo, provided the charterer then had one,—as he had not,—and that by the terms of the charter party the charter hire ceased, the vessel was at the expense of the owners until her restoration to a suitable carrying condition, and that he should recover back the sum of \$2,680.59, the hire paid for the ship from 29th December, the date of her discharge at Tampico, until January 13th, when she arrived at Baltimore; also \$341.25, the value of the coal consumed on the return voyage; also \$41.99, the port charges at Tampico. Further facts remain to be stated. The charterer paid no charter hire for the time the vessel was under repair at Baltimore, but after she came from the dry dock a settlement for loss of time growing out of the stranding was had, and the following receipt shows the understanding and claims of the parties relative thereto:

18 Broadway, New York, Feb. 28th, '99.

W. D. Munson, Esq., to Bennett, Walsh & Co., Dr.

To Hire of S. S. Thornley, as per Charter Party, from Jan. 6th, 1899, to Feb. 6th, 1899.

Second half of month at 8/1 p. g. (2847)—£1,138.16.0 per calendar month, £569.8.0 at \$4.85.....	\$2,761 59
Feb. 6 to Mar. 6, first half, £569.8.0 at \$4.85.....	2,761 59
Feb. 6 to Mar. 6, second half, £569.8.0 at \$4.85.....	2,761 59
	<hr/> \$8,284 77

Less.

Time lost from Jan. 13, 10 a. m., Feb. 6, 10 a. m., 24 days, 31 dy. mo., 8/1 per mo., £881.12.0 at \$4.85.....	\$4,275 76
Time lost from Feb. 6, 10 a. m., to Feb. 25, 10 a. m., 19 dys., 28 dy. mo., £772.14.11 at \$4.85.....	3,747 82
Com. 2½%.....	6 53
	<hr/> 8,030 11
	<hr/> \$ 254 06

Received payment,

Bennett, Walsh & Co.

Moreover, from March 6th to May 13th semimonthly settlements for charter hire were had, and on the latter date a final settlement occurred, pursuant to which the libelant paid the sum of \$1,082.10, which, together with a certain allowance for coal on hand, made up the hire then apparently due. At none of these settlements, and at no time previous to a demand made subsequent to the sale of the vessel, was any claim suggested for the alleged loss of time now the subject of controversy. With these facts in mind, it becomes necessary to inquire, what knowledge, during all this time, the charterer had respecting the condition of the vessel after the stranding. From Key West, under the date of December 4th, the master of the vessel telegraphed the charterer: "Arrived here this morning. Jettisoned five hundred tons of coal. Will probably sail Monday after settling salvage claim. Diver examining bottom. Anticipate no danger." Previous to the arrival of the vessel at Baltimore, the charterer received no further report concerning the vessel, and had no further knowledge of her condition previous to her leaving Tampico, although he had an agent at Tampico. There is no contention that the charterer did not know the vessel was put on dry dock and repaired on account of injuries received from the stranding, if such was the case. While the evidence does not show that the vessel was disabled from carrying a cargo from Tampico, yet, if that be assumed, it is quite certain that the libelant has no lien enforceable against the ship after the sale. On February 28th he settled his claim for loss of time. He repeatedly failed to present any claim thereafter by paying charter hire, and surrendered the ship finally, making deductions claimed by him, and ignoring the claim now presented, of which in fact he had full knowledge. The settlement of February 28th was a specific settlement of claims for loss of time arising from injury from stranding, and the subsequent settlements and payments were confirmatory, and the final settlement evinces the ultimate understanding of the parties upon the severance of their relations. The valuable presentation by the libelant's proctors of the authorities, illustrating that laches may not arise necessarily from lapse of time or sale of the ship to a bona fide purchaser, fail to meet the real reason for estopping the libelant's enforcement of his present action. Such estoppel does not spring from the brief time that intervened between the opportunity to present the claim and its actual presentation and attempted enforcement, nor from the mere fact of a sale to a bona fide holder, but from the settlement of the claims arising out of the charter party. By reason of such settlement the owner of the vessel was justified in believing that there was no further claim against her, and that he might sell the vessel free from liens; and the purchaser, who may be presumed to have made inquiry of the owner, could be assured, upon the basis of the libelant's own conduct, that all matters relating to the charter party had been arranged. In view of such adjustments it is considered that the libelant cannot, with good conscience, ask that the ship shall respond for the claim here involved, whatever may be the legal right of the libelant to reopen the accountings concluded with the former owner. It follows that the libel should be dismissed, with costs.

SPEAR & TIETJEN SUPPLY CO. v. VAN RIPER.

(District Court, E. D. New York. July 16, 1900.)

PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL FOR DEBTS CONTRACTED BY AGENT.

The owner of a pleasure launch, who sent one of the crew to purchase supplies, in some instances not furnishing him with funds to pay for the same, but paying him the money on his rendering an account thereafter, must be held to have intended that his agent should buy on his credit, or that of his vessel, and is liable for supplies so furnished by a dealer, and which were delivered to and used on the vessel, but were not paid for by the agent.

In Admiralty. Suit to recover for supplies furnished to a vessel.

Hyland & Zabriskie, for libellant.

Hassett & Waldo, for respondent.

THOMAS, District Judge. The present libel is to recover the purchase price of certain goods alleged to have been furnished to the respondent for the use of the launch Kingston. The launch was a small boat used for the pleasure of the owner, who was himself master, although no licensed master was required. The supplies were sold, on the credit of the owner, to one Webber, who, upon the occasions of purchasing them, called himself "Captain Webber," although he was merely one, although the principal one, of the small crew. The libellant took no pains to inquire directly from the respondent whether Webber had authority to purchase the goods upon the credit of the owner or the launch, nor was any demand of payment made upon the owner until some time after the goods had been delivered to Webber or to the launch, or at a place designated by Webber, at which time the respondent had paid Webber all his disbursements and wages, and the latter had left the employment. The answer made upon the trial to the claimed indebtedness is that, while the respondent at times, and upon numerous occasions, sent Webber to purchase supplies for the yacht, he did not authorize him to purchase upon credit, and that, on the other hand, he always furnished him with money to pay cash for the goods which he was sent to buy. It is considered that, if the respondent sent out Webber to buy goods, and furnished him with the money to pay for the same, he is not liable to pay for goods secured by Webber on credit. The mere fact that he authorized him to purchase would not justify the agent in buying upon credit, unless some other fact appeared. But if the owner sent Webber to buy goods, and did not furnish him with money, but received an account of goods purchased thereafter, and settled such account, he must have known that Webber was purchasing the goods upon credit, and intended him to do so. Thereby he authorized Webber to buy goods on behalf of the owner. Now, the bills presented by the respondent on the trial do not show that the respondent at all times furnished money to Webber to purchase the goods for cash, but the accounts rather show that Webber bought and was sent to buy goods for the launch without funds to pay for the same, and that he rendered an account thereafter, and finally received the money in

settlement of the account produced by him. This illustrates that the owner knew, or should have known, that Webber was buying goods upon the credit either of the launch or as his agent. In such case the owner should make good to the seller the purchase price of such goods as are shown to have been delivered to him, or used by him or in his behalf; for it is considered that, if a principal sends his agent to buy and receive goods, and does not provide money to pay for the same, he intends that the agent shall buy on the credit of his principal, and there is no presumption that the agent will use his own money. The matter is therefore referred to a commissioner to ascertain what portion of the goods claimed to have been sold to Webber by the libellant was used for the benefit of the launch or the owner, or were accounted for to him, and for such portion the respondent should make payment. Let there be a decree accordingly, with costs.

THE WILLIAM CHURCHILL.

(District Court, E. D. New York. July 9, 1900.)

1. COLLISION—CONTRIBUTORY FAULT—BURDEN OF PROOF.

Where the fault of the burdened vessel was the primary cause of a collision, she must produce reasonably clear evidence to sustain a plea of contributory fault on the part of the privileged vessel on the ground that the latter, in trying to avoid the threatened collision, departed from her course.

2. SAME—SAILING VESSELS CROSSING.

A schooner sailing free *held* in fault for a collision with one on a crossing course, sailing closehauled, because of her failure to maintain a proper lookout; and evidence to show contributory fault in the privileged vessel *held* insufficient.

In Admiralty. Suit for collision.

James J. Macklin and L. R. S. Gove, for the Hencken.
Carpenter & Park, for the William Churchill.

THOMAS, District Judge. The schooners William Churchill, in cargo, north bound, and Freddie Hencken, unladen, south bound, collided about 6 o'clock in the afternoon of January 22, 1899, north of Barnegat, on the Atlantic coast. The wind was westerly. The Churchill was sailing free on a course north by east one-half east; the Hencken was closehauled on a course southwest by south one-half south. Both vessels carried proper lights, and the lights as well as the vessels themselves could be seen at a sufficient distance to avoid accident. The evidence shows conclusively that a proper lookout was not kept on the Churchill, and that she did not discover the Hencken until the danger of a collision was considerable, and that she was then roused to activity by the horn sounded on the Hencken. Hence the Churchill, by her negligence, contributed to the injury of the Hencken, and, as she was the burdened vessel, she alone must respond for the damage, unless the Hencken, without excuse, failed to keep her course. The substance of the claim of the Churchill is that she did not see the Hencken earlier on account of the obstruction

caused by another schooner, and that when she did discover the Hencken the latter's red light appeared a little on the Churchill's starboard bow, and that the Churchill's jibboom was heading for about the foremast of the Hencken; that the Churchill's wheel was put hard up, and that she went off several points, the spanker sheet being let go to aid the maneuver; that the Churchill struck the Hencken on her starboard side, near the main rigging, within a point of abeam; that the collision was caused by the failure of the Hencken to keep her course, and by reason of her paying off, some three points to avoid the collision, which maneuver was undertaken by the Hencken as soon as the Churchill tried to go off. If the Churchill went off, and the Hencken followed in the same direction,—of which there is much evidence,—the Hencken was negligent unless she acted in extremis. But the evidence of the Hencken is that she kept her course without deviation, and her evidence is as credible as that of the Churchill, although certain evidence of the mate is unacceptable. He states that from first seeing her the Churchill "kept off, and showed her red light, and she luffed up, and showed her green light, and then kept off, and showed her red light again." This may be true, but he further states that when she showed her green light she fully crossed the Hencken's bow, so that her stern cleared by about 60 feet, and that she "turned around and showed her red light, and shut out her green" light, and struck the Hencken amidships. This seems impossible. But the mate's erroneous estimate of the distance is not controlling. The captain of the Hencken is dead, and the court is deprived of his evidence, but the truth seems to be that the Churchill was, in the first instance, the offender, and the burden is upon her to show that the Hencken changed her course. Considering the evidence with all its confusion and inconsistencies, the court is not convinced that the Hencken changed her course, and therefore the fault must rest with the Churchill, who was clearly a wrongdoer. Her negligence was the primary cause of the accident, and without reasonably clear evidence she should not be permitted to bring the Hencken into fault upon the plea that the latter, in trying to avoid a threatening collision, departed from her duty to keep her course. There should be a decree for the damages caused the Hencken, and dismissing the cross libel, with costs

THE WEST BROOKLYN.

THE WILLIAM FLETCHER.

(District Court, E. D. New York. July 9, 1900.)

COLLISION—STEAM VESSELS IN FOG—EVIDENCE CONSIDERED.

Evidence in support of a libel and cross libel for collision considered, and held insufficient to show that a collision between two steamers in East river during a fog was due to negligent navigation on the part of either vessel, and both the libel and cross libel dismissed.

In Admiralty. Libel and cross libel for collision.

Wilcox, Adams & Green, for the William Fletcher.

James J. Macklin, for the Ferry Co.

THOMAS, District Judge. The Fletcher is a passenger steamboat, 135 feet in length, with a speed capacity of about 10 or 11 miles per hour. On the 12th day of October, 1899, being under charter to carry the guests of Sir Thomas Lipton from the barge office in the city of New York to the locality of the international yacht races, she started at about 10 minutes of 8 a. m., having been delayed about 20 minutes by the fog. The vessel started by working her engine slowly, increased her motion to full speed, and shortly reduced it to half speed, which, according to the description of her crew, was about 4 or $4\frac{1}{2}$, and in a fog about 3, miles per hour. She had proceeded about six or seven minutes on her way, when the fog thickened so that it was impossible to see a vessel over 50 feet away, and she gave usual and proper fog signals. After being out about 10 minutes, and hearing many whistles behind her, there was one long whistle on her port bow, which was heard and reported by the lookout, and was also heard by the mate, who was in the pilot house. Thereupon she immediately gave one whistle, stopped, reversed, and sounded alarm whistles, as she claims, at the same time porting her wheel so as to carry her from her then compass course of west-southwest to about west. Shortly she saw the West Brooklyn some 30 to 40 feet away from her stem, partly across her bow, and, knowing that a collision was inevitable, she starboarded for the purpose of throwing her head to port, and thereby lightening the contact; but this was ineffective, and the West Brooklyn struck the Fletcher on the starboard bow, and swung her about three or four points, injuring her port side. The West Brooklyn also was injured. The Fletcher's pilot, her lookout, and other members of the crew state that they did not hear other than the one whistle above described from the West Brooklyn. Lord Beresford, an English admiral, was sitting aft of and leaning against the pilot house. He states that in crossing the channel he did not think the Fletcher was going fast, but did not pay much attention, because he was reading his paper; that the Fletcher blew the ordinary amount of whistles sounded in a fog; that his attention was first called to the West Brooklyn by the Fletcher's engines stopping, and directly thereafter he heard the crash; that he first actually saw the West Brooklyn in collision; that he thought her wheels "were going ahead when we struck," but could not swear to it; that the Fletcher's bow went under the sponson beam and hit the paddle of the West Brooklyn, the former hitting the latter about a couple of points before the beam; that "she stopped before she struck, I think, because what first made me look up was stopping the engine, and it was almost directly after that I heard the crash." Mr. Barrie, in charge of Lord Lipton's party, testified that he was on lookout on the port side of the pilot house; that the Fletcher proceeded slowly, blowing whistles; that after getting out he heard other whistles; that his attention was called to the ferryboat almost simultaneously with the crash; that he heard a whistle from the West Brooklyn; that the Fletcher's engines were reversed before the collision; that the West Brooklyn came in sight about 40 or 50 feet away; that he could not speak of the movement of the other boat. The evidence on the part of the crew of the Fletcher is that the

West Brooklyn was moving with considerable speed, and that the Fletcher was making but little, if any, headway at the time of the collision; that the West Brooklyn was headed at the time about north by east, and the stem of the Fletcher came in contact with her starboard bow about 30 feet aft of the stem, and raked along the West Brooklyn's side, tearing away some of the braces, and finally lodging in the wheel in such a way as to do it considerable damage, in which injury the port side of the Fletcher shared; that the motion of the starboard paddle wheel of the West Brooklyn was forward as it scraped the port side of the Fletcher in a downward direction. It may be noticed here that the evidence on the part of the West Brooklyn tends to show that the motion of the paddle wheel was upward, as evidenced by the manner in which portions of the wheel were broken. The lookout of the Fletcher—Johnson, a Norwegian, a good witness—testified that he, with another person, was on lookout some four feet aft of the stem, and that he saw the paddle wheel of the West Brooklyn moving forward, although he turned away for safety before the collision. Hopkins, a Sandy Hook pilot engaged to take out the Erin, Lord Lipton's boat, was in the pilot house, looking forward. He confirms the evidence of the crew of the Fletcher as to the general conditions of weather, as to her half speed, the fog whistles blown by the Fletcher, the West Brooklyn's whistle, which appeared near by. He stated that he could not say whether the Fletcher had lost headway, but that she had not much headway; but he asserted that the West Brooklyn had headway. He did not seem to recall definitely the whistles. The witness seemed to be fair in his statement, but did not remember details with much accuracy. Tiffany was one of the lookouts ahead on the Fletcher, and coincided with the master of the Fletcher in his general statement. Buzzee, the fireman, stood on the deck on the port side, about 30 feet from the stern. He testified to hearing the whistles of the Fletcher, but he, as well as the other members of the crew, testified that they heard no whistles ahead of them until the loud whistle from the West Brooklyn. He states that the West Brooklyn was going ahead, which he judged from the motion of the wheels.

The evidence on the part of the West Brooklyn is as follows: She left her berth at Thirty-Ninth street, Brooklyn, at 7:30. The weather was hazy at the time of starting, but hardly to be characterized as foggy. She came along to the bell buoy near the Buttermilk Channel, at which point the fog closed in thick. She had been going at her usual speed, but at that point reduced to half speed, and proceeded, the lookout reporting the bell of a schooner anchored on the west side of Governor's Island. Shortly after passing the schooner, and while yet on a northern course by compass, she heard a whistle, which she took to be about one point on her port bow. Upon a repetition of the whistle she stopped, for the purpose of locating it, having, however, changed her course to north by east. She continued blowing her whistle, making little, if any, headway forward, with her engines stopped. She claims that the whistles on the port hand were not those of the Fletcher, and that two or three

minutes after the collision the Atwater came from that direction, and therefore she ascribes the whistle to that boat. After the West Brooklyn had been lying still in the water close to a minute, the Fletcher came in sight, moving at rapid speed, and struck the West Brooklyn on her starboard bow, about 30 feet off from the stem, and scraping along the side to the wheel house. The Fletcher was about 40 feet away when first seen, and her course made with the keel of the West Brooklyn something less than a right angle. The responsible persons of the West Brooklyn got no whistles or alarms from the Fletcher. When the Fletcher came in sight, the West Brooklyn was started astern, and was backed until the time of the collision, but did not get under much sternway, and may have been going ahead a little under the headway acquired before she stopped. The West Brooklyn had not reached the position off Castle William where she would turn to go easterly to pier 2 in the East river, which was her destination. Smedley, the deck hand, was on lookout for the West Brooklyn, and appeared reasonably honest, but did not impress the court as being as good a man for a lookout as Johnson of the Fletcher. Lundquist, the engineer of the West Brooklyn, swore to slowing down and stopping, and a bell to go back, and that he continued to go back until his wheel was stopped by the collision. McKittrick, the fireman, testified that he heard the one bell to slow down, and afterwards the two bells to stop, and that through the port hole he saw the Fletcher coming rapidly; but, as he was looking through the port hole, his evidence in this regard is not very useful. He also testified to the two bells to go back. Ambrose, the superintendent of the ferry, testified to the broken woodwork on the West Brooklyn from a point about 45 feet aft of the stem to the wheel, which was about 70 feet from the stem. He stated that a number of arms and buckets were broken, and that the wheel was jammed on top in such a manner as to indicate that it was in backward motion at the time of the collision. One Crowley, who was a cable operator, accustomed to use that ferry route to reach his business, stated that the accident happened about 5 minutes of 8 o'clock, in which he is confirmed by members of the crew of the West Brooklyn. He states that some time before the accident the West Brooklyn slowed up on account of the thickening fog, and that he heard the bell on Governor's Island; that he changed his position for the purpose of looking out towards it, and that he suddenly saw the Fletcher coming from a point off the island, but on the starboard side of the West Brooklyn. He stated that she was coming fast, navigating towards the West Brooklyn; that there was no signal from the Fletcher; that the West Brooklyn had been blowing from the time of starting, and at a later period very often. He did not know about the West Brooklyn's speed at the time of collision.

It appears from this evidence that each boat claims to have been stopped in the water, with machinery reversed, for the purpose of going astern, and with little, if any, forward motion due to the momentum already acquired; that usual fog signals had been given, but that no signals of any nature were recognized as coming from the opposite boat, except as the Fletcher heard the one whistle from the

West Brooklyn, to which she responded. It is suggested that the lookout of the West Brooklyn could not have been as careful or efficient as that of the Fletcher, because the lookout on the Fletcher says he did hear one signal from the West Brooklyn, while the pilot of the West Brooklyn states that he heard no signal or whistle from the Fletcher. However, it may be that the whistle heard by the lookout and pilot of the West Brooklyn, which they stated sounded off their port bow, may have been the whistle which the Fletcher claims that she gave. But if each of these vessels was blowing fog whistles, as claimed by them (and it is inconceivable that they should have been navigating in the fog without them), it is very strange that, approximating the time of the accident, no more than one whistle should have been heard on either boat, save as the captain of the West Brooklyn claims that he heard two whistles from some vessel. If the rule is to be adopted that the evidence of what happens on a boat is preferable to the negative evidence of the witnesses on the opposite boat that such event did not happen, then it must be concluded that each vessel blew fog whistles with reasonable frequency, and that the duty was fully performed in that regard. There seems to be no proof of superior alertness on the part of the lookout on either vessel. It is true that the Fletcher had two lookouts, where the West Brooklyn had but one. Johnson, on the Fletcher, seemed to be a reasonably good lookout; but the evidence of Tiffany, and his manner of testifying, does not seem to indicate that he added much to Johnson's efficiency. If everything was done as each boat claims, and if each boat is to be regarded as being on its proper course to reach its proper destination, then the case would seem to fall within the decision of *The St. Louis*, recently made by the circuit court of appeals of this district (39 C. C. A. 261, 98 Fed. 750). No vessel can be adjudged liable unless there is a preponderance of evidence establishing her negligence, and the court is not convinced that either vessel committed any of the faults charged against her. If the West Brooklyn was moving through the water negligently at the time of the accident, why did not Mr. Barrie, who stated that he was in charge of his party, and was acting as lookout, discover the forward motion of that vessel? The evidence of Mr. Barrie and Lord Beresford corroborates the evidence of the crew of the Fletcher that she was not moving forward when the accident occurred. Their evidence, in connection with other evidence adduced by the Fletcher, shows that she was giving proper fog signals, although the master of the Fletcher greatly impaired the case of his vessel by his excessive statements on this subject. It is difficult to disbelieve the concurring evidence of the several witnesses of the West Brooklyn that she frequently sounded her whistle. It is urged that the West Brooklyn should have stopped when she first heard the first signal, rather than at the time of its repetition; but it is enough that she was proceeding very slowly and cautiously at the time the accident happened, and it is not understood to be the rule that a vessel must stop in a fog, and remain silent in the water, at the very instant she hears a fog signal from another vessel. After a careful consideration of the evidence and arguments, the court is inclined to

adopt the conclusion of Lord Beresford that it was "an ordinary accident that would happen and be very liable to happen in any fog, no matter how careful any captain may be or both captains may be." The libel and the cross libel should be dismissed, with costs to each party against the other.

THE CITY OF READING.

THE CITY OF DUNDEE.

(District Court, E. D. Pennsylvania. August 21, 1900.)

1. COLLISION—IMPROPER ANCHORAGE—FAULT OF PILOT.

An ocean steamship, brought up the Delaware river to Philadelphia at night by a pilot, and anchored, cannot be held in fault for a collision while at her anchorage because the pilot placed her outside the anchorage grounds set apart by the regulations of the port, which fact was unknown to her officers.

2. PILOTS—NEGLIGENT SERVICE—LIABILITY OF PILOTS' ASSOCIATION.

The Pilots' Association of the Bay and River Delaware, which is an unincorporated association of pilots, intended to further the interests of its members in various ways, but having no power to make contracts for pilotage service, its members acting individually in that matter, does not stand in the relation of principal as to such contracts, and is not liable for the negligence or fault of one of its members in the performance of a contract for his services.

3. COLLISION—FERRYBOAT AND ANCHORED VESSEL IN FOG.

Evidence held insufficient to establish fault on the part of a steamship anchored in the Delaware river at Philadelphia for a collision between a ferryboat and such vessel in a fog.

In Admiralty. Suit for collision.

John G. Lamb for the City of Reading.

Henry R. Edmunds, for the City of Dundee.

Flanders & Pugh, for Pilots' Association.

McPHERSON, District Judge. This is an action to recover damages for the injury caused by a collision that took place about 7 o'clock in the morning of September 18, 1899, between the ferryboat City of Reading and the steamship City of Dundee. The ferryboat is one of a line that plies upon the Delaware river between the cities of Camden and Philadelphia. On the morning in question the river was covered by a fog so dense that objects could not be distinguished at a distance of a few feet. The boat had safely made one round trip between Camden and Philadelphia, and had returned to Philadelphia upon the second trip. After leaving Camden her course was up the river to a point nearly opposite Chestnut street, and then across to the dock at the foot of that street. Leaving Chestnut street for Camden, her course was down the river close to the Pennsylvania shore until nearly opposite the Allan Line pier, and then across in a southeasterly direction to Kaighn's Point on the New Jersey side. As she crossed and recrossed the river on her first round trip, she heard bells from several vessels at anchor in the stream, but did not know that the City of Dundee was among them,

or was in the berth that she actually occupied. The steamship had come up the river during the previous evening, and had been anchored about 8 o'clock, by the pilot who brought her from the capes, nearly in the middle of the channel, not far above Washington avenue. She was, therefore, close to the course of the ferry from the pier of the Allan Line to Kaighn's Point. As the City of Reading proceeded down the river upon her second trip towards Camden she was blowing her whistle, and was moving at half speed. Her officers—the captain and the second pilot—were properly vigilant, a lookout was on duty, and nothing was left undone by the boat that seemed necessary to guard her safety. She continued down the river until she supposed herself to be at the proper point to change her course,—being guided in part by the ringing of the ferry bell at the slip upon the Camden side,—and then turned across the stream. She heard bells from vessels in her neighborhood, and knew that two or three, at least, were anchored not far away. The officers in charge of the boat believed that the bells were from vessels anchored above her, and, acting upon this belief, continued at half speed in the usual course across the river. The tide was ebb, and, before the boat had gone far, the lookout gave warning that there was something ahead. This proved to be the anchor chain of the Dundee, and almost immediately the bows of the steamship appeared through the fog, but it was then too late to avoid collision. The boat was carried by the ebb tide across the bows of the steamship, and suffered considerable damage.

The charge of negligence is based upon two allegations: First, the steamship is said to have been anchored where she had no right to be; and, second, it is also averred that she failed to give the proper signals, and therefore left the ferryboat in ignorance of her whereabouts. Concerning this second ground there is a good deal of testimony that is in some degree conflicting. On the part of the libellant, it proceeds mainly from persons upon the ferryboat, officers and passengers, who testify that they heard no ringing of bells, or, at all events, no adequate ringing of bells, upon the steamship. This testimony, however, is for the most part negative testimony; and when it is further considered that there is often much difficulty in locating the place from which sound comes in a fog, I have little difficulty in believing the positive testimony of the witnesses called on behalf of the steamship, who declare that she was giving due notice of her position in the stream by ringing proper bells at frequent intervals. I am unable, therefore, to sustain the charge that the steamship was negligent because she failed to give the customary signals. In my opinion,—if it be assumed for the moment that the steamship was not at fault in anchoring where the collision took place,—the injury to the ferryboat was an inevitable accident, for which neither herself nor the steamship should be held liable.

It remains to consider the charge of fault based upon the place of anchorage. It seems clear to me that the steamship should not be held liable for the collision, even if it should be conceded that the injury was caused by anchoring her in an improper place. It is true that her berth was outside of the anchorage ground set apart by the

regulations of the board of port wardens, and I have no doubt that the pilot who brought her from the capes knew these regulations, and also knew that he was anchoring the boat upon a forbidden ground; but I do not think that the steamship can be held liable for this conduct of the pilot, even if it be assumed to have been without sufficient excuse. The officers of the ship knew nothing of these regulations, and they could not be expected to run counter to the pilot's instructions. Whether the pilot himself was at fault under all the facts need not be considered in this proceeding. He is not individually a party, and the question of his blameworthiness is not now material, unless he was the agent of the other respondent, the Pilots' Association, so that his misconduct (if any existed) is to be attributed to his principal. Upon this point I agree with the counsel for the association that the relation of principal and agent did not exist. The pilot is a member of the association, but the association itself has nothing to do with the pilotage of vessels upon the Delaware river. It is an unincorporated society, intended to further the interests of the pilots, and in part to serve as a beneficial association; but it does not attempt to take charge of vessels, nor to conduct them safely between the capes and the city of Philadelphia. In the appropriate language of the brief:

"It is an association *inter sese*, and its objects are limited to the management of its pilot boats, and the division of the moneys received from its members according to their respective shares as set forth in its rules. It has no power to contract for pilotage service. The pilot offers himself and serves in his individual capacity, and is paid in that capacity. He has no power to bind any or all of his associates; his contracts, his acts of omission or commission, not relating to the purposes of the association. He is not engaged in the business of the association, but is a licensee of the states of Delaware and Pennsylvania, respectively, and governed by the laws of said states, respectively, as to his conduct and acts as a pilot."

I think, therefore, that, as the steamship was not at fault, and as the association was not liable for the conduct of the pilot, no fault has been shown entitling the libellant to recover.

It may, perhaps, be well to add a few words concerning libellant's averment—filed at the argument of the case—that the steamship was negligent in failing to keep an anchor watch. There is very little testimony on this subject, and I think the paucity of evidence is to be charged against the libellant, upon whom the burden of proof rested. Several witnesses from the steamship were examined, but the libellant did not go into this matter, so as to make the point clear. From the meager testimony, however, I am inclined to conclude that a watch was kept by the quartermasters that were on deck, although no watch may have been formally set; but, in any event, I am satisfied that the collision could not have been prevented even if the most vigilant watch had been on duty. The Elk (C. C. A.) 102 Fed. 697. The fog was too dense to permit the eyes to be of service, and the steamship (as I have already found) was giving the only notice possible by ringing her bells.

The libel must be dismissed, with costs.

THE WILLKOMMEN.

THE AUREOLE.

(District Court, E. D. Pennsylvania. August 20, 1900.)

Nos. 5, 6.

1. COLLISION—OVERTAKING VESSELS.

Evidence considered, and *held* to show that a collision between two steamships, one of which was attempting to pass the other, was due to the fault of the overtaking vessel, which, after passing, relying upon her greater speed, attempted too soon to cross the bows of the other.

2. SAME.

A steamship cannot be held in fault for reducing her speed and changing her course where another vessel, after overtaking and passing her, turns to cross her bows, and collision is certain if she maintains her speed and course, and where her action, although it does not prevent, in fact lessens, the force of the collision.

In Admiralty. Cross libels for collision.

Convers & Kirlin, for the Aureole.

Henry R. Edmunds, for the Willkommen.

McPHERSON, District Judge. On the 13th day of January, 1898, the British steamship Aureole and the German steamship Willkommen collided in the Delaware river, near the town of Newcastle, and both vessels were injured. The cross libels now under consideration are one result of the accident, each vessel charging the other with various negligent acts or omissions. The testimony discloses the contradictions usual in cases of this kind, each set of witnesses apparently holding a brief for their own ship. In my opinion, the facts are as follows:

Both vessels, fully loaded with crude oil in bulk, were at anchor opposite Marcus Hook, in the Delaware river, on the day in question. About noon both weighed anchor, and began the voyage down the stream, the Willkommen being a considerable distance in the lead. The day was clear, the tide at flood, the wind fresh from the west or northwest, and both ships were properly manned and equipped. A pilot was in charge of each vessel, and her captain, with two or three subordinate officers, was also on duty upon the bridge. Competent steersmen were in charge of the wheel, and the steering gear was in good order. The Aureole was the speedier boat, and desired to pass the Willkommen as soon as circumstances would permit. About 2 o'clock the attempt to pass was made at a point where the channel was about 600 feet wide. No signal was given by either vessel, but both knew that the passing was about to be undertaken, and neither asserts that the resulting collision was in any degree due to the failure to give the usual preliminary notice. The Aureole is a steel ship of 2,553 tons net register, 345 feet long, 46 feet in the beam, and was drawing about 25 feet aft, and 23 feet forward. The Willkommen is also of steel, 1,999 tons net register,

325 feet long, 41 feet in the beam, and was drawing about 24 feet aft and 22 feet forward. The Willkommen was on the western side of the channel, a little to the east of the ranges, abundance of room to the eastward being available for the overtaking ship. As the Aureole came up, she changed her course—having been following nearly astern—so as to pass the Willkommen on the east or port side of that ship. Both vessels were going at full speed, and the Aureole maintained this speed until the collision took place; but the Willkommen slowed down to half speed as the bow of the Aureole came abreast of her beam, and soon afterwards stopped her engines, and went back full speed as the imminent danger of a collision became apparent. The collision was not averted, however, and the vessels came together with a good deal of violence, the side of the Willkommen near the port bow striking the starboard side of the Aureole a glancing blow near the stern. Both ships were so much injured that they were obliged to return to Philadelphia for repairs, before they were able to proceed upon their respective voyages.

The question for decision is, to whose fault was the collision due? Upon this point the testimony is in hopeless conflict, and I can do no more than adopt what seems to me the reasonable and probable explanation of the contact. The Aureole's theory is that the two vessels were proceeding upon substantially parallel courses at a distance of 300 feet apart, until the bridge of the Aureole had reached a point opposite the bow of the Willkommen; and that, for some reason not apparent, and not yet explained, the Willkommen then sheered suddenly towards the Aureole, and did the damage complained of. To my mind, this theory is incredible. If the vessels had been 300 feet apart, going upon parallel courses, and if they were still 300 feet apart when the bridge of the Aureole was opposite the bow of the Willkommen, the latter ship could not possibly have crossed the intervening space at an angle,—being the slower boat, and her engines moving at only half speed,—and have delivered the blow in question. The Aureole must inevitably have passed out of danger before her course could have been reached by the Willkommen. The other theory is, I think, much the more probable, namely, that the Aureole was attempting to pass at a distance not greater than 75 or 100 feet, and that, relying upon her greater speed, she undertook to cross the bows of the Willkommen, but changed her course too soon, and thus brought about the injury. This theory explains, and fully justifies, the Willkommen's change of speed and course. To have held her speed and course, when it became apparent that a collision was dangerously near, would have probably sunk the Aureole; and certainly no rule requires speed and course to be maintained when such a result would have been produced.

I have not discussed the testimony in detail. It would be profitless to point out the contradictions between the witnesses, or to criticise their accounts of what took place. An attentive reading of the evidence has satisfied me that the weight of probability is in

favor of the Willkommen's contention, and I have found the facts in accordance with this view.

The libel filed by the Aureole must be dismissed, with costs. In the other case a decree will be entered in favor of the Willkommen.

THE DEAN RICHMOND.

(District Court, E. D. New York. July 16, 1900.)

1. COLLISION—MOVING AND MOORED VESSELS—PRESUMPTION OF FAULT.

A collision between a moving vessel and one moored raises a presumption of fault on the part of the moving vessel which imposes upon her the necessity of explanation of the presumed culpability.

2. SAME—VESSEL LYING AT END OF PIER—NEW YORK CHARTER PROVISION.

Section 879 of the New York City charter, relating to the mooring of vessels at the ends of piers, does not relieve a moving vessel from liability for collision with a vessel so moored, which did not unduly obstruct navigation, and where the moving vessel was not seeking entrance to an adjoining slip.

In Admiralty. Suit for collision.

Wilcox, Adams & Green, for libelant.

William P. Prentice, for claimant.

THOMAS, District Judge. At about half past 6 o'clock on the morning of June 27, 1899, the canal boat H. A. Peck was made fast outside the canal boat Ada, which was lying abreast of pier 33 in the North river. The Peck had been in this position about half an hour, and was awaiting an opportunity to find a berth in the slip of which such pier was the southern boundary. The slip between piers 33 and 32 is 98 feet wide, pier 32 is 64.89 feet wide, the slip between piers 32 and 31 is 171 feet wide; making a total distance of 333.89 feet from the south side of pier 33 to the north side of pier 31. The Peck was about 17 feet wide, and the Ada was about 20 feet wide, so that together they occupied 37 feet of the water way adjoining the head of pier 33. The stern of each boat projected somewhat, but not considerably, into the slip south of pier 33. The Dean Richmond, a steamboat 375 feet long, plying between Albany and New York, on the date and at the hour named passed the Peck, and approached the northwest corner of pier 31, with the intention of casting a line from her bow to such point on such pier, which line should be carried to the stern of the Richmond, for the purpose of working the vessel ahead, and thereby drawing her stern into the slip. Before the line was made fast and the boat worked forward, the stern of the Richmond, which she claims was 75 feet away from the Peck, drifted rapidly towards the Peck, striking the stern of the latter boat, and producing the injury for which the owner of the Peck files the present libel. There is evidence that it was not an unusual thing for boats to lie at rest at pier 33, and that the Richmond had found boats in that position, but that she had been so managed as to escape collision with them; and it is contended that

all suitable care was taken in the present instance, and that the collision was due to a very unexpected carrying of her stern towards the Peck on account of a sudden swirl of the ebb tide. It does not satisfactorily appear that there were any unusual conditions on the morning in question. The wind was light from the west, and there were no unaccustomed phenomena attending the ebb tide. It appears that the claimant was entitled to the use of the southern portion of the slip lying between piers 32 and 33, but it was her intention on the present morning to use the slip between piers 32 and 31. If the bow of the Dean Richmond were lying against the northwest corner of pier 31, her stern would be about even with the northern side of pier 33. Her evidence shows that she passed about 50 feet away from the outer side of the Peck. The captain of the Peck contends that the collision occurred while the Dean Richmond was passing, but the latter vessel insists that the accident arose in the manner above described.

Provided the Peck was rightfully in her position, a presumption of negligence against the Richmond arises from the fact of a collision with a moored vessel, and imposes upon the offending vessel the necessity of explanation of the presumed culpability. *The Nellie*, 7 Ben. 497, Fed. Cas. No. 10,093; *The Mary Powell* (C. C.) 36 Fed. 598; *The Michigan* (C. C.) 52 Fed. 501, 505; *Henderson v. City of Cleveland* (D. C.) 93 Fed. 844; *The Canima* (C. C.) 32 Fed. 302. The explanation given by the Richmond is that she used proper care, but that the sudden energy of the tide resistlessly drew the stern of the Richmond about, and produced the accident. This explanation does not appeal with much force to the court. She was accustomed to making her slip under similar circumstances. There was no unusual disturbance of the water, and the wind was slight. The failure to execute her wonted maneuver for the purpose of entering her slip on the present occasion was due, undoubtedly, to some error of calculation. It would be quite unsuitable to excuse a skillful pilot for his failure, under the present circumstances, to escape a boat lying at the end of a pier of which he was quite aware.

It is further urged by the claimant that the Peck was lying off the end of the pier, in violation of section 879 of the New York City charter, relating to the mooring of vessels at the ends of piers. Some construction of that statute was attempted by this court in *The F. W. Devoe* (D. C.) 94 Fed. 1019, and *The Cincinnati* (D. C.) 95 Fed. 302. In the latter case it was said, "The statute undoubtedly intends to prevent the use of piers forming the boundaries of slips to or from which another vessel seeks entrance or exit." The Richmond, in the present case, was not seeking entrance to a slip bounded by pier 33. In passing such pier she had the same, and no greater, rights than any other vessel. The Peck was authorized to lie where she did, and her act was neither wrongful nor was she guilty of any negligence contributing to the accident. It may be that it would be negligent for boats in too great numbers to lie one beside the other off the end of a pier, where there was considerable traffic, but the court is not prepared to say that two canal boats constitute an un-

due obstruction of the water way. The Dean Richmond had the same rights as any other vessel navigating the river. She may not justly claim greater privileges or considerations. She committed an act which, unexplained, condemns usual vessels, and her explanation is entirely unacceptable.

It is urged that it was the duty of the master of the Peck to move her from the end of the pier, so as to avoid the accident. But the advocate for the claimant emphatically states that the accident was unexpected, and it certainly happened without premonition, so far as the master of the Peck was concerned, and the case is not brought within *The Etruria* (D. C.) 88 Fed. 555. The libellant should have a decree for damages and costs.

THE GAMMA.

(District Court, E. D. New York. July 31, 1900.)

COLLISION—STEAM NAVIGATION ON CANAL—CARE REQUIRED.

A steam canal boat, with three other steel boats heavily laden in tow, was passing eastward through the Erie Canal, and on rounding a bend, which obscured the view ahead, came in collision with a horse boat, which was proceeding westward, and which had passed over towards the berme bank, and stopped about 350 feet from the bend, to allow overtaking boats to pass her. *Held*, that the steam vessel was in fault for the collision in moving around the bend at such speed that she could not be stopped in such distance, and especially for failing to give any signal of her approach before entering the curve, which, though not required by any conventional rule, was required by custom, which should be held obligatory.

In Admiralty. Libel for collision.

Wilcox, Adams & Green, for libellant.

Bassett & Williams, for claimant.

THOMAS, District Judge. At about 8:45 p. m., September 4th, the canal boat Morse, closely attached to and preceding a consort, was going westward on the Erie Canal. At a point where a turn intercepted the forward view beyond 350 feet, the Morse dropped over towards the berme bank to allow two overtaking boats to pass. During this undertaking the Gamma, a steel steamer drawing two steel boats and pushing one, all loaded with grain, came around the curve, and a collision occurred between the Morse and the head boat. The libellant claims that the head boat was run into the Morse, while the Gamma contends that her captain saw the Morse some 350 feet away, and immediately reversed, and ran the head boat into the bank, and that her tow was at once run ashore; but that the horses of the Morse were whipped up, and thereby the Morse was brought in collision with the stranded head boat. The preponderance of evidence leads to the conclusion that the accident was caused by the forward motion of the Gamma, rather than that of the Morse, although the horses of the Morse may have been started up in apprehension of a collision, to aid the starboard direction which was attempted to be

given to the Morse. It is considered that the Morse did not unduly occupy the water way, and that no rule of practice or prudence condemns her for stopping when she did to allow the overtaking boats to pass. The more serious question relates to the manning of the Morse and her consort, and the alertness of those in charge. There were two persons aboard, and but one seems to have been on immediate duty when the Gamma came in view. But the Morse was practically at rest, and the failure of the second man to be in full readiness to act does not condemn the Morse, inasmuch as it does not appear that such unreadiness contributed to the accident. The passage of the overtaking boats was proceeding successfully until the Gamma disturbed the undertaking. The accident is attributable solely to the Gamma. There was no conventional rule requiring her to sound a whistle when approaching a curve. But such is the practice, and the practice should be obligatory. In the present case four great steel vessels, heavily laden with grain, impelled by steam power located in the second boat, were occupying a water way not primarily intended for such navigation. The momentum of the mass was highly dangerous to any craft with which it should come in collision. The danger arising from this new means of propulsion on the canals may be met and avoided by the use of care. Ordinary prudence would require that in approaching a bend in a canal, of an available width for passing of about 60 feet, notice of their oncoming should be given by steam-propelled boats, inasmuch as the conditions found in the present case, or others equally embarrassing, might be expected. The evidence enforces the conclusion that no such warning was given, and the Gamma and her accompanying boats found herself confronted by the four canal boats, and that she considered that there was not sufficient opportunity for passing. The jeopardy or apprehension was so great that, according to the claimant's evidence, the whole fleet was run onto the bank. When a navigator, meeting with usual and normal conditions of navigation, is obliged with precipitation to strand his vessel to prevent a collision, the act itself, in a degree, points to the absence of due care on his part. The conviction is that the Gamma did not approach the curve with sufficient caution. She was not under control as regards speed; the vigilance of her lookout is not shown; and in any case she did not give proper signals. The truth concerning the collision cannot be known with certainty, but the probabilities turn the decision against the Gamma. There should be a decree accordingly, with costs.

PLATT v. MASSACHUSETTS REAL-ESTATE CO. et al.

(Circuit Court, D. Massachusetts. July 26, 1900.)

No. 1,413.

1. JURISDICTION OF FEDERAL COURTS—DISTRICT OF BRINGING SUIT—WAIVER.

The provision of section 1 of the federal judiciary act of 1887-88 that, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant, does not affect the general jurisdiction of the court, where the requisite diversity of citizenship appears, but creates a personal exemption in favor of a defendant, which he may waive by agreement or consent, and which is waived by his entering a general appearance in a suit brought in a district other than either of those specified.

2. SAME—CORPORATIONS—CONSENT TO BE SUED IN ANOTHER STATE.

The compliance by a corporation with a statute of another state requiring a foreign corporation, as a condition of doing business therein, to appoint an attorney in that state upon whom all lawful processes in any action or proceedings against it may be served, and to agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on the company, does not make such corporation a citizen or resident of the state, or constitute an agreement or consent that it may be sued in a federal court of that district by a plaintiff who is a resident of another district, where the jurisdiction is founded only on diversity of citizenship, but it may insist on the right given by the judiciary act of 1887-88 to be sued only in the district where it is incorporated, or that in which the plaintiff resides.

In Equity. On motion to dismiss for want of jurisdiction.

Robert M. Morse, Wm. M. Richardson, and Wm. M. Stockbridge,
for complainant.

Jabez Fox, for defendants.

COLT, Circuit Judge. This is a bill brought in the United States circuit court for the district of Massachusetts by a stockholder, in behalf of himself and other stockholders, against the Massachusetts Real-Estate Company, a corporation incorporated under the laws of the state of Maine, and three individuals, two of whom are officers and trustees of the company, praying for a receiver, an account, and, in substance, for the winding up of the company. From the frame of the bill it is manifest that the corporation is a necessary and indispensable party. The plaintiff is a citizen of Connecticut, the defendant corporation is a citizen of Maine, and the other defendants are citizens of Massachusetts. The corporation has appeared specially, and moves to dismiss the case for want of jurisdiction on the ground that the suit is improperly brought against it in the district of Massachusetts, instead of the district of Maine. As the suit is between citizens of different states, there is no question of the general jurisdiction of the court under section 1, c. 373, of the act of March 3, 1887, as corrected by the act of August 13, 1888, c. 866 (25 Stat. 434). The only question is whether the plaintiff is not prohibited from bringing suit in the district of Massachusetts against the defendant corporation by reason of the provision in section 1 which declares that, "where the jurisdiction is founded only on the fact that

the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." While diversity of citizenship is an indispensable condition of jurisdiction of the federal courts in this class of cases, the particular district in which the action may be brought is a matter of personal privilege, which the defendant may insist upon or may waive, at his election. *Construction Co. v. Gibney*, 160 U. S. 217, 219, 16 Sup. Ct. 272, 40 L. Ed. 401; *Ex parte Schollenberger*, 96 U. S. 369, 378, 24 L. Ed. 853; *Gracie v. Palmer*, 8 Wheat. 699, 5 L. Ed. 719; *Toland v. Sprague*, 12 Pet. 300, 330, 9 L. Ed. 1093; *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 206, 13 Sup. Ct. 44, 36 L. Ed. 377; *Railway Co. v. Saunders*, 151 U. S. 105, 14 Sup. Ct. 257, 38 L. Ed. 90; *Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98; *Express Co. v. Todd*, 12 U. S. App. 351, 5 C. C. A. 432, 56 Fed. 104.

In *Construction Co. v. Gibney*, Mr. Justice Gray, speaking for the court (page 219, 160 U. S., page 273, 16 Sup. Ct., and page 401, 40 L. Ed.), said:

"Diversity of citizenship is a condition of jurisdiction, and when that does not appear upon the record the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon or may waive, at his election."

In *Ex parte Schollenberger*, Chief Justice Waite, speaking for the court (page 378, 96 U. S., and page 588, 24 L. Ed.), said:

"The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

This personal privilege of the defendant may be waived by entering a general appearance in the case (*Construction Co. v. Gibney*, supra), or by agreement or consent (*Ex parte Schollenberger*, supra). In the case at bar the corporation has not entered a general appearance, and the only question is whether it has waived its privilege by agreement or consent. Under St. Mass. 1884, c. 330, the corporation, as a condition of doing business in the state, appointed the commissioner of corporations its attorney "upon whom all lawful processes in any action or proceedings against it may be served," and agreed that "any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on the company." The judiciary act of September 24, 1789 (chapter 20, § 11), provided, in cases where jurisdiction is founded on diversity of citizenship, that no civil suit should be brought in any other district than that whereof the defendant is an inhabitant, "or in which he shall be found at the time of serving the writ." 1 Stat. 78, 79. This provision was substantially re-enacted in all the succeeding judiciary acts down to the acts of 1887 and 1888. In these last acts

the alternative that a person may be sued in the district "in which he shall be found" was eliminated; so that, as the law stands at present, suit can only be brought in the district in which the plaintiff or the defendant is an inhabitant and resident. Under the earlier act of March 3, 1875 (18 Stat. 470), it was held that, where a corporation transacted business in a foreign state, and appointed a general agent upon whom process could be served, pursuant to a local law, it thereby consented to be "found" there, and the federal courts acquired jurisdiction. *Ex parte Schollenberger*, *supra*; *Insurance Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379; *In re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991. In *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942, the question arose whether, under the acts of 1887 and 1888, a corporation doing business in another state, and authorizing service of process upon an agent in that state as required by a state statute, thereby agreed to become a citizen or inhabitant of that state, and so subjected the corporation to the jurisdiction of the circuit court of the United States. It was held that such agreement did not confer jurisdiction; that, while such agreement subjected the corporation to jurisdiction so long as the judiciary acts allowed a corporation to be sued in the district in which it was "found," it did not subject the corporation to jurisdiction under the acts of 1887 and 1888, which restrict the bringing of suits to the district of the residence of the plaintiff or of the defendant. Mr. Justice Gray, in delivering the opinion of the court (page 207, 146 U. S., page 46, 13 Sup. Ct., and page 945, 36 L. Ed.), said:

"Moreover, the supposed agreement of the corporation went no further than to stipulate that process might be served on any officer or agent engaged in its business within the state. It did not undertake to declare the corporation to be a citizen of the state, nor (except by the vain attempt to prevent removals into the national courts) to alter the jurisdiction of any court as defined by law. The agreement, if valid, might subject the corporation, after due service on its agent, to the jurisdiction of any appropriate court of the state. *Insurance Co. v. French*, 18 How. 404, 15 L. Ed. 451. It might likewise have subjected the corporation to the jurisdiction of a circuit court of the United States held within the state, so long as the judiciary acts of the United States allowed it to be sued in the district in which it was found. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Insurance Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379; *In re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991. But such an agreement could not, since congress (as held in *Shaw v. Mining Co.* [145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768]) has made citizenship of the state, with residence in the district, the sole test of jurisdiction in this class of cases, estop the corporation to set up noncompliance with that test when sued in a circuit court of the United States."

The rule laid down in *Southern Pac. Co. v. Denton* has been affirmed in *Re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402, and *Railway Co. v. Gonzales*, 151 U. S. 496, 502, 14 Sup. Ct. 401, 38 L. Ed. 248. There is no substantial difference, so far as relates to the present question, between the statute of Massachusetts and the statute of Texas, which was under consideration in *Southern Pac. Co. v. Denton*. Under both statutes the corporation agrees to appoint an agent upon whom all lawful processes may be served. The agreement did not attempt to alter the jurisdiction of any court as defined by law. If the law was that a corporation may

be "found" in a foreign state, then lawful service could be there made upon it. But under the acts of 1887 and 1888 such service was not authorized, and the only lawful service which could be made was in the district of which the corporation was an inhabitant and resident. If the agreement had been that the corporation consented to become a citizen and inhabitant of another state for the purpose of the service of process upon it, the case would be different. Such an agreement might be held as a waiver of its privilege to be sued in the district where it was incorporated.

Under the decision of the supreme court in *Southern Pac. Co. v. Denton*, I must hold that the objection of the defendant corporation to the jurisdiction of this court is well taken, and it follows that the bill should be dismissed.

NORTHERN PAC. RY. CO. v. CUNNINGHAM.

(Circuit Court, D. Washington, S. D. August 28, 1900.)

1. JURISDICTION OF FEDERAL COURT—AMOUNT IN CONTROVERSY.

In a suit to enjoin the defendant from grazing stock on lands of the complainant, the amount of damage already done is not the amount in controversy for jurisdictional purposes, but the value of the right to be protected, and, where it reasonably appears that the injury which will result to complainant if the defendant is not enjoined will exceed \$2,000, it is sufficient to sustain the jurisdiction of a federal court.¹

2. INJUNCTION—GROUNDS—CONTINUED TRESPASSES.

A court of equity has jurisdiction to grant relief by injunction against continued trespasses committed by the pasturing of sheep upon lands owned by the complainant which are valuable only for grazing purposes, where it is shown that such pasturing results in the destruction of the grass and the permanent injury of the land.

3. SAME—GRAZING ON UNINCLOSED LANDS.

In a suit to enjoin the defendant from pasturing sheep upon the uninclosed lands of the complainant it appeared that complainant was the owner, through a grant from congress, of a large number of odd-numbered sections of land, the intervening even-numbered sections being still public lands of the United States. Under the laws of the state, defendant had no right to graze his sheep on the lands of the complainant. *Held*, that the difficulty encountered by defendant in keeping his sheep on the government lands, where he had the right to graze, owing to the section lines being unmarked, was one which he must overcome at his peril, and did not enlarge his rights nor deprive the complainant of the right to an injunction, but that defendant would not be enjoined from driving across complainant's lands to reach the government sections to the same extent that an owner of the even-numbered sections would have the right to a way of necessity.

This is a case in equity to enjoin the defendant from pasturing sheep on uninclosed grazing land owned by the complainant. Argued and submitted on final hearing. Decree for complainant.

Crowley & Grosscup, for complainant.

A. S. Bennett, for defendant.

¹ Jurisdiction of circuit courts as determined by amount in controversy, see notes to *Auer v. Hombard*, 19 C. C. A. 75, and *Shoe Co. v. Roper*, 36 C. C. A. 459.

HANFORD, District Judge. A decision in this cause upon exceptions to portions of the defendant's answer will be found reported in 89 Fed. 594. Since the rendition of that decision testimony has been taken in behalf of both parties, and the case has been argued and submitted for final determination upon the merits. By the documents and evidence introduced the complainant has established its title to more than 12,000 acres of land situated in Yakima and Klickitat counties, which are of no value whatever except as pasture lands. Before the bringing of large bands of horses and flocks of sheep into the vicinity of these lands, a nutritious grass, commonly spoken of as "bunch grass," valuable for feeding all kinds of domestic animals, was produced in moderate abundance. The soil, however, is light and sandy, and the country is open and windy; the breaking of the surface crust by large numbers of animals trampling it loosens the soil, so that it is easily lifted and carried away by the prevailing winds, and the sweeping away of the soil leaves the roots of the grass exposed to the action of drought and frost, so that it perishes. Unless due care is observed, pasturing causes permanent destruction of the grass in the manner I have indicated, rendering the land valueless; and the evidence is convincing that between the summer of 1896 and the spring of 1898 the defendant did drive his flocks of sheep over the lands in controversy, and permitted them to graze upon the same to such an extent as to work irreparable injury to several different sections; and by his defense in this suit the defendant has shown a disposition and a purpose to continue trespassing in the same manner, unless he shall be restrained by judicial process.

The defendant disputes the jurisdiction of this court on the ground that the evidence does not clearly show that the damages which may be caused by the defendant's trespasses will amount to \$2,000. The complainant asks protection for more than 12,000 acres of grazing lands from further injury by a continuing trespass. The evidence does not enable me to fix precisely the value of the right which is the subject of controversy, but the amount of damage which has been done certainly is not the measure of value. The evidence shows that the lands in their natural condition are reasonably worth from 75 cents to \$1.50 per acre for grazing purposes. After being pastured, as some of the sections have been, by the defendant's sheep, they are of no value for any purpose, and the owner must pay annual taxes, without having any beneficial use of ownership, or abandon its property. Considering the number of acres involved, I am satisfied that the value of the protection which the complainant asks for is more than \$2,000; and it is not necessary, in order to sustain the jurisdiction of the court, for the complainant to show the amount in controversy with any greater accuracy.

The next position of the defense is based upon a denial that the case is cognizable in a court of equity, and it is contended that the complainant should be remitted for relief to an action for damages in a court of law. An action for damages does not afford adequate relief to an owner of real estate for continuing trespasses destructive of his property. Courts of equity have always been open to suitors seeking preventive relief against wrongdoers who persist in commit-

ting trespasses of the kind which do permanently impair the value of real estate, whether the injury consists in the removal of minerals from mining lands, cutting down trees, digging the soil, or other kinds of mischief; and there is no reason for denying to the owner of lands valuable only for its native grass such relief in the form of an injunction against the unlawful pasturing of sheep, when it appears that the sheep will destroy the grass. 3 Pom. Eq. Jur. §§ 1356, 1357; 1 High, Inj. § 724; Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; Smith v. Bivens (C. C.) 56 Fed. 352; Schneider v. Brown (Cal.) 24 Pac. 715; Cattle Co. v. Chipman (Utah) 45 Pac. 348; Kellogg v. King (Cal.) 46 Pac. 166.

As to the question as to the defendant's right to permit his sheep to roam over the uninclosed lands of the plaintiff, his counsel appears to acquiesce in the decision heretofore rendered by this court, which was to the effect that an injunction should issue forbidding the defendant to herd his sheep upon the complainant's lands, but that the injunction should not be so broad as to prevent the defendant from taking his sheep upon the vacant uninclosed public lands of the United States for grazing. 89 Fed. 594. The case presents this difficulty: The complainant's lands are all odd-numbered sections, which were granted by act of congress to the Northern Pacific Railroad Company, and most of the alternate even-numbered sections are public lands of the United States, upon which the defendant has the right, in common with other citizens, to pasture his sheep; but the public lands upon which the defendant has a license to go are inaccessible without passing over some part of the odd-numbered sections, and the lines separating the odd sections from the even are not marked. From consideration of the evidence, I am convinced that it will be extremely difficult, but not impossible, for the defendant to take his sheep upon different even-numbered sections, without permitting them to graze upon the odd-numbered sections. The difficulty, however, is for the defendant to contend with. In principle the court should not interfere with his right to pasture his sheep upon the public lands while the government permits him to do so. On the other hand, the laws of the state of Washington make it unlawful for him to permit his sheep to graze upon the lands owned by the complainant. The court will leave him to overcome the difficulty if he can. The interlocutory injunction will be modified, and made perpetual. By its terms the defendant will not be enjoined from driving his sheep across the complainant's lands to pasture them upon the even-numbered sections, but he will not be permitted to use any more of the complainant's lands than the owner of the even-numbered sections could rightfully make use of as a way of necessity. He cannot drive his sheep across the middle of an odd-numbered section, nor permit them to graze upon it. If he attempts to avail himself of the right to cross complainant's land at all, and fails for any reason to prevent his sheep from grazing or doing greater damage than they would if being driven in a lane along the boundary line of the complainant's lands, he will have to suffer the consequences of violating the court's injunction.

LOS ANGELES CITY WATER CO. v. CITY OF LOS ANGELES.

(Circuit Court, S. D. California. August 13, 1900.)

No. 954.

1. FEDERAL COURTS—JURISDICTION—CONSTITUTIONAL QUESTIONS.

A federal court has jurisdiction of a suit by a water company to enjoin the enforcement of a municipal ordinance fixing rates of charge for water, on the ground that it impairs the obligation of a contract between the city and the company, although the contract, as set out in the bill, expired by its terms prior to the passage of the ordinance, where it is alleged to be still in force.

2. MUNICIPAL CORPORATIONS—CONTRACT WITH WATER COMPANY—TERMINATION.

Under a contract with a city to reconstruct its water works and operate the same for a term of 30 years, a water company during the term practically constructed an entirely new and greatly enlarged plant, increasing the distributing system from one having 6 miles of wooden pipes to one with 320 miles of iron pipes. The contract required the company to furnish water free for all municipal, fire, and school purposes, and to supply the inhabitants of the city with water for domestic purposes at rates not exceeding those therein fixed, and for that purpose to make all reasonable extensions of its system. It further provided that at the end of the term the plant should be returned to the city, which should pay the value of all improvements made therein; the amount to be agreed upon or fixed by arbitrators. At the expiration of the term the city did not pay or tender the value of such improvements, which had not been agreed upon or satisfactorily determined; but it continued to require the company to make extensions, and to furnish water free for public uses, the same as before. *Held*, that so long as the company complied with such requirements, and until the city terminated the contract by making or tendering the required payment, its provisions for the benefit of the company remained in force, and the city could not, without unconstitutionally impairing its obligation, reduce the rates which the company was thereby authorized to charge for water supplied to private consumers.

3. INJUNCTION—GROUNDS.

A water company is entitled to an injunction to restrain a city from enforcing an ordinance reducing its rates of charge in impairment of a contract, and subjecting the company and its officers and employees to penal actions for its violation, and also to restrain private persons from instituting threatened prosecutions under such ordinance.

In Equity. On exceptions and demurrers to original and supplemental bills.

J. S. Chapman, John Garber, and Stephen M. White, for complainant.

Walter F. Haas and Lee & Scott, for defendant.

ROSS, Circuit Judge. This is a suit in equity, the chief object of which is the annulment of an ordinance adopted by the defendant city on the 26th day of February, 1900, establishing the rates at which the complainant shall furnish water to its consumers. To the bill certain exceptions were filed by the defendant, as, also, a demurrer. Subsequently a supplemental bill was filed by the complainant, to which certain consumers of the water within the city were also made parties; and they, together with the defendant city, filed certain exceptions to the supplemental bill, as well as a demurrer thereto. The case now comes before the court on these

pleadings. A similar ordinance adopted by the defendant city in February, 1897, was attacked by the complainant in a suit tried in this court before Judge Wellborn, and resulted in a decree annulling the ordinance on the ground that the rates so established were lower than those provided for by a contract entered into on the 22d day of July, 1868, by and between the defendant city, then known as the "Mayor and Common Council of the City of Los Angeles," on the one part, and John S. Griffin, Prudent Beaudry, and Solomon Lazard, on the other part, to whose rights and obligations under the contract the complainant company almost immediately thereafter succeeded. (C. C.) 88 Fed. 720. On appeal that decree was affirmed by the supreme court. 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. —. Each of the opinions in that case shows that the validity and effect of the contract of 1868 were carefully considered, and the result of that litigation is plainly conclusive against the validity of the similar ordinance of February 26, 1900, now in question, if the provision of the contract of 1868 to the effect that the city shall not reduce the water rates below those then charged continues in force. On the part of the city it is denied that that provision of the contract in 1868 was in force at the time of the commencement of this suit, and that is the principal question in the present case. The demurrers, of course, confess the truth of all facts properly alleged in the original and supplemental bills. From these it appears that in August, 1865, the city of Los Angeles, through its then mayor and common council, thereto authorized by ordinance, entered into a contract with one Jean Louis Sainsevaine, by which the city leased to Sainsevaine "the public water works of Los Angeles City," so called, with all and singular the rights of way and water, easements, wheels, flumes, pipes, canals, reservoirs, and appurtenances thereunto belonging and appertaining, with the further right to build necessary and suitable reservoirs on vacant city lands for use in connection with said water works, and with the further right to sell and distribute water through, by, and from said works for the benefit of the said Sainsevaine" for the period of four years from February 8, 1865, with the privilege on his part to continue the agreement and lease for the further period of six years after the expiration of the four years, he giving written notice to the city of his intention to avail himself of the extension at least three months before the expiration of the original term. The obligations imposed on Sainsevaine by that instrument, and by him assumed, were: (1) To give a bond in a specified amount for the faithful performance of the contract on his part. (2) To pay to the city, as rent of the leased property and privileges, \$1,000 yearly, in quarterly installments of \$250 each. (3) To supply the city, so far as pipes "have been or shall be laid," with pure, fresh drinking water for all domestic purposes, and to keep constantly on hand, in reservoir or reservoirs, a sufficiency of such water for a 30-days supply for those purposes. (4) To replace or repair such of the pipes as should burst or leak, as soon as practicable. (5) To pay all the costs of repairs, enlargements, extensions, and preservations of the water works and appurtenances. (6) To furnish water free of charge to

the public school houses in the city and to city hospitals, "where the same are adjacent to such works and any line of pipe," and also for the irrigation of trees and shrubbery in the lots of school houses and in the public plaza; and to furnish water in cases of fire free of charge, whether the conflagration be of public or private property. (7) In no case to interfere with the general irrigation of the city from the public zanja, nor with the laws and ordinances governing the same. (8) In case of the extension of the lease for the additional term of six years, to execute to the city a new bond for his faithful performance of the agreement. (9) Upon the expiration of the agreement, or its continuance, as the case should be, to surrender or deliver to the city peaceable possession of the water works, rights of way, water, pipes, flumes, machinery, wheels, canals, keys, and other appurtenances thereunto belonging, including all enlargements, extensions, alterations, and additions made thereon or there-to during the tenancy, in good order and condition, reasonable use and wear excepted, and free of all debt, charges, and incumbrances. The lease also contained on the part of the city a concession to the lessee of the right to lay pipe underground in all the public streets of the city, and of taking them up when necessary, and the further covenant on the part of the city not to grant any franchise to any other person or corporation for similar purposes. In July, 1868, the contract which forms the basis of the present suit was executed; the Sainsevaline lease having been previously surrendered and canceled. It bears date July 20, 1868, but was not executed until the 22d day of that month, at which time it was authorized and confirmed by an ordinance of the city. The water works therein referred to consisted at that time of a water wheel placed in the Zanja Madre, below the point of its diversion of water from the Los Angeles river, which wheel was used for lifting the water from the zanja into a wooden flume, by which it was conducted to a pipe system consisting of about six miles of wooden pipe, which had been laid in the streets of the city, and from which the then population of about 5,000 people received water for domestic purposes. The contract of 1868 is as follows:

"This agreement, made and entered into this the 20th day of July, A. D. 1868, between the corporation known as the 'Mayor and Common Council of the City of Los Angeles,' and their successors in office, for and on behalf of said city of Los Angeles, party of the first part, and John S. Griffin, Prudent Beaudry, and Solomon Lazard, residents of the city and county of Los Angeles, state of California, party of the second part, witnesseth: That for and in consideration of the yearly payment of one thousand five hundred dollars per annum in gold coin, such payments to be made upon the first day of January of each year, after the signing and approval of this ordinance and contract, until the conclusion of the term of this contract, and the further consideration that the said parties of the second part will surrender to the said party of the first part and cancel all claims they now hold against said city for repairs of said water works and for damages, amounting to the sum of eight thousand dollars, a little more or less, and for the further consideration that the said parties of the second part shall make the following improvements about, in, and upon the said water works at their own proper cost and expenses, to wit: Lay down in streets of said city twelve miles of iron pipes of sufficient capacity to supply the inhabitants of said city with water for domestic purposes, and shall erect, or cause to be erected, one hydrant, to be used as a protection

against fire, at one corner of each cross street of said city, where the water pipes now are or may hereafter be laid by virtue of this contract, and shall, within one year from the approval of this contract and ordinance, erect or cause to be erected an ornamental fountain upon the public plaza of said city, of such design as the mayor and common council shall direct, at a cost not to exceed one thousand dollars, and, shall, within two years from the approval of this contract and ordinance, construct, at their own expense, such ditches, flumes, or erect such machinery, in connection with said water works, as will secure to the inhabitants of said city a constant supply of water for domestic purposes, and shall construct reservoirs of sufficient capacity for that purpose. The said party of the first part, for the above consideration, and one dollar in hand paid, the receipt whereof is hereby acknowledged, hereby covenants and agrees with the said party of the second part, their heirs, executors, administrators, or assigns, to deliver and concede to the said parties of the second part, their heirs, executors, administrators, or assigns, the exclusive use, control, possession, and management of the Los Angeles City Water Works, so called, together with, all and singular, the pipes, flumes, wheels, and other personal property composing and appertaining to said water works, in any manner whatsoever, with all the rights, easements, and privileges, and covenants as described and contained in a certain instrument of lease executed by the mayor and common council of the said city of Los Angeles, of date October 16, A. D. one thousand eight hundred and sixty-five, to Jean L. Sainsevaline, for the period of thirty years from the signing and approval of this contract and ordinance, with the right to sell and distribute water for domestic purposes, and to receive the rents and profits thereof for their own use and benefit, except as hereinbefore provided, hereby giving and granting the said parties of the second part, their heirs, executors, administrators, or assigns, the right to lay pipes in any and all the streets of said city, and to dig and to make all necessary excavations for that purpose, and the right of way through, upon, and over land or street belonging to the said city of Los Angeles, with the additional right to take water from the Los Angeles river at a point above or near the present dam, provided, always, that the said parties of the second part, their heirs, executors, administrators, or assigns, shall at no time take from said river for the use of said water works more than ten inches of water, without the previous consent of the mayor and common council of said city, and that they will, within sixty days from the date hereof, select the point from which the water will be taken from said river. The said party of the first part hereby covenant and agree with the said parties of the second part, their heirs, executors, administrators, or assigns, that, at the expiration of the period of thirty years from the execution of this instrument, they will pay to the said parties of the second part, their heirs, executors, administrators, or assigns, the value of the improvements made in, about, and upon the said water works in pursuance of this contract; the same to be ascertained by arbitration, in case the parties cannot agree upon the value thereof; the said party of the first part and the parties of the second part, their heirs, executors, administrators, or assigns, to choose one man each, and the two men thus chosen to select a third man, and the judgment of the three men thus selected shall be final in the premises. And the said party of the first part hereby covenant and agree to make no other lease, sale, contract, grant, or franchise to any person or persons, corporation or company, for the sale or delivery of water to the inhabitants of said city for domestic purposes, during the continuance of this contract, always without prejudice to any rights already granted. And the said parties of the second part, their heirs, executors, administrators, or assigns, hereby covenant and agree with the said party of the first part that they will pay the sums of money at the time and in the manner hereinbefore mentioned and set forth, and cancel the claims hereinbefore mentioned and set forth, upon the signing and approval of this contract and ordinance by the proper parties thereto; that they will make the improvements hereinbefore mentioned and set forth, in the following manner, to wit: That they will replace all the wooden pipes now belonging to said water works within one year from the signing and approving of this contract and ordinance, and that they will extend said iron pipes as fast as the citizens desiring to be supplied with water for domestic purposes will agree to take sufficient water to pay ten per cent. per annum interest upon the cost

of extending such pipes through the streets now unsupplied with water; that they will, within one year, from the date hereof, place a hydrant, to be used as a protection against fire, at one corner of one street at each of the cross streets where the pipes are now laid down, and will erect hydrants at other street corners, according to the terms of this contract, as fast as the pipes are extended through the streets of the said city; that they will erect, or cause to be erected, an ornamental fountain upon the public plaza, of such design as the mayor and common council shall direct, within one year from the date hereof; that they will furnish water for the public schools, city hospitals, and jails free of charge, when the same are near the pipe, the city furnishing the necessary conduits for that purpose; that they will make all the improvements herein mentioned and set forth, and keep the same in repair, at their own cost and expense, for the said period of thirty years, and return the said water works to the said party of the first part, at the expiration of the said period of thirty years, in good order and condition, reasonable wear and the damage of the elements excepted, upon the payment to them of the value of the improvements made after the approval of this contract, to be ascertained as hereinbefore provided, and give a bond in the sum of twenty thousand dollars, conditioned for the compliance by them of the conditions of this contract, to be approved by the mayor of said city, and will pay all state and county taxes assessed upon said water works during the said period of thirty years: always provided, that the mayor and common council of said city shall have, and do reserve, the right to regulate the water rates charged by said parties of the second part, or their assigns, provided that they shall not so reduce such water rates or so fix the price thereof to be less than those now charged by the parties of the second part for water: provided, that a certain contract of lease heretofore executed by the mayor and common council of said city to Jean L. Sainsevaline of said water works, of date October sixteenth, A. D. one thousand eight hundred and sixty-five, be surrendered up and canceled at or before the signing of this contract: provided, always, that the rights and privileges by these presents conceded to said parties of the second part do not embrace, to any extent, or have any reference to, the water works of said city used for the distribution of water for the purposes of irrigation, or affect in any manner any rights of irrigation either existing at present, or which may exist hereafter, except as to the ten inches of water, as hereinbefore provided. And it is expressly stipulated and covenanted that said parties of the second part shall not dispose of any water for the purpose of irrigation, but shall only take from said river the water necessary for domestic purposes, as above specified. In testimony whereof, the said parties have hereunto set their hands and seals the day and year first above written.

John King, President.

"Approved this 22nd day of July, A. D. 1868.

"C. Aguilar, Mayor.

"John S. Griffin. [Seal.]
 "P. Beaudry. [Seal.]
 "S. Lazard. [Seal.]"

The 30 years mentioned in this contract expired with the 22d day of July, 1898, for which reason the defendants contend that the contract then came to an end, and for which reason they also say that this court is without jurisdiction of this cause. The objection to the jurisdiction of the court is clearly without merit. Whether or not the contract ended with the 22d day of July, 1898, as well as the results to flow from the determination of that question, are questions involving the exercise of jurisdiction, and can only be determined after the court takes jurisdiction of the case. The bill alleges that the contract, including all of its provisions and conditions, continues in force, and that notwithstanding that fact the defendant city, under and pursuant to the provisions of sections 1 and 2 of article 14 of the constitution of the state of California, adopted in the year 1879, and by virtue of an act of the legislature

of the state of California approved March 7, 1881, passed in pursuance of those provisions of the constitution of the state, enacted the ordinance in question, fixing the rates at which the complainant should furnish water to its consumers at rates aggregating \$75,000 less than those prevailing at the time of the execution of the contract of July 22, 1868, in violation of its provisions, and contrary to that provision of the constitution of the United States securing it against impairment. That the question so presented is of federal cognizance does not admit of doubt, and it is equally plain that, if the contract is still in force, a court of equity only is capable of affording the complainant appropriate relief. *Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; *City of Shreveport v. Cole*, 129 U. S. 36, 10 Sup. Ct. 210, 32 L. Ed. 589; *Insurance Co. v. Austin*, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626; *Douglas v. Kentucky*, 168 U. S. 488, 18 Sup. Ct. 199, 42 L. Ed. 553; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *City of New Orleans v. Citizens' Bank of Louisiana*, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *Benson v. City of San Diego (C. C.)* 100 Fed. 158; *Kimball v. City of Cedar Rapids, Id.* 802; *Agua Pura Co. v. City of Las Vegas (N. M.)* 60 Pac. 208; *Southwest Missouri Light Co. v. City of Joplin (C. C.)* 101 Fed. 23; *Bank v. Stone (C. C.)* 88 Fed. 383; *Mercantile Trust & Deposit Co. of Baltimore v. Collins, Park & B. R. Co. (C. C.)* 99 Fed. 812; *Citizens' St. Ry. Co. v. City Ry. Co. (C. C.)* 56 Fed. 746; *Iron Mountain R. Co. of Memphis v. City of Memphis*, 35 C. C. 410, 96 Fed. 113.

The ordinance sought to be annulled provides, among other things, that:

"Any person who shall charge, demand, collect or receive, either as owner, agent, collector, employee of any water company or person furnishing water to the inhabitants of said city for domestic use or private purposes, any rate or compensation for water furnished to the inhabitants of the city of Los Angeles in excess of the rates fixed by this ordinance, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not to exceed one hundred dollars, or shall be imprisoned in the city jail for a term not exceeding ninety days, or shall be punishable by both such fine and imprisonment."

The bill sets out the provisions of the constitution and statute of California above referred to. The constitutional provisions are as follows:

"Section 1. The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law: provided, that the rates or compensation to be collected by any person, company or corporation in this state for the use of water supplied to any city or town, or the inhabitants thereof, shall be fixed annually by the board of supervisors, or city and county, or city, or town council, or other governing body of such city and county, or city, or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or reso-

lutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action, at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city, or town, in this state, otherwise than as so established, shall forfeit the franchises and water-works of such person, company or corporation to the city and county, or city, or town, where the same are collected, for the public use.

"Sec. 2. The right to collect rates or compensation for the use of waters supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

The act of March 7, 1881, of the state of California, passed pursuant to these constitutional provisions, and referred to in the bill, provides as follows:

"Section 1. The board of supervisors, town council, board of aldermen, or other legislative body of any city and county, city, or town, are hereby authorized and empowered, and it is hereby made their official duty, to annually fix the rates that shall be charged and collected by any person, company, association or corporation for water furnished to any such city and county, city, or town, or the inhabitants thereof. Such rates shall be fixed at a regular or special session of such board or other legislative body held during the month of February of each year, and shall take effect on the first day of July thereafter, and shall continue in full force and effect for the term of one year and no longer."

"Sec. 6. The rates for the furnishing of water shall be equal and uniform. There shall be no discriminations made between persons, nor between persons and corporations, nor as to the use of water for private and domestic and public or municipal purposes: provided, that nothing herein shall be so construed as to allow any person, company, association or corporation to charge any person, corporation or association anything for water furnished them, when by any present law such water is free.

"Sec. 7. Any person, company, association or corporation charging or attempting to collect from the persons, corporations or municipalities using water any sum in excess of the rate fixed as hereinbefore designated, shall, upon the complaint of said board of supervisors, town council, board of aldermen or other legislative body thereof, or of any water rate payer, and upon conviction in any court of competent jurisdiction, forfeit the franchises and water-works of such person, company, association or corporation to the city and county, city, or town wherein the said water is furnished and used.

"Sec. 8. Any board of supervisors or other legislative body of any city and county, city, or town, which shall fail or refuse to perform any of the duties prescribed by this act at the time and in the manner hereinbefore specified, shall be deemed guilty of malfeasance in office, and upon conviction thereof at the suit of any interested party in any court of competent jurisdiction shall be removed from office."

The bill alleges that at no time prior to the adoption of the constitution of 1879 was there any law of the state of California imposing any condition of forfeiture of the works of any company or individual engaged in the business of supplying water to the inhabitants of cities and towns and to the municipalities, for charging rates other than those fixed by the governing body of such city or town, or any other agency established by law for fixing such rates, or any conditions of forfeiture of such works for or on account of the rates charged by such person, company, or corporation; that the provisions of the constitution and statute of the state of California mentioned, attempt to annex to the estate of the complainant in the system of water works mentioned in the bill a condition sub-

sequent to the contract of 1868, in impairment of its provisions, and in violation of the provisions of the constitution of the United States; that the defendant city claims that, under and by virtue of the above provisions of the constitution and statute of California, it has the right to fix rates to be charged by any individual, company, or corporation engaged in the business of furnishing water to the city of Los Angeles or its inhabitants for all purposes, and that the rates so fixed by it are the only rates that can be charged or collected by such company, individual, or corporation, including the complainant, and that the collection of any rate by the complainant in excess of the rates so fixed by the ordinance here in question subjects the property of the complainant to forfeiture to the city, and it threatens and intends, and will, unless restrained by this court, in the event the complainant should collect the minimum rates provided for in the contract of July 22, 1868, or any rates except those fixed by the ordinance of February 26, 1900, attempt to enforce the forfeiture of the property of the complainant, and threatens and intends and will attempt to seize the water works mentioned, and to dispossess the complainant thereof, and to take possession of, manage, and control the disposition of the waters through the system of works belonging to complainant, and to collect the rates therefor and claim the same as the property of the city, free and discharged of all claims of the complainant for the payment of the value thereof as provided in the contract of July 22, 1868; that the city further claims that the provisions of the ordinance in question making it a misdemeanor for any person, corporation, or company so engaged in the business of furnishing water to the inhabitants of the city to charge, demand, collect or receive, either as owner, agent, collector, or employé of any water company or person so furnishing water to the inhabitants, any rate or compensation in excess of the rates fixed by the ordinance, is a valid provision, and threatens complainant and its agents, collectors, and employés, in the event complainant should attempt to collect any rates other than those so established, with divers criminal prosecutions and a multiplicity of suits under the provisions of the ordinance, and will so harass and annoy and prosecute the complainant and its agents, collectors, and employés, unless restrained by this court.

The bill shows that the rights and obligations of Griffin, Beaudry, and Lazard under the contract were transferred to the complainant water company on the 12th day of June, 1869, and that on the 2d day of April, 1870, the contract and ordinance authorizing the same were ratified by the legislature of the state. It further shows that the complainant and its assignors paid to the city the \$1,500 per annum provided for in the contract until the 2d day of December, 1870, on which day the city and the complainant company, for mutual considerations, reduced the annual payment from \$1,500 to \$400, after which the annual payment of \$400 was regularly made by the complainant under the contract of July 22, 1868, and received by the city. The bill also shows that the Sainsevaine lease was surrendered and canceled as provided for by the contract of July 22, 1868, prior to its execution, and that the claims of Griffin, Beaudry,

and Lazard against the city, therein referred to, amounting to the sum of \$8,000, were also surrendered and canceled. It further shows that, differences having arisen between the respective parties concerning the rates that were charged at the time of the execution of the contract for furnishing water to the inhabitants of the city by the parties of the second part thereto, commissioners were, in the year 1870, appointed by the city for the purpose of ascertaining and determining what those rates were, which committee, after investigation, reported to the council certain rates, in the bill set out, as being those charged at the date of the contract of July 22, 1868, and which rates so ascertained and reported were accepted by the city and the complainant water company as being the rates charged at the date of the contract by the parties of the second part thereto. The bill further alleges that, in pursuance of the terms and provisions of the contract, Griffin, Beaudry, and Lazard, and their successor in interest, the present complainant, replaced within one year from the execution of the contract all of the wooden pipes then pertaining to the water works with iron pipes, and that the complainant company, after succeeding to the rights of Griffin, Beaudry, and Lazard under the contract, proceeded to lay down 12 miles of iron pipes within the time therein prescribed, and has continued the extension of such pipe lines, and constructed a system of pipes and reservoirs under and in pursuance of the contract for supplying the city with water for municipal purposes, and its inhabitants with water for domestic uses, and in the construction of the system originally provided for, and in its extension, has laid down about 320 miles of iron pipes in the city, and has been conducting the water and distributing the same to the city and its inhabitants for more than 30 years, and has, under the direction and supervision of the city, by and through its constituted authorities, and under and in pursuance of the contract, erected more than 600 fire hydrants, and has during all the time mentioned been supplying the city with water for extinguishing fires, and for the use of the public schools, jails, hospitals, and all other public municipal buildings, free of charge, and furnishing the inhabitants of the city with water for domestic purposes and collecting rates therefor; that within one year from the approval of the contract of 1868 the complainant and its predecessors in interest erected an ornamental fountain upon the public plaza of the city, of a design directed by its mayor and common council, and did at their own expense, and within the time provided in the contract, construct such ditches and flumes and erect such machinery in connection with the waterworks as to secure to the inhabitants of the city a constant supply of water for domestic purposes, and did construct reservoirs of sufficient capacity for these purposes, and has erected one hydrant, to be used as a protection against fire, at each cross street in the city where water pipes were then laid, and also where water pipes were thereafter laid, and, as requested and directed by the council of the city, did give the bond provided for in the contract. It is alleged that the complainant has extended the iron-pipe system as fast as the citizens of the city desiring to be supplied with water for domestic

purposes would agree to take sufficient water to pay 10 per cent. per annum interest upon the cost of extending such pipes through the streets then unsupplied with water; that the complainant has constructed for use in connection with the said system of water works four reservoirs, having an aggregate capacity of 20,000,000 gallons, all of which are used in connection with and as a part of the system; that at the date of the contract in question the territorial limits of the city were about four square leagues, in a square form, the center of which was the center of what was known as the "Old Pueblo Plaza," and was co-extensive with the limits of the four square leagues which had theretofore been patented by the United States government in pursuance of the decree of confirmation of the city's claim under the grant made to it by the Mexican government, and that in the year 1872 the limits of the city were extended 420 yards south of its former south boundary, and so as to embrace a tract of land 420 yards in width, and extending across the southern boundary of the city, and that within the last two years the limits of the city have been further extended so as to include about 15 or 16 square miles of additional territory; that the complainant has, in pursuance of the request and direction of the city, and in pursuance of the contract in question, extended its water system into the said tracts of land which have been added to the city limits as above stated, and has, at the request and under the direction of the city, from time to time, and extending down to a period within six months of the commencement of this suit, erected fire hydrants within the limits of the said new territory thus included within the city, and outside of the boundaries of the city as existing in 1868 and in 1872, and that school houses have been erected in said added limits, and the complainant has been furnishing water for the extinguishment of fires in the said added limits, and has also furnished water for the school houses constructed within such additional limits, free of charge, and that said extensions of the pipe lines and the erection of the fire hydrants were demanded by the city, and made by the complainant, for the use of such school houses and for the extinguishment of fires, free of charge, under and in pursuance of the contract of July 22, 1868, and not otherwise. The bill shows that in the construction of this water system the complainant has expended more than \$2,500,000; that since the execution of the contract of 1868 the city has increased in population until there are now more than 100,000 inhabitants within its limits; that at the time of the execution of the contract there were but three school houses in the city, with an average aggregate number of pupils of about 250, and that there are now more than 60 school houses within the city limits, with an attendance in the public schools of about 25,000 pupils; that within the territory added to the city since the execution of the contract about 20,000 people reside, and use water from the complainant's system for domestic purposes.

The bill further alleges that, within 60 days of the date of the contract in question, Griffin, Beaudry, and Lazard selected the point from which the water should be taken from the Los Angeles river,

which point was above the dam mentioned therein, and that the point thus selected was so located that it was difficult to maintain a dam in the stream, owing to the frequent changes wrought by floods therein, and that in order to obviate those difficulties, and to obtain the water at a higher elevation, and to enable the complainant more effectually to perform the terms of the contract, a new location was made by the complainant, by and with the consent of the city, at a point still higher up the river, and about six miles above the north boundary of the city, from which point the complainant constructed a ditch, by means of which and of flumes the complainant conducted the waters of the river to the city, and discharged the same into a reservoir known as the "Buena Vista Street Reservoir," near the northern boundary of the city and within its limits, and from thence conveyed the waters by means of iron pipes through the city, and distributed them for the purposes of supplying the inhabitants of the city with water for domestic uses, and the city with water for all public uses, including the extinguishment of fires, which ditch has since been known as the "Power Ditch," and is still used by the complainant in diverting the waters of the river and conducting the same to the said reservoir for the uses and purposes stated; that owing to the growth of the city, and the increase in its population and in buildings of all kinds, it became necessary to obtain larger supplies of water, for the purpose of enabling the complainant to furnish the inhabitants of the city, and the city itself, with an adequate supply of water for the purposes mentioned in the contract in question; that about the year 1886 a corporation was organized, known as the Crystal Springs Land & Water Company, which company acquired various tracts of land and rights of development in the Ranchos Los Feliz and San Rafael, lying to the north of the city, and that the Crystal Springs Land & Water Company did, at heavy expense, make excavations and lay pipes within those portions of the Los Feliz and San Rafael Ranchos, and developed of the waters percolating in said soil about 650 inches of water, measured under a 4-inch pressure, and that the said Crystal Springs Land & Water Company did lay and construct a pipe line extending from a point known as the "Gate House," and into which the said developed waters were collected, down to the north boundary of the city, and did, by means of the said conduit, conduct the said waters to the north boundary of the city, and that the complainant leased from said Crystal Springs Land & Water Company its waters and pipe line, and conducted the same to the Buena Vista street reservoir, and has ever since used the same for the purpose of distributing the water to the inhabitants of the city through the system of works already mentioned; that the excavations made and the pipe line laid by the Crystal Springs Land & Water Company were completed in the year 1890; that in the year 1894 that company constructed another pipe line, known as the "Bellevue Branch," which connected with the main conduit used for conducting the waters from the Gate House to the north boundary of the city at a point between the Gate House and the north boundary, and about a mile and a half

north of the north boundary of the city, and extended the branch line in a southwesterly direction to the reservoir known as the "Bellevue Reservoir," belonging to the Crystal Springs Land & Water Company, of a capacity of about 40,000,000 gallons, and that the Crystal Springs Land & Water Company constructed pipes leading from that reservoir to a point on the western side of Hoover street, then outside of the city of Los Angeles, and from the said western side of Hoover street continued that pipe line in a southerly direction to Seventh street, and there, under the lease and contract aforesaid, delivers the water to complainant, and from thence it is conducted by complainant in its said system of pipes, and distributed throughout the city, for the purposes mentioned in the contract of July 22, 1868; that the main conduit of the Crystal Springs Land & Water Company is an iron pipe about 44 inches in diameter, and the Bellevue Branch pipe is of about the same dimensions, and that the pipe extending from the western side of Hoover street to Seventh street is 30 inches in diameter, which last-mentioned pipe was, when it was laid, outside of the territorial limits of the city, and is in a portion of the territory which has since been incorporated within the city; that ever since the said pipe has been laid it has been used continuously for the purpose of conducting water to the complainant's system of pipes, and for distribution by the complainant among the inhabitants of the city for domestic purposes, and for furnishing the city with water for municipal uses; that in the year 1893 the complainant purchased the system of water works known as the "Citizens' Water Company's Water Works," which had been constructed, for supplying the hilly portion of the city, upon lands lying above the pipes of the complainant, and that immediately after that purchase the system was remodeled, enlarged, and re-enforced by complainant, and connected with its system of water works, and has ever since been owned by the complainant; that thereafter the complainant acquired the stock of the East Side Spring Water Company, which company was organized for the purpose of supplying portions of the eastern side of the city of Los Angeles with water, and obtained control of that property consisting of the system of water works constructed by the East Side Spring Water Company, and connected the same with the system belonging to complainant more than five years ago, and that the said Citizens' Water Company's plant, as remodeled and improved by complainant, and the said East Side Spring Water Company's plant, also improved and repaired by complainant, are now connected together, and constitute a part of the system of water works of complainant, and used by it for the purpose of supplying the city and its inhabitants with water as in the contract of 1868 provided. The bill alleges that it was necessary for the complainant to acquire the plants of the said East Side Spring Water Company and the said Citizens' Water Company, and the waters thereof, as also the waters developed by the Crystal Springs Land & Water Company, and also waters from the Arroyo Seco, to the extent of about 75 inches, measured under a 4-inch pressure, in order to enable it to furnish an adequate supply of water to the city and its inhabitants; that in

order to furnish an adequate supply to the inhabitants of the city, and to the city itself, for municipal uses, it requires, and has required ever since the execution of the contract of 1868, from 70 to 130 gallons of water per capita per day, and that never at any time would 10 inches of water, measured under a 4-inch pressure, have been sufficient to supply the inhabitants of the city with water for the uses and purposes mentioned in the contract in question; that, when the ditch was first constructed by complainant for the purpose of conducting the waters of the Los Angeles river to the city for the purposes mentioned, complainant, with the knowledge and consent and acquiescence of the city, took at least 200 inches of water, measured under a 4-inch pressure; that of the waters so diverted a large proportion was lost by seepage and evaporation along the line of the ditch, which was from the beginning about five or six miles in length; that at that time more than 30 inches of water were used in the city for supplying the city and its inhabitants with water for the uses and purposes mentioned in the contract, and that more than 30 inches, measured under 4-inch pressure, were required for those purposes during all of the time, and that as the city increased in population and in buildings of various kinds, and as industries sprang up, requiring the use of water for machinery and manufacturing purposes, all of which have been supplied by the complainant, with the knowledge and consent of the city, ever since the contract was executed, it became necessary to increase the amount from time to time, until more than 20 years ago the amount so taken from the Los Angeles river by and through the said Power ditch by complainant for the purposes stated amounted to at least four or five hundred inches, measured under 4-inch pressure, and such quantity has been increased to meet the growing demands of the city until the whole amount now used by the complainant, including the waters acquired by it from the Arroyo Seco and from the Crystal Springs Land & Water Company developments, amounts to an average daily use of about 1,200 inches, measured under a 4-inch pressure, and in the summer season expands sometimes to as much as 1,600 inches, measured under a like pressure, and that during all of the said time, and as the amount was increased as aforesaid, and up to the year 1896, no objection of any kind was ever made by the city, although the same was done with its knowledge, but that, on the contrary, the city acquiesced in the taking of the said water, and understood that complainant had the right to take the same, and whatever quantity was necessary for the purpose of supplying the city and its inhabitants with water, provided, always, that the amount so taken did not interfere with the use of the waters of the river for irrigation purposes, as provided in the contract of July 22, 1868; that never at any time has the complainant's diversion of the waters of the river diminished the same so that the city has not had an ample supply of water for irrigation purposes, but that, on the contrary, the city has, during all of the 20 years last past, been disposing of waters of the river for irrigation to a greater or less extent each year for use outside of the city limits.

The bill further alleges that the city has been continually increasing in population, and in the number of residences and other buildings of all kinds; that ever since the execution of the contract in question the complainant has been furnishing the inhabitants of the city with water for all purposes other than irrigation, including the water for the generation of steam for the operation of steam engines of various kinds employed in the manufacturing businesses of the city, for operating elevators in buildings, for use in livery stables and private residences, for watering horses, washing carriages, and other like uses, and that such use has been made during the entire period with the knowledge and acquiescence of the city, and that the term "domestic uses," as used in the contract in question, has been interpreted by the parties from the beginning to mean, and that the said term was intended to grant to the complainant and its predecessors, the right, and to impose upon them the duty, of furnishing the water to supply the inhabitants of the city for all uses and for all purposes except irrigation; that the number of houses in the city is now, and for more than two years last past has been, increasing at the rate of more than 100 per month, and that each and all of them demand and require surface connections to be made with the complainant's system of water works, for the purpose of supplying the same with water, and that complainant has continued ever since the 22d day of July, 1898,—the expiration of the 30-year period mentioned in the contract in question,—to make such surface connections, and to supply such new edifices and industrial establishments with water for their uses, and that the city has required and directed the complainant, since the last-mentioned date, at divers times, to make extensions of its pipes, and to erect other fire hydrants, all of which have been complied with by the complainant in pursuance of the terms of the contract; that notwithstanding the meaning of the provisions of the constitution of California above set out is that the governing body of every city or town in the state should in the month of February fix and establish a rate to be charged by any company or individual engaged in the business of supplying water to the city and its inhabitants for all purposes, the council of the defendant city has during every year since July 22, 1898, passed an ordinance fixing the rates to be charged by such companies and individuals, but has never in any instance fixed any rate to be charged by the complainant for furnishing water to the city for use in the public schools, jails, or other public buildings, or for extinguishing fires, but, on the contrary, has at all times claimed that the complainant is bound to furnish the city with water for public uses as provided in the contract of July 22, 1868, free of charge, and that the complainant has acceded to that claim, and has admitted and does now admit that it is bound by the terms of that contract to furnish the defendant city with water for its municipal purposes in accordance with the terms of the contract, and that the contract continues in full force, and will so continue until the complainant is paid the value of the said water works. The bill further alleges that the defendant city pretends that by reason of the fact that the complainant is diverting from the Los Angeles river from 600 inches, measured under 4-inch pressure, to 1,000 inches, measured under a like pressure, in

order to supply the needs of the city and its inhabitants with water, the complainant is taking an amount of water in excess of the amount mentioned in the contract of July 22, 1868, claiming that, by the 10 inches of water mentioned in that contract, 10 inches measured under a 4-inch pressure was intended, and that because the complainant is so diverting a larger amount than 10 inches measured under a 4-inch pressure, it is not acting under and in pursuance of the contract, and that therefore the city has the right to fix the rates, under the provisions of the constitution and act of the legislature of the state of California, without regard to the contract rate; that the said claims on the part of the city are unfounded; that it was not the intention of the contract to limit complainant or its predecessors in interest to the taking of 10 inches of water, measured under a 4-inch pressure, nor to prevent them from taking any other amount of water necessary to the performance of the contract to supply the city and its inhabitants with water, provided that such amount so taken and diverted did not deprive the city of sufficient water for irrigation purposes; that at the time of the making of the contract in question there was no known source of supply of water for the city, other than the Los Angeles river, and that the obtaining of water by the complainant from any other source was not contemplated or deemed possible at that time; that at the time the contract was made there was no knowledge on the part of any of the parties to the contract, or any one else, of the existence of underground percolating waters in the vicinity of the city, and from which a supply could be obtained, and that the amount of such underground percolating waters yet developed is not now sufficient to supply one-half of the quantity necessary for supplying the city and its inhabitants with water; that as the city has grown and expanded, and as the higher elevations of the city have become settled and inhabited, the convenience and comfort and health of the inhabitants have required the grading of a large number of streets, until the amount of such graded streets at present existing in the city is more than 300 miles, and that, to keep those streets in good order and condition, it is necessary that they should be regularly sprinkled; that the sprinkling of streets was not one of the purposes for which the complainant could use the waters of the river, but, on the contrary, that the sprinkling of streets is included under the term "irrigation"; that, owing to the position of many of the graded streets, it became necessary that water should be provided for street-sprinkling purposes at higher elevations than any of the ditches belonging to the city, and that for the convenience of obtaining such water, and filling the sprinkling carts used in that business, it became necessary that the city should obtain the water for this purpose through the works of the complainant, and that the city has constantly for more than 15 years obtained the water for street sprinkling through the system of water works of the complainant, and that the complainant has furnished water through its works for such purposes free of charge, and that the city now obtains from the complainant, through its system of works, water for street sprinkling to the amount of 3,000,000 gallons per day; that the water is so furnished through the complainant's said system of water works, and is received by the city

from the fire hydrants erected by the complainant, and kept and maintained at complainant's expense, as provided in the contract in question, and that the city has not paid at any time, and does not now pay, to the complainant, any compensation whatever for the water so furnished through the said system for street sprinkling, and that the city claims, and has at all times claimed, that the street sprinkling comes within the provisions of the contract in question providing for the city's use of the water for irrigation purposes, and that the term "irrigation purposes," as used in that contract, includes the sprinkling of streets, and that the city has never, in any ordinance passed by it regulating or assuming to regulate and fix the price to be charged for water, fixed or established any rate to be paid for street sprinkling; that the city has already laid and constructed more than 100 miles of sewer pipes within the city limits, and has caused to be connected therewith more than 600 flush tanks, the water supply of which is furnished through the pipes of the complainant for the purpose of flushing the sewers, and that the city continues to increase the number of taps upon the complainant's system of water works connecting the same with flush tanks constructed from time to time by the city as its needs require, and which are used in flushing the said sewers, and demands and obtains from the complainant and its said system of water works the water used in flushing the sewers, all of which is furnished by the complainant free of charge, and that the city has never paid or tendered or offered to pay any amount whatever therefor, nor made any provision in its ordinances for rates fixing the payment therefor; that the construction of the sewers and flush tanks and surface taps connected therewith has been carried on by the city from time to time as the sewer system was constructed and increased, and extending over a period of 15 years last past, and that the city has taken the water for flushing the sewers from the system of the complainant, and that a large portion of the water so diverted by the complainant from the Los Angeles river is and has been furnished to the city by the complainant and used by the city for those purposes; that the city also claims that the contract of July 22, 1868, has expired, and that it is no longer bound by its terms; that the city has not paid to the complainant the value of the water works as in the contract provided, nor otherwise, nor at all, nor paid or tendered to the complainant any portion of the value of the property, or any sum of money thereon, whatever, nor has the value of the property or the price to be paid therefor ever been fixed or determined, either by the agreement of the parties or otherwise, and that under the terms of the contract the complainant is entitled to the possession and operation of the water works until such payment, and that the contract does not expire until the payment is made; that the city and its inhabitants insist upon the performance by the complainant of all the terms of the contract imposed upon the complainant, and which are burdensome, and that such demands have been acceded to by the complainant, and it has continued to perform, and does now perform, all the terms of the contract upon its part to be performed, but that the city denies that the contract continues in force for any of the purposes beneficial to the complainant; that the complainant has been constantly doing

all things which the contract requires it to perform in providing water to the municipality for public use, and to its inhabitants for all uses other than irrigation, all of which is and has been well known to the city, and that the city is receiving all of the benefits of the contract that accrue to it under the terms of the contract in question, and that the complainant cannot cease to make such extensions and provisions of all kinds for supplying the increased population of the city without stopping its growth and progress. The bill further alleges that, under the terms and provisions of the contract in question, arbitrators were appointed, one by the complainant and one by the city, and the third by the two thus selected, and that proceedings were had and evidence taken before them for the purpose of determining the value of the complainant's system of water works, and that a pretended award was made by two only of the arbitrators, whereby they agreed upon and reported to the council of the defendant city as the value of the said property the sum of \$1,183,591.42, and that the city claims that the said report, concurred in by the two arbitrators, constitutes an award and a final determination of the value of the property, all of which is denied by the complainant, which claims that, if the award be not void upon its face, it was obtained by such means as that it should be set aside, and that a suit has been brought by the complainant in this court for the purpose of having the said award decreed to be invalid and to be set aside, and that the court fix the value of the property in question; that the amount so named as the value of the property by the two arbitrators was not concurred in by the third, but, on the contrary, that the third arbitrator dissented from the award, and declared as his opinion that the amount awarded by the two was far less than the actual value of the property; that the rates fixed by the ordinance of February 26, 1900, here in question, would not produce sufficient revenue over and above the cost of maintenance and operating the said water works to pay 7 per cent. per annum upon the amount of the pretended award, and would not produce sufficient revenue, over and above the cost of maintenance and operation of the works to pay $3\frac{1}{2}$ per cent. on the actual value of the property.

By the supplemental bill the complainant alleges, among other things, that since the filing of the original bill, and on the 25th day of June, 1900, the council of the defendant city adopted an ordinance entitled "An ordinance regulating the rates and compensation allowed to be collected by the West Side Water Company, a corporation, supplying water for domestic and private purposes to the inhabitants of the city of Los Angeles, during the year commencing July 1, 1900, and ending June 30, 1901," which ordinance the supplemental bill sets out at large, and alleges that, if it be intended to apply to the West Side Water Company alone, it is unjust and not uniform, in that it fixes rates largely in excess of the rates fixed by the ordinance of February 26, 1900, set forth in the original bill, and thereby authorizes or attempts to authorize the West Side Water Company to charge and receive a much larger compensation for furnishing water to the inhabitants of the city for domestic uses and the various uses and purposes therein named than it has fixed by

the ordinance of February 26, 1900; that while the ordinance of June 25, 1900, does not fix any rate to be charged for the use of water for extinguishing fires, yet there is a contract between the defendant city and the said West Side Water Company whereby the city pays the West Side Water Company a rental of \$40 per annum for each and every fire hydrant under its system, for water furnished to the city for extinguishing fires. The supplemental bill further alleges that on the 29th day of June, 1900, the council of the defendant city passed another ordinance assuming to fix the rates to be charged by the Highland Water Company, a corporation engaged in supplying a part of the inhabitants of another portion of the city that had been recently included within the city limits, and that the rates so pretended to be established by the last-mentioned ordinance are the same as the rates fixed by an ordinance adopted in February, 1899, which were substantially the same as the rates fixed in the aforesaid ordinance of June 25, 1900; that each and all of the aforesaid ordinances passed in the year 1900, and the ordinance of February, 1899, fix the rates to be charged for the use of water at much less than was charged by the complainant's predecessors in interest at the time of the execution of the contract of July 22, 1868, each and all of which impair the obligations of that contract, in violation of the constitution of the United States; that by reason of the enactment of the several ordinances of the year 1900 it is rendered uncertain and doubtful as to which fixes the rate to be collected from and after the 1st day of July, 1900, by any corporation, company, or individual to which the same are applicable, and that the complainant does not know to which of the said ordinances to conform, in order to avoid taking any risk of forfeiture of its water works to the city, and alleges that, though neither of them is valid as to the complainant, such forfeiture will be attempted to be enforced unless it conforms to such of the ordinances as the defendants may assert regulates the rates to be charged by the complainant, unless restrained by this court. The supplemental bill also shows that both of the last-mentioned ordinances, to wit, those enacted June 25 and 29, 1900, also contain the provision that "any person who shall charge, demand, collect or receive, either as owner, agent, collector, employé of any water company or person furnishing water to the inhabitants of said city for domestic use or private purposes, any rate or compensation for water furnished to the inhabitants of the city of Los Angeles in excess of the rates fixed by this ordinance, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not to exceed one hundred dollars, or shall be imprisoned in the city jail for a term not exceeding ninety days, or shall be punishable by both such fine and imprisonment," and alleges that the individual rate payers who are made defendants to the supplemental bill have asserted that they are not bound to pay any greater rate to the complainant for the water furnished to them than the rates fixed by the ordinance of February 26, 1900, set out in the original bill, and threaten and intend to tender to the complainant the rates so fixed for the several services and uses for which the water is

furnished them, and that each of them intends to refuse to pay any greater sum for such water, and threatens and intends, unless the complainant accepts such compensation and continues to furnish them with water for domestic uses at those rates, that they will institute divers legal proceedings against the complainant to hinder and prevent it from collecting the rates to which it is entitled under the contract of July 22, 1868, and in the event the complainant charges more than the rates fixed by the ordinance of February 26, 1900, will institute proceedings to obtain a decree of forfeiture of the complainant's property to the city, unless restrained by this court. The supplemental bill also repeats in substance some of the averments of the original bill in respect to the supplying by the complainant of the city and its inhabitants with water through the water works described in the original bill under the contract of July 22, 1868, and the acceptance of such service by the city and its inhabitants. The relief sought by the complainant is a decree that the ordinance of February 26, 1900, is, as respects the complainant, a violation of its rights under the contract of July 22, 1868, and therefore void, and that the complainant is entitled to collect water rates as in that contract provided, and that pending this suit the defendants be enjoined from enforcing or attempting to enforce, as respects the complainant, either of the ordinances of 1900, and that the defendant city, its officers, agents, and employés, be restrained from taking possession or attempting to take possession of the system of water works referred to, or ousting the complainant of the possession thereof, or from collecting or attempting to collect any rates for water furnished thereby, or from in any manner interfering with the management, operation, or control thereof by the complainant, and that the defendants be enjoined from enforcing or attempting to enforce any claim of forfeiture of the said water works growing out of any rates collected or charged by the complainant under and pursuant to the contract of July 22, 1868, and for such other and further relief as may be equitable and just.

It is apparent that the suit involves no question between the city and the Crystal Springs Land & Water Company in respect to the water, whatever its nature, alleged in the bill to have been developed by that company on its own land, and leased to the complainant company. The exceptions to that portion of the bill, therefore, setting out the nature of the water alleged to have been developed by the Crystal Springs Land & Water Company on its land, as well as its source of title thereto, will be sustained, as also the exceptions to that portion of the bill alleging the percentage upon the actual value of the property in question, as well as the percentage upon the award referred to in the bill that can be realized by the complainant under the rates established by the ordinance in question. The averments of the bills in regard to the conduct of the respective parties under the contract are not impertinent. The construction placed upon a contract by the parties to it by their conduct is always allowed to be shown, and is often of controlling weight in ascertaining their true meaning. Under this familiar rule, and for reasons afterwards stated, I am of opinion that none

of the other exceptions filed by the defendants are well taken. That a city in making such a contract as that here involved is acting in a quasi private business capacity, rather than in its governmental capacity, and is therefore governed by the same rules that govern a private individual or private corporation, is well settled. *Illinois Trust & Savings Bank v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 271, and numerous cases there cited.

The fundamental question in the case relates to the status of the respective parties to the contract of July 22, 1868, upon the expiration of the 30 years therein mentioned, and since. That question, together with the incidental rights growing out of that status, is the only question here for determination. Upon the expiration of that period, litigation arose between these parties in the superior court of Los Angeles county, and was carried to the supreme court of the state. It was there said that the main question in those cases was this: "Had the city the right to take possession of the water works at the end of the 30 years, without paying for the same or tendering payment?" And the court, without a dissent, held that it had not. *City of Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368, 379, 57 Pac. 210, 571. Why? Manifestly because the contract itself required such payment before its provisions were ended. In those cases it was contended on the part of the city, as it is contended here, that the instrument in question should be classed as a "lease," one of the features of which is that at the expiration of the term the lessor has an immediate right of re-entry and possession; but the court held that contention untenable, saying: "The written instrument in question cannot be categorized into any smaller class than that of a 'contract.' It is a contract with many and various covenants." This is entirely true, and any one who attempts to designate it by a particular name, such as a "lease" or "mortgage," and to rigidly apply the ordinary features of such instruments to its provisions, will wholly fail to give it its true interpretation. A bare perusal of the instrument plainly shows that it is a contract with many different covenants on the part of both parties to it. It would not have been a difficult matter to have made its language clearer and more concise. In several instances inapt words and expressions are used. For example, it provides for the "return" of the water works to the city upon the expiration of the 30 years, and the making of the payment for the improvements, which word—"return"—has been much commented on by counsel for the city as showing that the instrument should be treated as a lease. But, as was well said by counsel for the complainant, the city, so far as appears, has never been in possession of any part of the present works. No one can be properly said to "return" a thing never in his possession. The contract itself required the absolute demolition of what little there was of the old works, and the construction of an entirely new plant by the complainant and its predecessors. In *Speed v. Railroad Co.*, 30 C. C. A. 1, 86 Fed. 237, it was said:

"It may be regarded as the recognized rule that in the exposition of grants and contracts the construction should be upon the view of the attitude of the

persons making it, and upon a comparison of every part of the entire instrument, so that, while endeavoring to give every substantive part operative effect, also to give it a practical, rather than a theoretical, application. And when the intention is apparent, without repugnance to the settled rules of law, it will control the technical terms; for the intention, and not the words, is the sense of any agreement, and this will prevail, regardless of inapt expressions or careless recitations."

See, also, *Southwest Missouri Light Co. v. City of Joplin* (C. C.) 101 Fed. 23. It is not at all difficult, in my judgment, to ascertain from the terms of the instrument itself the rights and obligations of the respective parties, not only during the 30-year period, but upon the expiration of that period; and when read in connection with the conduct of the parties thereunder, as disclosed by the pleadings, both during and since the expiration of the 30 years, it seems to me that no room for doubt remains. Taking the contract by its four corners, as all contracts should be taken, and reading the entire instrument, we see that the obligations thereby assumed by the predecessors of the complainant company were: To pay to the city an annual sum of \$1,500, gold coin, on the 1st day of each January during the continuance of the contract (afterwards reduced by agreement of the respective parties to \$400 per annum). The surrender by the complainant's predecessors of all claims then held by them against the city for repairs of the then water works and for damages, amounting to the sum of about \$8,000. The making of certain improvements at their own expense in, about, and upon the then water works, thus specified: The laying down in the streets of the city of 12 miles of iron pipe of sufficient capacity to supply the inhabitants of the city with water for domestic purposes; the erection of one hydrant, to be used as a protection against fire, at one corner of each cross street of the city where the water pipes then were or might thereafter be laid by virtue of the contract; the erection within one year from the approval of the contract of an ornamental fountain upon the public plaza of the city, of such design as the mayor and common council of the city should direct, at a cost not to exceed \$1,000; the construction within two years after the approval of the contract, at their own expense, of such ditches and flumes, and the erection of such machinery, in connection with the water works, as would secure to the inhabitants of the city a constant supply of water for domestic purposes; the construction of reservoirs of sufficient capacity for that purpose; the selection within 60 days from the date of the contract of the point from which the water should be taken from the river, such point to be at or above the then dam. To furnish water for the public schools, city hospitals, and jails free of charge, "when the same are near the pipe," the city furnishing the necessary conduits for that purpose. To give a bond in the sum of \$20,000, conditioned for the compliance by them with the conditions of the contract. To pay all state and county taxes assessed upon the water works during the said period of 30 years. To return the works at the end of that period in good order and condition, reasonable wear and damage by the elements excepted, upon the payment to them of the value of the improvements made after the approval of the contract. To surren-

der up to the city the Sainsevaine lease, to be canceled, prior to the execution of the contract. In so making the improvements specified, all of the wooden pipes were required to be replaced by the parties of the second part to the contract within one year from its execution; and they also obligated themselves, their heirs, executors, and assigns, to extend the iron pipes as fast as the citizens desiring to be supplied with water for domestic purposes would agree to take sufficient water to pay 10 per cent. per annum interest upon the cost of extending such pipes through the streets unsupplied with water, and that within one year from the date of the contract they were to place the hydrants to be used as a protection against fire at one corner of the cross streets where pipes were then laid, and erect others at the street corners, according to the terms of the contract, as fast as the pipes were extended through the streets of the city, and were to keep all of the water works in repair at their own expense during the said period of 30 years. The city, in consideration of the performance of these obligations on the part of the parties of the second part to the contract, granted to them, their heirs, executors, and assigns, the exclusive use, control, possession, and management of the then Los Angeles City Water Works, together with all and singular the pipes, flumes, wheels, and other personal property composing and appertaining thereto, with all the rights, easements, privileges, and covenants described and contained in the Sainsevaine lease, for the period of 30 years from the approval of the contract, with the right to sell and distribute water for domestic purposes, and to receive the rents and profits thereof for their own use and benefit, except as afterwards provided, and with the right to lay pipes in any and all of the streets of the city, and to dig and to make all necessary excavations for that purpose, and the right of way through and over land or streets belonging to the city, with the additional right to take water from the Los Angeles river at a point above or near the then dam: "provided, always, that the said parties of the second part [Griffin, Beaudry, and Lazard], their heirs, executors, administrators, or assigns, shall at no time take from said river for the use of said water works more than 10 inches of water without the previous consent of the mayor and common council of said city." The city also covenanted not to make any other lease, sale, contract, grant, or franchise to any person or persons, corporation or company, for the sale or delivery of water to the inhabitants of the city for domestic purposes, during the continuance of the contract, always without prejudice to any rights already granted. Upon the foregoing rights and obligations were imposed by the contract these limitations: A provision declaring that the domestic uses therein specified and provided for were not to include the furnishing of water for irrigation, and that the parties of the second part should not have the right to dispose of any of the water of the river for that purpose. A reservation upon the part of the city of the right to regulate the rates to be charged by the parties of the second part, their heirs, executors, and assigns: "provided, that they shall not so reduce such water rates or so fix the price thereof to be less than those

now charged by the parties of the second part for water." The contract contained the further covenant and agreement on the part of the city to pay to the parties of the second part, their heirs, executors, administrators, or assigns, at the expiration of the period of 30 years from the execution of the instrument, the value of the improvements made in, about, and upon the water works in pursuance of the contract; the amount thereof to be ascertained, in the event the parties could not agree, by arbitration; each party to choose one man, and the two thus chosen to select a third, to determine the value; and the judgment of the three men so selected to be final in the premises.

The contention on the part of the city that the grant of the right to take water from the Los Angeles river was limited to 10 inches, measured under 4-inch pressure, was disposed of by the supreme court of California, by Judge Wellborn, and by the supreme court of the United States, adversely to the contention, in the cases already referred to; the supreme court of the state saying:

"The words of the contract on this subject are simply that the company shall not take from the river 'more than ten inches of water without the previous consent' of the city. There is nothing in the contract about 'four-inch pressure,' nor is there any intimation as to what the parties meant by 'ten inches' of water. But, looking at the context and the subject-matter of the contract, it is quite evident that the parties did not mean only ten inches under a four-inch pressure. If that had been the meaning, there would have been no sense in the other important covenants. At the time of the contract it would have taken many times ten inches under a four-inch pressure to furnish water for domestic purposes to even the few thousand people who were then inhabitants of the city, and much more than that amount was necessary to supply free water under the contract; and a solemn covenant to supply a growing city with sufficient water for domestic and municipal purposes for thirty years, from a flow of ten inches under a four-inch pressure, would have been absurd. The company, immediately after the date of the contract, commenced to use an amount of water greatly in excess of ten inches under a four-inch pressure. Soon after the execution of the contract the company was using three hundred inches under a four-inch pressure, and from that to the present time they have been using, with the knowledge and consent of the city, from three hundred to seven hundred inches, so measured. Therefore, whatever, if anything, was meant by the simple words 'ten inches,' the contract was immediately, and has been continuously, construed by the action of the parties as meaning more than ten inches measured under a four-inch pressure. There is no pretense that the city ever objected to the use of this water by the water company until 1896, when an ordinance was passed by the city government undertaking to withdraw the city's consent to the taking of more than ten inches from the river. It is difficult to imagine how this ordinance was passed seriously; for, if the water company had been prevented from taking from the river at that time more than ten inches of water under a four-inch pressure, there certainly would have been a water famine in the city, for the city had no works of its own, and no means whatever for supplying water for either domestic or municipal purposes. But the city, having allowed the water company for nearly thirty years to divert the quantity of water above mentioned, and to expend vast sums of money upon the faith of a continuance of the right to take said water, could not withdraw its consent within the period of the contract." *City of Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 378, 57 Pac. 210, 571.

The case as now presented shows that, notwithstanding the expiration of the 30-year period mentioned in the contract, the city has not paid or tendered to the complainant company the value of the improve-

ments made in, about, and upon the water works in pursuance of the contract, nor have the respective parties been able to agree upon the value of such improvements. And the bill shows that, although three arbitrators have been appointed, as provided by the contract, for the purpose of ascertaining that value, they have been unable to agree upon the proper amount. Nevertheless the city insists that the complainant is still bound by all the obligations imposed on it by the contract, and the complainant so admits. The city still insists upon the complainant extending its lines of pipe as the needs of the city and its inhabitants require, and the keeping in repair those already in existence; upon its erection of additional fire hydrants; upon the furnishing of the city by the complainant with water for the various municipal uses free of charge, and the furnishing of its inhabitants with water for domestic purposes, as provided in the contract; and the company admits its obligation to do so thereunder, and has continued to perform those obligations ever since the expiration of the 30-year period. Yet the astonishing claim is now and here made on the part of the city that all of its grants and covenants made in consideration of the performance of those obligations by the complainant and its predecessors ceased with the 22d day of July, 1898, with the exception of its agreement to pay the value of the improvements made to the property, notwithstanding the fact that it has not paid or tendered to the complainant the value of those improvements. It ought not to be necessary to cite decisions to show that this contention is wholly without merit. It is a self-evident proposition that it takes at least two parties to make a contract, and it is equally plain that, as long as it exists at all, all parties are bound by its provisions. The fact that one of them is a municipal corporation in no manner alters the case. In *Meyer v. Brown*, 65 Cal. 589, 26 Pac. 284, the court said:

"It is well occasionally to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations, entered into for value, than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other."

See, also, *Zabriskie v. Railroad Co.*, 23 How. 400, 16 L. Ed. 488; *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *Illinois Trust & Savings Bank v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 293; *Bates v. Porter*, 74 Cal. 224, 15 Pac. 732. As has been said, it was settled by the supreme court of the state in the suit between the complainant and the city that the company is not bound to surrender the property in question until it is paid for the improvements, but is entitled, until payment is made or tendered, to remain in the exclusive possession thereof, notwithstanding the expiration of the 30-year period. This, of course, can only be because the contract secures it in that right. A similar ruling was made by the circuit court of appeals for the Eighth circuit in a case quite similar to the present one, entitled *National Water Works Co. v. Kansas City*, reported in 10 C. C. A. 653, 62 Fed. 853. There a contract had been entered into between the water company and the city by virtue of an ordinance adopted by the city pursuant to an act of the legislature of the state which, among other things, empowered the city to grant to any person or persons or any corporation the right to erect and operate water

works described in the act, and to accomplish that purpose on such terms and conditions as might be agreed on in a contract therefor, with certain provisions in respect to the approval of the ordinance by two-thirds of the qualified electors of the city, and with the provision that "no grant so made shall confer the right to operate the water-works for any period beyond 20 years from the time of approval of the ordinance as aforesaid; but the grant may be renewed by or pursuant to ordinance approved as aforesaid during the last of such 20 years for another term not exceeding 20 years on terms and conditions specified in the ordinance for the renewal of the grant," and with the further provision, among other things, "that at the expiration of the 20 years, if the grant be not renewed, the city shall purchase and become sole owner of such water-works as aforesaid, and pay therefor a price agreed upon by the parties or ascertained as they may agree, or, if the price cannot be thus fixed, then the city shall pay the fair and equitable value of the whole works, to be ascertained by" a court on the petition of either party filed for the purpose. The contract sued on was made under and by virtue of an ordinance passed pursuant to that statute. The circuit court of appeals (Mr. Justice Brewer delivering the opinion) said, among other things:

"The act of 1873 provided 'that at the expiration of the twenty years, if the grant be not renewed, the city shall purchase.' The ordinance passed in pursuance of that act, and in effect the contract under which the works were created, provided that on a failure to renew the grant at the expiration of 20 years 'the city shall then be required to purchase.' There has been no renewal of the grant. The twenty years have elapsed. The imperative voice of the act and the ordinance is that the city 'shall purchase.' This is not an incidental, directory, or subordinate provision, but one mandatory, vital, and controlling. The thought of the legislature was that the city should own its water works; that, if any arrangement was made with a corporation for their construction and operation, the control and right of such company should be temporary, and the city should become, willingly or unwillingly, at a certain time, the owner. The time fixed was at the expiration of 20 years, with a privilege of extension for another twenty years. This vital, mandatory, and controlling provision compels a decree that the company sell and the city buy. Such was the will of the legislature; such the terms of the act and the ordinance. * * * We dissent in toto from the claim of the city that at the lapse of the twenty years the title of this property, with the right of possession, passed absolutely to it, without any payment or tender of payment, leaving only to the company the right to secure compensation by agreement or litigation, as best it could. Much was said in argument of the relative rights of lessor and lessee to buildings erected during the term of the lease. The city and the company were called 'licensor' and 'licensee,' and it was insisted that, as the right to operate was to cease at the expiration of twenty years, the relation was equivalent to that of lessor and lessee; that full title and right of possession passed instantly to the city, leaving all questions of amount and time and manner of payment to be subsequently determined. Much was said, too, about the rule of construction of public grants; that rule being that the grants are to be construed favorably to the public and unfavorably to the grantee. It is unnecessary to attempt to define the peculiar quality of the title held by the company, nor do we question the rule of construction of public grants; but all contracts involving property rights and obligations between municipalities and individuals must be presumed to be based upon and to recognize the ordinary laws of business transactions, and, if any departure therefrom is contemplated, such departure must be clearly manifested. Now, the familiar and ordinary law of business transactions is that he who parts with title receives, at the time, payment. In other words, payment of price and transfer of property are contemporaneous and concurrent acts.

When it is affirmed that a contract made by a municipality contemplates that he whose money builds and constructs, and therefore establishes title to, property, shall surrender his title and possession without payment, or even the amount thereof determined, the language compelling such a construction must be clear and imperative. There is no such language in either the act or the ordinance. While it is true that the act provides that no grant so made shall confer the right to operate the water works for any period beyond twenty years, yet such provision is no more imperative than the one that at the expiration of the twenty years the city shall purchase and pay therefor. If the city fails to purchase and pay, it acquires no title, no right of possession, to the property of the water works. There is no language which would justify the court in saying that it is clearly expressed that the purpose of this contract and the thought of the legislature were to vest the title and right of possession in the city at the end of twenty years, leaving to future litigation the fixing of the amount and the enforcing of the act of payment. If at the expiration of the twenty years the city had tendered to the company, in payment for the property, an amount admitted or found to be 'the fair and equitable value,' doubtless the right of the city to the possession and future earnings would have immediately accrued, and the present decree would have been based upon such transfer of right, but no such tender was made. In so far, therefore, as the decree of the circuit court attempted to transfer the title and the possession to the city before payment, we are constrained to hold that it was erroneous."

The complainant here being entitled to the exclusive possession and control of the property, as was explicitly adjudged in the former case between it and the city, and that by virtue of the contract in question, what is it to do with it, except to operate the works? And if it operates them, as the city itself insists that it is bound to do, under what possible terms and conditions does it do so, except those specified in the contract? The city insists that the complainant shall continue to keep the works in repair, and it does so. It insists that the complainant must continue to extend its lines and pipes as required by the contract, and the complainant does so. It insists that the complainant shall continue to erect fire hydrants as demanded by the city, and the complainant accedes to the demand. It insists that the complainant shall continue to furnish the city with water for all of its municipal purposes free of charge, and this the complainant continues to do. It insists that the complainant shall furnish the inhabitants of the city with water for domestic purposes, and this the complainant continues to do. To sustain the contention on the part of the city that only the burdens imposed upon the complainant by the contract continue, and that all rights and benefits secured by it thereby ended with the expiration of the 30 years, except the payment by the city of whatever may be ultimately ascertained to be the value of the improvements made to the property by the complainant and its predecessors, would not only violate the first principles of law and equity, but would leave the city at liberty at any time after July 22, 1898, to grant water to another company, with the right to establish a competing system of water works for the supply of the city and its inhabitants with water for domestic and other purposes, which other company would be under the protection of the provisions of the constitution of the state of California, requiring the rates to be fixed for all purposes, including the municipal uses, while the complainant would remain bound to furnish water to the city for those uses free of charge. Such a result would clearly fall directly within the principle the supreme court applied in

refusing to allow the city of Walla Walla to build water works in competition with the Walla Walla Water Company, with which it had contract rights. The charter of the city of Walla Walla empowered it to provide a sufficient supply of water, and to erect and maintain water works within or without the city limits, or to authorize the erection of the same, for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water, and also to grant the right to use the streets of the city for the purpose of laying gas and other pipes intended to furnish the inhabitants thereof with light or water, to any person or association of persons, for a term not exceeding 25 years, provided that none of the rights or privileges thereby granted should be exclusive, nor prevent the council from granting the same rights to others. The city was also by its charter empowered to condemn and appropriate so much private property as should be necessary for the construction and operation of such water works, and to purchase or condemn water works already erected, or which might be erected. Under that statute the city, by ordinance, granted to the water company the right to lay and maintain water mains, etc., for 25 years, reserving to itself the right to maintain fire hydrants and to flush sewers during the term without charge. It also covenanted not to erect water works of its own during the life of the contract. The contract further provided that it should be voidable by the city, so far as it required the payment of money upon the judgment of a court of competent jurisdiction, when there should be a substantial failure of the supply of water, or failure of the company to perform its undertaking. The works were erected pursuant to the provisions of the contract, and the company for a number of years supplied the requisite water and performed its part of the agreement. Then the city passed an ordinance to construct its own system of water works, and to issue bonds therefor, when the water company filed a bill to enjoin the city from so doing. The court below granted the injunction, and the supreme court affirmed its judgment, saying in its opinion, among other things:

"Nor do we think the contract objectionable in its stipulation that the city would not erect water works of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect water works of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn, and pay for the water works of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That, if the city should desire to establish water works of its own, it would do so by condemning the property of the company, and making such changes in its plant or such additions thereto as it might deem desirable for the better supplying of its inhabitants, but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith. An agreement of this kind was a natural incident to the main purpose of the contract; to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding 25 years. In establishing a system of water works, the company would necessarily incur a large expense in the construction of the power house and the laying of its pipes through the streets; and, as the life of the contract was limited to 25 years, it would

necessarily desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself,—a field in which it undoubtedly would have become the master,—and practically extinguish the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking."

I am unable to see the slightest ground for the contention on the part of the city that it is not as much bound by the terms and provisions of the contract in question as is the complainant company, and it seems very clear to me that the continued right and obligation on the part of the complainant to operate the works under the contract is necessarily accompanied by the right to collect and appropriate to its own use the water rates therein provided for; for the right to collect and appropriate those rates was the principal consideration that moved the complainant and its predecessors to enter into the contract, to construct the works, and to carry on the business. And that such was the view of the circuit court of appeals for the Eighth circuit in *National Water Works Co. v. Kansas City*, supra, is clear, not only from its opinion in the case, but from the judgment that it drafted and directed to be entered by the lower court. The defendant city has it in its power to put an end to all of the rights and obligations arising under the contract by paying or tendering to the complainant company the value of the improvements made in, about, and upon the water works as therein provided for. It can do this at any moment that it is ready to make the payment, after the amount has been agreed upon or has been otherwise determined. Until it does so, or offers to do so, all of the covenants and provisions of the contract continue, including that prohibiting the city from establishing lower rates than those charged at the time of the execution of the contract. If these views be correct, it necessarily results from the determination of the supreme court in the former suit between the complainant and the defendant city regarding the ordinance of February, 1897, that the similar ordinance now in question is, as respects the complainant, invalid. And if so, is it not plain that a court of equity only can decree it void, and that a court of equity only is capable of affording the complainant the incidental relief to which it is in that event entitled? If the ordinance be void, and the defendant city, notwithstanding, threatens to, and, unless restrained by the court, will, proceed to enforce its penal provisions, including those contained in it and in the constitution and statute of California, for the forfeiture to the city of the water works in question should the complainant charge other rates than those therein prescribed, and otherwise dispossess the complainant of the property, nothing can be plainer than that a court of equity ought to restrain the city, and its power to do so is quite as clear. *Iron Mountain R. Co. v. City of Memphis*, 35 C. C. A. 410, 96 Fed. 113; *Southwest Missouri Light Co. v. City of Joplin* (C. C.) 101 Fed. 23. And if, as is alleged, cer-

tain of the water consumers, acting under such statutory provisions and under the same provisions of the ordinance in question, threaten to, and will, unless restrained, commence similar suits for the forfeiture of the works to the city, and criminal suits against the complainant and those acting for it, as provided in the ordinance, ought not a court of equity to restrain them, also? Undoubtedly so. It is only by such means that the rights of the complainant under the contract can be protected. See decree in *National Water Works Co. v. Kansas City*, 10 C. C. A. 653, 62 Fed. 853, 867; *Singer Sewing Mach. Co. v. Union Buttonhole & Embroidery Co.*, 22 Fed. Cas. 222 (No. 12,904); *Wat. Spec. Perf. Cont.* § 109; 1 Beach, *Inj.* § 444. The revenue laws of the city contain no provisions by which any tax can be levied for the payment of the value of the improvements; the only means of providing such money being the issuance of bonds by the city, first authorized by its qualified electors. *City of Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368, 376, 377, 57 Pac. 210, 571. The other preliminary relief asked for by the complainant is an order permitting it to collect, pending the suit, from the consumers of water for domestic purposes, the rates established by the defendant city at which other companies than the complainant shall furnish water to the inhabitants of the city for the same purposes. As those rates are shown to be less than those to which, under the views above expressed, the complainant is, under the contract in question, legally entitled, it is manifest that neither the city nor any of its inhabitants can be injured, unless it should turn out on appeal to a higher court that the views here taken are wrong, in which event the city and its inhabitants will be protected by proper bond. But every court must award the relief appropriate to its own conclusions. Holding, as I do, upon the facts averred and confessed, that the ordinance of February 26, 1900, is invalid as respects the complainant, and that it is entitled to collect the rates provided for by the contract of July 22, 1868, so long as the city permits that contract to continue in existence, I would not hesitate to authorize the complainant to collect those rates, pending the determination of the suit, however high they may be, upon the giving of a proper bond, but for the fact that the complainant itself asks only for an order permitting it to collect, pending the suit, the lesser rates established by the defendant for the furnishing of water to the inhabitants of the city for domestic purposes by other companies than the complainant. I entertain no doubt of the power of the court to make the order, and I think it is right and proper that it should be done; for, as has been said more than once, the city insists that the complainant must continue to furnish the water for domestic purposes under the contract, and no one, I apprehend, will seriously contend that it must do so without remuneration. Similar orders were made in the cases of *Interstate Commerce Commission v. Louisville & N. R. Co.* (C. C.) 101 Fed. 146, and *Cotting v. Kansas City Stock-Yards Co.* (C. C.) 82 Fed. 850, 857.

For the reasons stated, orders will be entered: (1) Sustaining the exceptions hereinbefore indicated and overruling all of the other exceptions. (2) Overruling the demurrers to the bills, with leave to

the defendants to answer within the usual time. (3) Continuing in force the preliminary injunction heretofore granted against the defendant city, and granting the preliminary injunction asked for against the individual defendants to the supplemental bill, upon the giving by the complainant of a bond in the sum of \$20,000, to be approved by the court. (4) Allowing the complainant to collect, pending the suit, or until the further order of the court, the rates established by the defendant city at which other companies than the complainant shall furnish water to the inhabitants of the city for domestic purposes, upon the execution of a bond by the complainant, to be approved by the court, in the penal sum of \$50,000, payable to the clerk of this court and his successors in office, for the benefit of whom it may concern, conditioned that in the event it shall be finally determined that the ordinance of February 26, 1900, is valid, the complainant will, on demand, pay to the party or parties entitled thereto all excess of rates collected by it over the charges therein authorized.

GRAND TRUNK RY. CO. v. CENTRAL VERMONT R. CO.

(Circuit Court, D. Vermont. March 24, 1900.)

RAILROADS—SUIT TO FORECLOSE MORTGAGES—EFFECT OF SALE.

A court, in its decree foreclosing railroad mortgages, ordered the property sold free from all claims except such as should be decreed to have preference over the mortgages, and provided that no claim should be allowed preference unless it had been filed in the suit, or should be filed within 60 days, notice of which provision was published. In the subsequent order confirming the sale after the expiration of the 60 days, the purchase price having been paid chiefly in mortgage bonds, the court reserved the right to require the purchaser to pay such further sums in cash as should be necessary to pay claims which should be allowed preference under the terms of the decree. *Held*, that the court, after having sold and transferred the property, had no further jurisdiction in the suit to entertain a petition to enforce a claim against it, or to require the payment by the purchaser of any claim which had not been filed as required by the decree.

In Equity. Suit to foreclose railroad mortgages. On petition of intervention.

Hollis R. Bailey, for petitioner.

Chas. M. Wilds, for respondent.

WHEELER, District Judge. While the Vermont Central and Vermont & Canada Railroads were in the hands of receivers of the state court of chancery by the name of trustees and managers, that court, by decree of April 20, 1872, authorized them to issue and dispose of their notes, called "income and extension bonds," to an amount not exceeding \$2,500,000, on time not exceeding 30 years, at interest not exceeding 8 per cent., to "constitute a lien and charge upon the trust property and the earnings thereof under the control of said trustees and managers; and in case said trustees and managers shall fail to pay said notes, or the interest thereon, as it becomes due and payable, the holders of said notes, or any of them,

may apply to this court by petition for a realization of his or their securities, or for a summary order for the payment of the amount due out of the property or current earnings of the railroads under the control of said trustees and managers." Pursuant to the decree, the trustees and managers issued such notes to a large amount, whereby in each they, "as such trustees and managers only, and out of the funds and property and securities reserved and devoted to that purpose by the order and direction of the chancellor under and by virtue of a decree of the court of chancery under the date of April 20, 1872," promised to pay ———, or bearer, the sums specified in each, 30 years after date, with interest semiannually at 8 per cent., on presentation at their office in Boston. Upon reorganization, in 1883, these notes were made exchangeable for first mortgage bonds at face value, without interest, on presentation to the trustee. That mortgage, with a subsequent one, has been foreclosed in this cause. All the bonds issued for notes presented for exchange were reckoned in computing the sum due in equity, and on January 27, 1899, a decree of sale was made, on failure to redeem, of all the property free of all claim except such as should have a preference over the mortgages, to be paid for, mostly, in bonds and coupons to be deposited, and providing that "no claim shall be allowed a preference over the said mortgages unless the same has already been filed in this cause, or shall be filed within sixty days from the date of this decree," and for notice by publication to all parties desiring to file such claims to do so within the time limited. The property was sold on a bid of \$7,000,000, and by the decree of confirmation of the sale the grantee of the purchaser was required from time to time thereafter to "pay such further portions of said bid and purchase price in cash as the court may direct in order to meet the expenses of foreclosure and sale, and such claims as may, in accordance with the terms of said decree entered January 27, 1899, be allowed a preference over the mortgages thereby foreclosed, or either of them, and be ordered by the court to be paid, and the distributive share due upon all bonds and coupons not deposited in payment of the purchase price." Roland M. Smythe has, since the expiration of the 60 days, and after the decree of confirmation, presented a petition setting forth that he is the owner for value in good faith of five of the income and extension bonds or notes of \$1,000 each, with interest coupons unpaid; that through ignorance of the proceedings in respect to them they were not presented for exchange under the reorganization nor within the 60 days under the decree of sale, nor till after the decree of confirmation of the sale; and claiming that the grantee the Central Vermont Railway Company should, by the terms of the decrees, pay into the court such sum as the petitioner is entitled to receive in payment of his five bonds, and interest; and praying that such payment be ordered, and for further relief. That company has moved that the petition be dismissed, and the cause has now been heard upon that motion.

That these notes or bonds were valid securities upon the property in the hands of the receivers issuing them while it remained in the custody of that court could not well be questioned, and that they

were so wherever the property might be situated, if it could be reached by proper proceedings to enforce them, may be true; but that does not answer the question whether this petition should be retained here for further proceedings. While the property was in the custody of this court, through its receivers, an intervening petition like this would be a proper proceeding for any one having a lien or claim upon the property to take for enforcement of the right, because the court had the property in the grip of the law, and it could not be proceeded against elsewhere. That the court has so had the property in custody is, however, no good reason for such a proceeding against it after it has gone to the owners. The custody, which is the foundation for such a proceeding in such a case, is gone. The actual custody of the property here is gone, and no ground for such a proceeding remains, unless the liability of the purchaser has been so retained, through the proceedings mentioned, as to warrant it. Liabilities for labor, materials, and supplies were pending in the course of the cause, and they were understood to be claims having precedence over the mortgages when allowed as such. Still other claims might, from the generality of the expression, be included. However this might be, only such as had been presented, or should be within the 60 days, were, by the terms of the decree, saved. The running of the time might not at all affect the validity of the securities, and yet exclude them from among those reserved for summary proceedings against the purchaser of the property which the court, by the decree, parted with. The time for presenting them expired before the confirmation of the sale, and in that aspect presentation within the time would be quite material to the rights of the purchaser. The further provision as to distribution of the price among bondholders not depositing their bonds applies to those who had mortgage bonds and did not deposit them, and not to those who might have had mortgage bonds, but did not. The petitioner might have had such bonds, but did not, and through his failure to exchange his notes or bonds for them nothing has been reserved for him in the receivership proceedings here. Petition dismissed without prejudice.

In re FITCHARD.

(District Court, N. D. New York. September 20, 1900.)

1. **BANKRUPTCY—DISCHARGE—GROUNDS OF REFUSAL.**

The burden rests upon a creditor to establish by convincing proof that a bankrupt, since his adjudication, has concealed property belonging to his estate from his trustee, and that the concealment was knowingly and fraudulently made, to defeat his right to a discharge on that ground.

2. **SAME—FRAUDULENT CONCEALMENT OF PROPERTY.**

The fact that a bankrupt, after his failure in business, many years before Bankr. Act 1898 was enacted, conducted business in the name of his wife, with capital borrowed by her, for the purpose of preventing his creditors from reaching the product of his industry and skill, does not render property which is thereby accumulated in the name of the wife, and to which he never had any title, legal or equitable, assets of his estate on his subsequent adjudication as a bankrupt, so that his failure to schedule such property or report the same to his trustee constitutes a

knowing and fraudulent concealment of property, or the making of a false oath to his schedule, which will defeat his right to a discharge.

2. SAME.

Property transferred by an insolvent to his wife years prior to the passage of Bankr. Act 1898, which was purchased by him principally on credit, and subsequently paid for from the proceeds of business conducted by him as agent for his wife, is not assets of his estate which he is required to schedule on his subsequent adjudication as a bankrupt, in the absence of proof that it was held for him on a secret trust; and his failure to so schedule it is no bar to his discharge under such act.

In Bankruptcy. On motion to confirm report of referee recommending the discharge of the bankrupt, and on exceptions to said report.

A copy of the objections interposed by the creditor has not been handed to the court, and neither original nor copy is found among the papers in the possession of the clerk. It may, however, be gathered from the briefs that the discharge is opposed upon two grounds: First, that the bankrupt has knowingly and fraudulently concealed certain property belonging to his estate; and, second, that in omitting to mention said property in his schedules and in verifying the same he knowingly and fraudulently took a false oath. But one creditor appears in the schedules. The discharge is opposed by this creditor who recovered a judgment against the bankrupt March 12, 1890, for \$637.52, upon a debt created prior to 1880. The facts upon which opposition to the discharge is founded, except as to some formal matters, all come from the bankrupt. He is the sole witness as to the principal transactions. These occurred between 1879 and 1886. It is impossible to formulate a perfectly correct statement as the testimony fails to give the facts with accuracy. There is uncertainty and confusion as to dates and amounts. The testimony has been read in full, and the following are, it is thought, its salient features: In 1879 the bankrupt commenced a grocery business at Clinton, N. Y. He also engaged in buying and selling hops. The business continued until about 1884, when he failed. When the grocery business was sold out he was indebted about \$1,700 for goods purchased in that business. He also owed the demand of the present objecting creditor, which at that time amounted to about \$500. He owed other debts amounting to about \$2,400, occasioned by a drop in the price of hops. He sold his interest in the grocery business for about \$1,000, and was then insolvent in the sum of about \$3,600. On the 27th of March, 1886, he purchased property in Clinton known as "The Seeley Place," the consideration being \$2,000; he paid \$500 in cash and gave a bond and mortgage for the balance. On the 24th of July, 1886, this property, through a third person, was conveyed by the bankrupt to his wife, he having married in August, 1882. A portion of the Seeley property was subsequently sold for \$700. On the remaining portion two houses were erected, in one of which the bankrupt and his family lived. Soon after his failure the bankrupt commenced paying his creditors, and that all have since been paid, with the single exception stated, may fairly be inferred from the testimony. After the grocery business was sold out the bankrupt commenced buying and selling hops as agent for his wife, and since then has been acting in that capacity. This business started with \$500 which his wife borrowed from her aunt. In one of the first transactions thereafter the bankrupt purchased a quantity of hops at 3 cents per pound and sold them at 17 cents per pound, realizing a profit of some \$3,200. From 1882 down to the date of filing the petition the business was all transacted in the name of the bankrupt's wife. Up to 1892 the business was profitable, but since then it has been losing at the rate of from \$200 to \$500 yearly. The bankrupt has had his living expenses and spending money out of the business, the house being kept and the family supported out of the money thus produced. From time to time real property has been purchased from the avails of the business which is worth about \$5,000 over the mortgages thereon.

Andrew W. Mills, for bankrupt.

D. C. Stoddard, for objecting creditor.

COXE, District Judge (after stating the facts). In order to succeed, the opposing creditor must prove that the bankrupt, since the adjudication, has concealed property belonging to his estate from his trustee, and that the concealment was knowingly and fraudulently made. The burden is upon the creditor to establish these propositions by convincing proof. *In re McGurn* (D. C.) 2 Nat. Bankr. N. 877, 102 Fed. 743; *In re Marsh*, 2 Nat. Bankr. N. 649; *In re Berner*, Id. 268; *In re May*, Id. 93; *In re Cornell* (D. C.) 97 Fed. 31; *Roberts & Co. v. Buckley*, 145 N. Y. 215, 39 N. E. 966. It is unnecessary to consider separately the specification relating to the bankrupt's false oath. In the circumstances disclosed by the proof if there be no concealment there can be no false oath. Briefly stated, the case presented is that of a man who, having failed with judgments against him, transacts business thereafter in the name of his wife for the purpose of preventing his creditors from reaching the avails of his labor. There is nothing unusual in this situation. Thousands of insolvents, since the repeal of the bankruptcy act of 1867, have resorted to similar devices. One of the main objects of the present law is to emancipate this vast army of unfortunates by permitting them to emerge from a questionable and undignified seclusion and face the vicissitudes of the business world openly and honestly. The court has no difficulty in finding that the business of the bankrupt was conducted in the name of his wife for the purpose of preventing his creditors from reaching the products of his industry and skill. The title to the real estate was placed in her name for a like reason; but there is nothing in the present act which makes such conduct a ground for withholding a discharge. To prevent the discharge, property belonging to the bankrupt must be fraudulently concealed from his trustee. The record does not show a case of this kind. When the bankrupt failed in 1884 his entire estate, apparently, was swept away. He was insolvent in the sum of nearly \$4,000. Since then, unless the testimony is to be rejected arbitrarily and suspicion and conjecture substituted, the bankrupt has transacted business for his wife, the capital being money which she borrowed and placed in his hands. He gave up everything when he failed; there is not a dollar's worth of property which he then owned now in existence; there is nothing that the trustee can put his hand on and assert that it was once the property of the bankrupt. The property which is the subject of controversy was never owned by the bankrupt. With the exception of a few months when the title to the Seeley property stood in his name, he never held the equitable or legal title to any of it. What property did he conceal? Where is it situated? In what language can the court describe it? If he owns no property it is manifest that he can conceal no property. The general facts resemble those disclosed in the case of *In re McGurn*, *supra*, and in the Case of *Freund* (D. C.) 98 Fed. 81, where the business was transacted by the bankrupt as the agent of his wife. A married woman may carry on business with her husband as agent, and the fact that he receives no compensation other than his support does not impair her title to the property or subject it to the claims of his creditors. Such an arrangement, considered ethically, may be a fair subject of discussion, but that it can be

upheld from a legal point of view, is beyond doubt. In *Abbey v. Deyo*, 44 N. Y. 343, Judge Hunt, who delivered the opinion of the court of appeals, says, at page 346:

"The appellant's counsel insists that the services, the time and talents of the husband are valuable, and he has no more right to give them to his wife, as against his creditors, than to give to her his property to their prejudice. The one, he says, is as much their property as the other. This argument is entirely unsound. The property of a debtor, by the laws of all commercial countries, belongs to his creditors. He must be just before he is generous. He must pay before he gives. Not so with his talents and his industry. Whether he has much, or little, or nothing, his first duty is the support of his family. The instinctive impulse of every just man holds this to be the first purpose of his industry. The application of the debtor's property is rigidly directed to the payment of his debts. He cannot transport it to another country, transfer it to his friend, or conceal it from his creditor. Any or all of these things he may do with his industry. He is at liberty to transfer his person to a foreign land. He may bury his talent in the earth, or he may give it to his wife or friend. No law, ancient or modern, of which I am aware, has ever held to the contrary. No country, unless both barbarous and heathen, has ever authorized the sale of the person of a debtor for the satisfaction of his debts."

See, also, *Buckley v. Wells*, 33 N. Y. 518; *Knapp v. Smith*, 27 N. Y. 278.

Even were it proved that the property in dispute was once owned by the bankrupt and that years prior to the passage of the act he transferred it to his wife, such a conveyance, in the absence of proof that the property is held for the bankrupt by a secret trust, cannot bar a discharge under any of the provisions of the present act. Where property owned by the bankrupt is actually in existence and is in fact concealed from the trustee, "or where the title is concealed by a colorable conveyance, the discharge should be refused." Where neither of these conditions exists, it should be granted. In *re Murdock*, 1 Low. 362, 17 Fed. Cas. 1010 (No. 9,939); In *re Boynton* (D. C.) 10 Fed. 277.

Counsel for the creditor relies upon the *Quackenbush Case* (D. C.) 102 Fed. 282; but the case at bar lacks the essential element which there induced the court to refuse the discharge. In the *Quackenbush Case* the referee found that the bankrupt had in his possession and under his control property, in specie, which had been transferred by him to his wife without consideration, by a mere legal fiction, to prevent his creditors from reaching it. But for this fraudulent title the trustee could lay his hand upon and divide among the creditors the identical property once owned by the bankrupt. In other words, it was the property of the bankrupt which he had attempted to hide by a veil so transparent that the failure was visible to the most unobserving. All these ingredients are lacking in the case at bar. There is no property which can be said to belong to the bankrupt, there is no concealment and no fraud.

The report of the referee is confirmed, the exceptions are overruled and the discharge is granted.

WESTERN UNION TEL. CO. v. CITY OF TOLEDO et al.

(Circuit Court, N. D. Ohio, W. D. August 23, 1900.)

No. 1,597.

TELEGRAPHS—OCCUPATION OF STREETS—REVOCATION OF PERMIT.

A general telegraph company, granted a permit by a city to erect poles and wires in the streets and alleys of the city, cannot, under cover of its franchise, confer the right to use such streets and alleys upon a separate company desiring to construct a local system, without the consent of the city, and an attempt to do so will justify the city in revoking its franchise.

In Equity.

H. D. Estabrook and E. A. Foote, for complainant.

Moses R. Brailey, for respondents.

THOMPSON, District Judge. This cause is submitted on an application for a preliminary injunction. The gist of the complaint, found in paragraph 10 of the bill, is that:

"The said city of Toledo, through its common council and its various officers, particularly the defendant officers here impleaded, threatens to cut the wires, destroy the lines, and remove the poles of your orator from districts and localities not covered by the underground ordinance, and in places and localities which do not and cannot by any possibility interfere with the ordinary travel upon the streets and alleys of said city of Toledo, and without designating any place or locality, other than the places now occupied, to which your orator shall remove these lines and poles; and your orator avers and shows unto your honors that said city of Toledo, its common council, and officers aforesaid, will, unless restrained by order of this honorable court, destroy the property of your orator, interrupt the working of its lines, disorganize and ruin its business, and incapacitate it from discharging its duties to the public and its agency to the federal government."

The affidavit of Charles O. Brigham, filed in support of the application, shows that the city of Toledo revoked the permits "for outside construction of any kind" which had theretofore been granted the complainant, and that by "outside construction of any kind" complainant understood that the entire city of Toledo was included. The affidavits of the defendants show that the city of Toledo found that the National District Telegraph Company was using the permits granted to the complainant to construct for operation a system of local messenger call boxes, and thereupon revoked the permits; and afterwards, on the 5th of April, 1900, the common council of the city of Toledo passed an ordinance directing the chief of police, the civil engineer, and superintendent of the fire-alarm telegraph to remove forthwith from the streets, alleys, and public places of the city of Toledo the wires, fixtures, and poles erected or constructed by the National District Telegraph Company. The defendants disclaim any intention to cut, remove, or destroy any of the wires, poles, or other property of the complainant, but insist upon their right to remove the property of the National District Telegraph Company, because it has not complied with the laws of the state of Ohio, nor with the ordinances and regulations of the city of Toledo governing the placing of wires and poles in said city. The rebutting affidavits of the complainant state that every pole set and every wire strung on any of said poles

under permits issued to the complainant was and is the property of the complainant, and that no other person or corporation under said permits erected poles or strung wires thereon.

It clearly appears from the affidavits that the permits granted to the complainant contemplated work to be done in furtherance of the ordinary business of the complainant, but did not contemplate that any other company or corporation under cover of these permits would use the franchise of the complainant to establish and carry on a purely local business. Upon the case presented by the affidavits there would seem to be an abuse of the privilege granted the complainant sufficient to justify the revocation of the permits. The complainant, under its franchise, could not confer upon a separate and distinct company or corporation the right to use the streets and alleys of the city of Toledo without its consent. The ordinance referred to was directed against the National District Telegraph Company and its attempted use of the streets and alleys of the city of Toledo without its consent, and not against the complainant, and there is no proof to sustain the allegations of the bill that the defendants seek to remove or destroy the property of the complainant. The application for an injunction therefore will be refused, and the preliminary restraining order heretofore issued will be vacated.

ARKANSAS & O. R. CO. v. ST. LOUIS & S. F. R. CO.

(Circuit Court, W. D. Arkansas, Ft. Smith D. August 6, 1900.)

1. RAILROADS—POWER OF EMINENT DOMAIN—ARKANSAS STATUTES.

Under the statutes of Arkansas, as construed by the supreme court of the state, a railroad company which has complied with Sand. & H. Dig. § 6148, and thereby effected its incorporation, becomes vested with the right to exercise the power of eminent domain; and its failure to comply with the subsequent provisions of the statute relating to its organization cannot be invoked as a defense to proceedings under the statute to condemn right of way or an easement to cross the track of another road.

2. SAME.

A railroad company authorized by its articles of incorporation to construct, acquire, purchase, own, equip, and operate a railroad between designated termini may lawfully purchase the road of another company, and make use in its own line of such portion of the track of such road as it sees fit; and the building of a new road connecting with such track does not make necessary a compliance with the requirements of the Arkansas statutes relating to an extension by a railroad company of its road before it can maintain proceedings to condemn a right of way.

8. SAME—CROSSING TRACK OF ANOTHER ROAD.

Under the Arkansas statutes which enjoin upon every railroad company whose railroad is or shall be crossed by any new railroad the duty of uniting with the owner of the new road in forming such crossing, and of granting all necessary facilities for that purpose, and also for the interchange of business at such crossing, where a company desiring to cross with its track the track of another company suggested to the latter a point of crossing, which was approved, such approval estops the older company from objecting, either to the necessity for the crossing or the place, in subsequent condemnation proceedings made necessary by the failure of the two companies to agree upon the terms, and after the new company, in reliance thereon, has purchased right of way and constructed its road nearly to the point agreed on for the crossing.

4. SAME.

A railroad company which constructs and operates a line of road in another state subject to the laws of such state, which give other roads the right to cross its tracks, and which require it to afford all proper facilities therefor, has no right to impose upon another company unusual and unnecessary terms as a condition for permitting such a crossing; and its demand that a crossing company shall construct and maintain at its sole expense an interlocking switch, such as it does not itself maintain at any crossing similarly situated on its line, is not a reasonable demand which will be enforced by the courts.

5. SAME—OBSTRUCTING CROSSING BY ANOTHER COMPANY.

Where a railroad company, after agreeing with another company as to the point at which the latter should cross its track, and upon the subsequent refusal of the second company to agree to unreasonable conditions, constructed a switch and a spur track on either side of its main track at such point on different grades, and for which it had no need, the real purpose being to prevent the crossing, such tracks will be treated by the court as mere obstructions, which will not be permitted to interfere with the crossing, or to enhance the damages awarded therefor.

This was a proceeding by a railroad company under the statutes of Arkansas to condemn right of way and also an easement to cross the right of way and tracks of another company.

The following are the findings of fact:

On this day came on to be determined the above-entitled cause heretofore submitted, after argument by the respective attorneys of the parties, on the pleadings, exhibits, the depositions of witnesses reduced to writing and filed, maps, plats, profiles, written stipulations, and other proof, and the court, being now fully advised, doth make the following special findings of fact:

That the Arkansas & Oklahoma Railroad Company is a corporation duly organized under the general statutes of the state of Arkansas for the incorporation of railroads, and the St. Louis & San Francisco Railroad Company is also a corporation organized under the laws of the state of Missouri, and at the institution of this suit, and for many years prior thereto, owned and operated a railroad running north and south through the eastern part of Benton county, Arkansas, and through the town of Rogers, in said county, which is a town of about twenty-five hundred inhabitants. That for many years prior to the institution of this suit an independent railroad line, about six miles in length, known as the "Bentonville Railroad," was operated between the towns of Rogers and Bentonville, in the same county, and by an arrangement between the Bentonville Railroad and the defendant company the former road intersected the latter about three-quarters of a mile north of the depot of the defendant company at the town of Rogers, and used the track of the defendant company from the point of intersection to said depot for its terminal facilities. On the 1st day of April the plaintiff company, the Arkansas & Oklahoma Railroad Company, filed its articles of incorporation in the office of the secretary of state of Arkansas, said incorporation having been had under section 6148 of Sandels & Hill's Digest of the state of Arkansas, and in conformity thereto. That said railroad company was incorporated, as stated in its charter, "for the purpose of constructing, acquiring, purchasing, owning, equipping, and operating a railroad from a point at or near the southeast corner of section thirty-one, in township twenty north, range 29 west, in Benton county, Arkansas; thence in a westerly direction across the track of the St. Louis & San Francisco Railroad, and by the way of the town of Bentonville, in said county of Benton, and continuing in a westerly direction across the track of the Kansas City, Pittsburg & Gulf Railroad to the southeast corner of section thirty-five, in township twenty north, range thirty-three west, in said county of Benton," making the entire line of said proposed railroad between twenty-four and twenty-five miles in length. Before this suit was begun, the Bentonville Railroad was absorbed by the Arkansas & Oklahoma Railroad Company, and after its absorption, and up to the commencement of this suit, the Arkansas & Oklahoma Railroad Company, by an arrangement with the defendant

company similar to that which had previously existed between the Bentonville Railroad Company and the defendant company, continued the use of the defendant company's tracks at Rogers for terminal purposes. That the defendant railroad company originally owned, laid off, and platted the town of Rogers, reserving certain properties for railroad purposes, including the right of way which plaintiff company now seeks to cross. That some time afterwards it acquired title to the eighteen-acre tract described in plaintiff's complaint by donation from the people of Rogers, in order to secure a roundhouse and the end of a division at that place. That a roundhouse was constructed on said eighteen-acre tract, and the end of a division also maintained at Rogers until 1886 or 1887, when the end of the division was removed to Chester, and said roundhouse and eighteen-acre tract abandoned for railroad purposes. The roundhouse was left standing, and a single track running thereto was also left. All other tracks were taken up. That since the removal of the end of the division to Chester the roundhouse and the eighteen-acre tract have been abandoned for all railroad purposes. That at the commencement of this suit the walls of the roundhouse were crumbling down, the roof had rotted off, and nothing remained except the dilapidated walls and the single track, which was used by an oil company which had an oil tank upon the premises alongside of the remaining track. That said eighteen-acre tract was not reserved, when the town was laid off, for railroad purposes. That it lies outside of the original plat of the town, and, since the end of the division was removed, has been an abandoned common; used by the defendant company for no railroad purpose whatever. That early in 1898 the plaintiff company entered upon negotiations with the proper officers of the defendant company for new arrangements for terminal facilities, either joint or otherwise, at Rogers, and was then notified that, after the extension of the plaintiff's road west from Bentonville, it must provide its own terminal facilities, and that joint facilities would not thereafter be entertained. That thereupon the plaintiff company began negotiations with the defendant company for the crossing of the defendant road at Rogers. That, as the result of personal interviews and correspondence with the general solicitor and the vice president and general manager of the road, Mr. Yoakum, as well as of correspondence with the latter, the plaintiff company was requested by Mr. Yoakum to designate a point for a crossing, and did so designate the very point at which it now seeks to cross; and the plaintiff company, looking to an amicable arrangement with reference to the point of crossing, made inquiry of the defendant company whether or not there was any other point at which it would prefer that plaintiff company should cross. To this inquiry Mr. Yoakum, the general manager of the defendant company, wrote the following letter:

"St. Louis, January 28, 1899.

"Crossing at Rogers.

"Mr. J. M. Bayless, President, etc., Bentonville, Ark.—Dear Sir: I have gone over, with Mr. Bisbee, the matter of the crossing of the Arkansas & Oklahoma line through our station grounds at Rogers, and we were unable to suggest a point of crossing that would be less objectionable than the one indicated by you. Whenever you are ready, after the contract is signed, Mr. Bisbee will come or send some one to Rogers, and definitely fix the grade and point of crossing. After the agreement is signed, the matter of details can be arranged between Mr. Bisbee and yourself, I think, without any difficulty.

"[Signed]

Yours, truly,

B. F. Yoakum, by C. H. B."

"C. H. B.," It is shown in the proof, was the clerk or secretary of Mr. Yoakum. Before this letter was written, the matter had been referred by Mr. Yoakum to Mr. Bisbee, who is a civil engineer in the employment of the St. Louis & San Francisco Railroad Company, and the superintendent of its tracks, bridges, and buildings at Rogers; and Bisbee had recommended the crossing at the point designated in the complaint, upon condition that an interlocking plant was provided for. That the plaintiff company, in February, 1899, notified the defendant company that it would not stand the expense of an interlocking plant, and would force its way through at that point. The disagreement, therefore, with reference to the point of crossing, mainly grew out of the refusal on the part of the plaintiff company to stand the expense of

an interlocking plant. Prior to this a contract had been prepared by the plaintiff company specifying the conditions and requirements which the defendant company required, and the plaintiff company had refused to sign it, and had prepared and tendered another contract, which was not accepted by the defendant company. There was no disagreement between the parties as to the point of crossing. It grew out of the controversy over the interlocking plant and the expense incident to its provision and maintenance; in short, a controversy over the amount of compensation that plaintiff company was required by the defendant company to bear in order to effect the crossing at the point specified. Immediately after receiving the Yoakum letter above set forth, the plaintiff company, acting in good faith upon that letter, bought certain lands lying north and west of the defendant's said eighteen-acre tract on which to construct its roadbed, switches, and wye, preparatory to crossing at the point agreed upon, and proceeded, at great expense, to construct its roadbed and wye thereon, which was constructed down to the point of intersection on the northern boundary of the eighteen-acre tract above referred to. It also proceeded to acquire the right from the town of Rogers to extend its roadbed east and south of the point designated for the crossing of the plaintiff company's line, down Arkansas street in the town of Rogers, to a point opposite the defendant company's depot, and only a very short distance therefrom, and at which depot for many years the plaintiff company had transacted all of its local business at Rogers, using the defendant company's track, as above stated, for three-quarters of a mile north of Rogers for its terminal facilities. After the said lands were purchased and said rights acquired by the plaintiff company, and the defendant company advised of it, and after the right of way on the east side of the defendant company's track was procured from the town of Rogers, the defendant company permitted the plaintiff company to go on and construct its roadbed and wye down to the line of the said eighteen-acre tract, with the manifest purpose of crossing the said eighteen-acre tract and its right of way and track at the point designated, and never, up to the trial, withdrew, or attempted to withdraw, the said letter of Mr. Yoakum, agreeing to the point designated as the proper point for crossing, or even protested that it was not a proper point to cross, or that it would in any way interfere with its business, or detract from the usefulness of its yards; nor did it afterwards claim that any part of the eighteen-acre tract was necessary for trackage or future railroad purposes at the town of Rogers. When the defendant company saw that plaintiff company was constructing its roadbed and line and wye down to the line of the eighteen-acre tract at the point its contemplated line was to enter the eighteen-acre tract, and while the iron was being laid thereon, it at once extended a short spur track on the east side of the main track, south, a sufficient distance to become an obstruction to the crossing of the plaintiff's road at the point designated and agreed upon for a crossing, and constructed a long parallel switch on its right of way on the west side of its main line, the full length of the eighteen-acre tract. At the time the point of crossing was designated and agreed upon, neither of these switches constituted an obstruction at the point of crossing, and they were not put there until the plaintiff company began laying iron on its roadbed and wye just north of the eighteen-acre tract. Both of these switches were roughly and crudely laid down, and below the grade of the main track, and confessedly for obstructive purposes only, and not, as the court finds, because there was any real necessity, present or future, for their use. In truth, Mr. Bisbee, the superintendent of tracks, buildings, and bridges for the defendant company, and who is a civil engineer of many years' standing, and who extended the spur switch on the east side and constructed the long switch on the west side of defendant's line so as to obstruct the point of crossing, on cross-examination was forced to admit that the track of the switch on the west side is about 15 or 18 inches below the main track, and the east side about 4 feet below, and that the natural surface of the ground at that point on both sides is approximately on a grade with the main track,—not entirely so,—and that he constructed the switches in that way "simply to keep 'you folks' [meaning the plaintiff company] from crossing 'us' [meaning the defendant company]"; that that was "protection for ourselves" (meaning the defendant company). On being asked if he did not put the switch in as an obstruction to the con-

templated crossing by the plaintiff company, and for no other reason, he said: "I put those switches in because I had instructions to add what sidings were necessary to the Rogers yard, and use my judgment when and where to put them in. I put them in on a statement made by Mr. Bayless [who was the president of the Arkansas & Oklahoma Railroad Company] in St. Louis, in the general office, giving to understand he was going to force a track over that. I took the matter in hand, and did it as protection to ourselves, as he would not accept our interlocking plant." It is clearly established, therefore, that the refusal of plaintiff company to execute the contract, among other things, providing for an interlocking plant, involving large expense which the plaintiff company was not willing to stand, was the real cause of the disagreement, and brought about a failure of the original agreement as to the terms of crossing. The court finds that on the sixteen hundred miles of railroad operated by the defendant company, on which there are fifty or sixty crossings by other roads, it has only three such interlocking plants as was required of the plaintiff company,—one at Coburg, just outside of Kansas City, where the defendant company crosses two other roads; one at Fair Lawn, in the immediate vicinity of St. Louis; and one about half a mile from Oklahoma City, which has some six or eight thousand people; that it has no interlocking plants at such places as Neosho, Mo., Nichols Junction, and Springfield, Mo., Ft. Smith, Ark., Vinita and Claremore, Ind. T., some of which are towns from three to five times as large as the town of Rogers; that they have several contracts for putting in interlocking plants at some of the points just named, and perhaps at other places, and, when inquired of as to the reason why interlocking plants had not been put in at those places, the witness Bisbee stated that that was a question for the transportation department to say when they needed interlocking plants, and not him. The court finds as a matter of fact that there is no real necessity for an interlocking plant at Rogers; that there is no unusual or extraordinary danger at Rogers in establishing an ordinary grade crossing there which is not incident to crossings at other places much larger in size, and at which there are no interlocking plants; that the effort to show the necessity there for an interlocking plant, and the necessity for additional trackage on the eighteen-acre tract, is a mere subterfuge, having no foundation in fact, and is a part of the obstructive tactics employed by the defendant company to secure a contract for an interlocking plant, at their pleasure, at Rogers, at a place where one is now not required, and not likely ever to be required. The testimony fails to convince the court that the crossing of the plaintiff's road at the point designated will destroy or materially affect the value of its yard at Rogers, or impair its usefulness, or materially interfere with its business there beyond that which is incident to the crossing of a road at any point. The court further finds that before the institution of this suit the plaintiff company had surveyed and located its line of road across the eighteen-acre tract and across the line of the defendant company at the point designated in the complaint, and had made a map and profile of the route intended to be adopted by said company, which was duly certified and filed in the office of the clerk of Benton county, Ark., as required, and in conformity to section 2765 of Sandels & Hill's Digest of the Statutes of Arkansas, and that the line surveyed and located runs across the eighteen-acre tract and the right of way and track of the defendant company as the same is described in the complaint. The court further finds that the eastern terminus of plaintiff's line, as designated on the map and profile of the plaintiff's road, is in the neighborhood of one mile southwest from the point designated in the charter, and is on the east side of the defendant company's road, as designated in its charter; that the proof does not show that the plaintiff company has ever made any other survey, map, or profile of its road, or made any changes whatever in this one since it was filed; that the surveyed line is a substantial compliance with the plaintiff's charter. The court further finds that the yards of the defendant company are about one-half mile from the point designated for the crossing of defendant company's road, and the depot of defendant company is a little less than one-half mile from the proposed crossing; that plaintiff's road is now constructed and operated west from Bentonville about twenty miles, and graded several miles further west in the direction of Southwest City, Missouri. The court further finds that the short spur

switch on the east side of defendant company's main line, and which was extended so as to constitute an obstruction at the point of crossing, is not a switch in any general use; one of the witnesses who lived near by and passed the switch every day testifying that he never saw a car on that switch, and never had seen the switch open. The court further finds that the public convenience and necessity require that the road of the plaintiff company should cross the defendant's line of road at Rogers, and that the point designated in the plaintiff's complaint is a proper place for the crossing; that the necessity that the plaintiff's line should be run to the point on Arkansas street opposite and near the depot of the defendant company is a public necessity was recognized by the defendant company by its joint arrangement for the use of its own track for many years to its said depot near that point, as well as shown by other testimony, and especially by the Yoakum letter above quoted.

On the above findings of fact the court makes the following declarations of law:

1. That the Arkansas & Oklahoma Railroad Company is a corporation having power to exercise the right of eminent domain, and has in all things conformed to the statutes of the state of Arkansas giving it the right to the exercise thereof, and that this proceeding to condemn is for a necessary and public purpose.

2. That the defendant company is estopped from being heard to say that the point designated for the crossing by the plaintiff company is not a suitable and proper point for the crossing, or that there is no necessity therefor.

3. That, if it is not so estopped, the court declares that the point designated is a proper place for the crossing, and that there is a public necessity that the plaintiff company should cross the defendant's line so as to reach the point in Arkansas street opposite the depot of the defendant company in the town of Rogers, and that such necessity is shown by evidence and recognized by the defendant by the arrangement entered into by it with the Bentonville Railroad for the joint use of its tracks in order that the Bentonville Railroad, and afterwards the plaintiff company, might reach the depot of the defendant company.

4. That the eighteen-acre tract of land is in no proper or rightful sense a part of the yards of the defendant company, but is property now, and which has been for years past, held by the defendant railroad company for no public purpose connected with its railroad business, and is, therefore, subject to condemnation for public purposes like the property of any other corporation or individual.

5. That the plaintiff company is entitled to the right of way as described in the complaint, through the eighteen-acre tract, and of one hundred feet in width, and that the same should be condemned for that purpose, and that the value thereof, and the damage to the remainder of the tract, is the sum of \$550; that the plaintiff company should not be allowed to condemn for its sole and separate use any portion of the right of way or track of the defendant company, but is entitled to an easement over the same for the crossing at the point designated in the complaint for a single track of standard-gauge railway; and that the plaintiff company should pay all of the expenses necessary to the construction of an ordinary grade crossing across the defendant's main line at the point designated in the complaint, including the necessary grading, iron, frogs, switches, and other appurtenances for an ordinary crossing, as well as the labor and all material used in constructing the same. In short, that the crossing of the defendant's line should be made wholly at the expense of the plaintiff company, and that the defendant company should furnish such facilities therefor as the statute requires. The court further declares that the switches on the east and west sides of said road at said point of crossing should be treated as mere obstructions, which the court finds they are, and are not switches constructed there for railroad purposes because necessary or desirable for defendant's business. The court further declares that the plaintiff company should have the right to cross what is designated in the complaint as the "mill switch" at a point in the center of Arkansas street, and that the plaintiff company should furnish the material, including the grading, iron, frogs, switches, and other necessary appurtenances for an ordinary grade crossing, as well as all other labor and material in con-

structing the same. In short, that the crossing of defendant's main line and mill switch should be made wholly at the expense of the plaintiff, and that the defendant company should furnish such facilities therefor as the statute requires. The court further finds the damages of the defendant company for such easement over its said right of way, track, and mill switch, as well as the damages which the defendant company sustains by reason of the crossing thereof, to be the sum of \$450; making the total damage to be paid by the plaintiff the sum of \$1,000.

It is therefore considered, ordered, and adjudged that a right of way one hundred feet in width be, and the same is hereby, adjudged and condemned in favor of the plaintiff company, the Arkansas & Oklahoma Railroad Company, and against the St. Louis & San Francisco Railroad Company, across the following described real estate, situate in the county of Benton, and state of Arkansas, to wit: "A part of the northwest quarter of the northwest quarter of section 7, township 19 north, range 29 west, and more particularly described as follows, that is to say: Beginning at the northwest corner of said northwest quarter of said section 7, township 19 north, range 29 west, and running east with the line of said section 7 535 feet, and to the western boundary line of the right of way of the St. Louis & San Francisco Railroad; then in a southwesterly direction along the west boundary line of said right of way, and 50 feet from and parallel with the center of the railroad track of the said St. Louis & San Francisco Railroad, 2,016 feet to the north boundary line of Maple street, in the town of Rogers, Arkansas; then west along with said north boundary line of Maple street 86 feet, more or less, to the northeast corner of Maple and Douglas streets, Sikes' addition to said town of Rogers; thence north along the east boundary line of said Douglas street a distance of 380 feet to the northeast corner of Douglas and Cedar streets, in said town of Rogers; thence in a westerly direction along the north boundary line of said Cedar street to the point of intersection of the west boundary line of said section 7; thence north along said western line of said section 7 to the place of beginning,—containing eighteen acres, more or less." And that said right of way hereinbefore referred to is described as follows, that is to say: That the center of said right of way enters upon the said eighteen acres of land hereinbefore described at a point 31 feet east of the northwest corner of said section 7, township 19 north, of range 29 west; then running in a southeasterly direction to a point of intersection of the western boundary line of the defendant's right of way 1,060 feet south of a portion of the north boundary line of the northwest quarter of the northwest quarter of said section 7. The said right of way so condemned shall embrace 50 feet on either side of said above-described line across said entire tract of eighteen acres of land, the said right of way being more accurately described in plaintiff's complaint, to which reference is made, but not to interfere with the roundhouse or switch thereto. It is further considered, ordered, and adjudged that the plaintiff company is entitled to an easement for a standard-gauge railroad track across the entire right of way of the defendant railroad company at a point fixed by continuing the line heretofore described as the center of the right of way across said eighteen-acre tract in a southeasterly direction across the defendant's right of way, and across the defendant's railroad track, at a point thereon 1,159 feet south of the point where said track is crossed by the north boundary line of the said northwest quarter of the northwest quarter of said section 7; then continuing in a southeasterly direction over and across the defendant's right of way on the east side of its track a distance of 169 feet to a point of intersection of the eastern boundary of the street known and designated as "Arkansas Street," in said town of Rogers, which street runs south parallel and contiguous with defendant's right of way, said easement across said right of way and railroad track of the defendant company being of sufficient width only to construct and grade a track of a standard-gauge railway, and not to exceed at any point 20 feet. It is further considered, ordered, and adjudged that an easement be, and the same is hereby, condemned in favor of the plaintiff company across what is known and described in the complaint as the "mill switch," at a point in the center of said Arkansas street, and in the middle of said street, where said switch crosses the same, and that such easement be of such width only as is necessary for

the construction of the track and bed of said plaintiff railway company. It is further considered, ordered, and adjudged that all the expense of said crossings, including the necessary grading, iron, frogs, switches, and other appurtenances for an ordinary grade crossing, as well as the labor and all material used in constructing the same, be supplied and furnished by the plaintiff company, and that the plaintiff company pay into the treasury of this court, for the use and benefit of the defendant company, or to the defendant company, or its attorney of record, by way of compensation for damages sustained by the defendant company, as stated in the special findings of fact hereinbefore recited, the sum of \$1,000, for the sole use and behoof of the defendant company. It is further considered, ordered, and adjudged that each of the parties to this proceeding pay its own costs incurred herein. It is further considered, ordered, and adjudged that, upon the plaintiff company complying with the terms of this judgment, the proper lands and easements hereinbefore described be, and the same are hereby, condemned to the use of the plaintiff as hereinbefore more particularly stated, and that the plaintiff company have the right to enter upon and construct its line of railway over and across said property and defendant's right of way and railroad track and switches as the same are hereinbefore described, and, upon the failure of the plaintiff company to pay the amount hereinbefore stated within thirty days next after the rendition of this judgment, that all of its rights herein described be, and the same are hereby, forfeited, and this judgment held for naught.

James A. Rice, for plaintiff.

B. R. Davidson, for defendant.

ROGERS, District Judge. This is a civil proceeding under the statutes of Arkansas, and demands relief under two distinct statutes:

First. The condemnation of the right of way across the 18-acre tract of land described in the complaint; and the proceeding for that purpose was instituted under the following sections of Sandels & Hill's Digest of the Statutes of Arkansas:

"Sec. 2770. Any railroad, telegraph or telephone company, organized under the laws of this state, after having surveyed and located its lines of railroad, telegraph or telephone, shall in all cases where such companies fail to obtain by agreement with the owner of the property through which said lines of railroad, telegraph or telephone may be located, the right of way over the same, apply to the circuit court of the county in which said property is situated, by petition, to have the damages for such right of way assessed, giving the owner of such property at least ten days' notice in writing of the time and place where such petition will be heard."

"Sec. 2772. If the owner or owners of such property be non-residents of the state, infants or persons of unsound mind, such notice shall be given by publication in any newspaper in said county which is authorized by law to publish legal notices, which notice shall be published for the same length of time as may be required in other civil cases. If there be no such newspaper published in the county, then said publication shall be made in some such newspaper designated by the circuit clerk, and one written or printed notice thereof posted on the door of the court house of such county."

"Sec. 2774. Such petition shall, nearly as may be, describe the lands over which said road is located, and for which damages are asked to be assessed, whether improved or unimproved, and be sworn to."

"Sec. 2776. The amount of damages to be paid the owner of such lands for the right of way for the use of such company shall be determined and assessed irrespective of any benefit such owner may receive from any improvement proposed by such company."

"Sec. 2777. In all cases where damages for the right of way for the use of any railroad company have been assessed in the manner hereinbefore provided, it shall be the duty of such railroad company to deposit with the court or pay to the owners the amount so assessed, and pay such costs as may, in

the discretion of the court, be adjudged against it, within thirty days after such assessment; whereupon it shall and may be lawful for such railroad company to enter upon, use and have the right of way over such lands forever."

"Sec. 2780. In all cases where such company shall not pay or deposit the amount of damages assessed as aforesaid within thirty days after such assessment, they shall forfeit all rights in the premises.

"Sec. 2781. The words 'right of way' as used in this act, shall be construed to mean and include all grounds necessary for side-tracks, turn-outs, depots, work-shops, water stations and other necessary buildings."

Second. The condemnation of an easement, merely, across the right of way and the tracks of the defendant company; and for that purpose the proceeding was instituted under the following sections of said digest:

"Sec. 6345. Every railroad corporation created and organized under the laws of this state, or created and organized under the laws of any other state or the United States, and operating a railroad in this state, shall have the power to cross, intersect, join or unite its railroad with any other railroad now constructed or that may hereafter be constructed, at any point on its route and upon the grounds and right of way of such other railroad company, with the necessary turnouts, sidings, and switches and other conveniences in furtherance of the object of its construction. And every railroad company whose railroad is or shall be crossed, joined, or intersected by any new railroad shall unite with the owners and corporation of such new railroad in forming such crossing, intersection and connection, and shall grant to such railroads so crossing, intersecting or uniting all the necessary facilities for that purpose as aforesaid.

"Sec. 6346. If the two corporations can not agree upon the amount of compensation to be made for the purposes set forth in the foregoing section, or the points or manner of such crossing, junction or intersections, the same shall be ascertained and determined by a court of competent jurisdiction in the same manner as provided for the ascertainment of damages for right of way for railroads.

"Sec. 6347. Every railroad company operating a railroad in this state shall cause all freight and passenger trains running on their roads to stop at all points on their roads where another railroad crosses, joins, unites or intersects and take and receive on their trains all passengers, freights and mail which such railroad so crossing, joining or intersecting has for shipment at such point, and shall carry the same and shall also discharge all passengers, freights and mail consigned to said point of crossing, intersection or junction of such railroad, and which is to be transported, carried and conveyed on said railroad, and no railroad company shall in any wise discriminate against passengers or freight transported or conveyed by any intersecting railroad company.

"Sec. 6348. Any railroad company violating any of the provisions of the preceding sections shall forfeit and pay to the company injured thereby double the amount of damages which such injured company may have sustained, to be recovered in any court of competent jurisdiction."

There is no reported case of the supreme court of this state, nor in the United States courts, so far as has been discovered, settling the practice or the nature and character of the judgment to be rendered under the last-named sections of the statute providing for the crossing or intersecting of one railroad by another, and the statute itself is so crude and meager in its provisions as to what the court is to do that I have found no little difficulty in framing any judgment adequate to the situation without trenching on legislative ground. It is to be hoped that this case may be taken to a higher court, where some authoritative decision can be rendered for future guidance of the inferior courts, and that the attention of the leg-

islature of the state may be drawn to the crude, incongruous mass of patchwork legislation in regard to railroads in this state which now almost defeats intelligent judicial interpretation and enforcement in many particulars.

It was urged with much persistence that the plaintiff corporation, at the commencement of this suit, had not been organized so as to authorize it to exercise the right of eminent domain. It was not, however, insisted that it had not complied strictly with section 6148 of Sandels & Hill's Digest. It was insisted that it had not complied with section 6149 of Sandels & Hill's Digest, and that a compliance with that section of the statute was a condition precedent to its right to exercise the power of eminent domain. To this contention I cannot agree. The question has been settled by the supreme court of Arkansas in the case of *Brown v. Railway Co.* (Ark.) 56 S. W. 862. Upon the authority of that case, which is binding upon this court, I hold that, upon compliance by plaintiff with the section 6148 of Sandels & Hill's Digest, the plaintiff became an incorporation vested with the right to exercise the power of eminent domain, and that its failure to comply with the subsequent provisions of the statute, if such were true, relating to its organization, are questions which the defendant cannot raise under the statutes and decisions in this state in a proceeding like this, but that such questions must be remitted to the state under whose laws the plaintiff corporation was organized.

It was also urged that the plaintiff corporation had not complied with the act entitled "An act to amend the railroad laws of this state," found on page 365 of the bound acts of Arkansas, approved May 8, 1899. This act was not in force when the plaintiff corporation was organized or this suit was brought. It has no application to the case, and does not affect the organization of the plaintiff corporation, or impose any duty upon it as a condition precedent to the right to maintain this suit.

It was insisted that the plaintiff corporation, in seeking to build into the town of Rogers, was extending its road. Such is not the case. If the work now sought to be done was being prosecuted by the Bentonville Railroad, which plaintiff corporation absorbed, the contention might be pressed with much force that it could only be done after a compliance with section 6176 of Sandels & Hill's Digest, as amended by the act of May 8, 1899. But such is not the case. The plaintiff corporation, when organized, was not, under its charter, compelled to buy the Bentonville Railroad, or, after buying it, to continue the use of its whole line. It took out an original charter of its own, and defined its termini. It had a right to do this, and, if it chose, it had the right to absorb by purchase the Bentonville Railroad. But such a purchase did not compel it to adopt its whole line. It may be that, under the provisions of the constitution of this state, the plaintiff would not have had the right to have paralleled the Bentonville road from Rogers to Bentonville with its road; but whether it did or not was not a question for the defendant corporation, but was a question for the state. Surely, if it had the right to buy the Bentonville Railroad, it might use such portions of it in operating its own line as it saw fit,

and I know of no authority or power anywhere to prevent it from abandoning other portions so long as it operated its line of road from Rogers to Bentonville. At all events, as stated, these were not questions the defendant could raise, but questions for the state, whose creatures all domestic corporations are. The construction of the road into Rogers by plaintiff was not, therefore, an extension of its line, nor was it a branch line. It was merely the construction of its line as originally chartered, which charter was in no wise affected by the act of May 8, 1899. And the mere fact that in constructing its road from Rogers to Bentonville it used the greater portion of the old line of the Bentonville Railroad does not alter the fact that it was simply constructing, under its original charter, its own road.

Several other questions of a purely technical character were raised by the defendant corporation, but I think they are wholly without merit, or are determined either by the special findings of fact or the principles decided in *Brown v. Railway Co.*, supra.

Much evidence of an expert character was taken in this case in the effort to show that no public necessity had been shown for building this road down Arkansas street to a point opposite the defendant's depot in the town of Rogers, and hence no right to cross its 18-acre tract and its main line and switches on either side thereof; second, that, if such necessity existed, other points of crossing and other routes into said town were equally accessible, less injurious and dangerous to the public and the defendant's employes and business interests, and that no engineering obstacles or difficulties interposed to prevent the adoption of such other routes, and that it was only a matter of economy that the route sought was adopted; third, that the right of way and 18-acre tract were already condemned for railroad purposes, and should not, in the absence of imperative necessity, such as would defeat the purpose of plaintiff's charter rights, be condemned for other like railroad purposes by another corporation; fourth, that great loss and injury would be sustained by the impairment of the usefulness of defendant's yards if the crossing sought was allowed; fifth, that the grade of defendant's road at that point was unfavorable to a crossing; and other obstacles, more or less speculative and imaginary, were pressed with apparent zeal and pertinacity on the attention of the court. The St. Louis & San Francisco Railroad Company, although a foreign corporation, can only do business in this state by conforming to its laws. It is here by the grace of the state, and not by any right conferred upon it by any other sovereignty. Being here by the grace of the state, it is entitled to the full protection of its laws; and, on the other hand, it should cheerfully conform to any laws regulating it enacted for the general welfare of its people and the interests of the state.

Section 1, art. 17, of the constitution of Arkansas of 1874, provides:

"All railroads, canals and turnpikes shall be public highways, and all railroads and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within this state, and to connect at the state line with railroads of other states. Every railroad company shall have the right with its road to intersect, connect with or cross any other road, and shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination."

Section 9 of the same article provides:

"The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals."

Section 6175 of Sandels & Hill's Digest confers extensive powers upon corporations, and also places upon them liabilities and restrictions, and, among other things, provides that they shall have power "to construct their road upon or across any stream of water, water course, road, highway, railroad or canal, which the route of the road shall intersect." And by the sixth paragraph of the same section it is provided that they "shall have power to purchase lands or take them, may change the line of its road whenever a majority of the directors shall determine, as is hereinafter provided, but no such change shall vary the route of such road to exceed five miles laterally." It will be seen, by reading sections 1 and 9 of the constitution of this state, above quoted, that every railroad corporation doing business in this state, and holding property therein, holds the same subject to the state's right of eminent domain, and to have its property and franchises subjected to public use, the same as the property of individuals. It will also be seen that all railroads have the right to construct and operate their lines between any points within this state, and the further right to intersect, connect with, and cross any other road, and are compelled to receive and transport each the other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination. And the legislature of this state, by the act of March 20, 1883, embraced in sections 6345, 6346, and 6347, above quoted, in pursuance of the foregoing provisions of the constitution, gave every railroad corporation created and organized under the laws of this state, or the laws of any other state, and operating a railroad in this state, the power to cross, intersect, join, or unite its railroad with any other railroad now constructed, or that may hereafter be constructed at any point on its route, and upon the grounds or right of way of such other railroad company, with the necessary turnouts, sidings, switches, and other conveniences in furtherance of the object of its construction; and it enjoins upon every railroad company whose railroad is or shall be crossed, joined, or intersected by any new railroad to unite with the owners and corporation of such new railroad in forming such crossing, intersection, and connection, and to grant to such railroads so crossing, intersecting, or connecting all the necessary facilities for that purpose. It also provides that, if the two corporations cannot agree upon the amount of compensation to be paid for the purposes hereinbefore stated, or cannot agree as to the points or manner of such crossing, junction, or intersection, the same shall be ascertained and determined by a court of competent jurisdiction, in the same manner as provided for the ascertainment of damages for right of way for railroads. It is also provided in section 6347 that every railroad company operating a railroad in this state shall cause all freight and passenger trains running on their roads to stop at all points on their roads where another railroad crosses, joins, unites, or intersects, and take and receive on their trains all passengers, freights, etc., and for failure to do any of these things such railroad company

forfeits double the amount of damages which the injured company may sustain, to be recovered in any court of competent jurisdiction. It was the duty, therefore, of the St. Louis & San Francisco Railroad Company, upon application of the plaintiff corporation, to unite with it in effecting the crossing of its road; and what is meant by the word "unite" is "to concur, or act in concert with" the plaintiff corporation in accomplishing that end. And it was its duty to do this in good faith, and to offer all necessary facilities with the view of accomplishing that purpose.

In the premises now under consideration the defendant company, in the opinion of the court, while protesting its desire not to be capacious, but amicably disposed to unite in effecting the crossing of its road by the plaintiff company, has wholly failed to obey either the law or the spirit of the constitution and laws of this state regulating the crossing of railways. By permitting the Bentonville Railroad, while it was in existence, and the plaintiff company after it absorbed the Bentonville road, the use of its track for three-quarters of a mile in order to reach its depot, it recognized and admitted the public necessity for the plaintiff company, after such joint facilities were denied, to extend its line as near to the defendant's depot as possible, and manifestly for the mutual convenience of the traffic and travel of both roads, for both roads are compelled by the statute of the state (which it is to be presumed they both wish to obey) to stop all trains at all intersections or crossings, and to receive each the other's passengers, freight, and cars. If this could be done at the defendant's depot, and to the satisfaction of both roads and the public, rather than to have two depots and two stops within three-quarters of a mile of each other, manifestly it was for the mutual convenience of both roads, and more satisfactory to the public, to do so. And so, when the defendant company, after submitting the request to cross at the point designated to its engineer, and having received his report, then wrote plaintiff to the effect that the point suggested by plaintiff for crossing was as little objectionable as any other point it could name, it not only conceded the necessity for the crossing, but it also waived all objections to the point suggested. The effort, therefore, to show that there was no necessity for a crossing, and that the point suggested was ruinous to its business interests and to its yard, and that the grade of its road was such as to make it expensive and dangerous to have the crossing there, is, of necessity, futile. All these objections are merely subterfuges and afterthoughts,—obstacles intended to embarrass a crossing already conceded to be proper and necessary,—and do not address themselves either to the judgment or charitable consideration of the court. Manifestly, the real reason the defendant company opposes the crossing is its desire for a contract enabling it to introduce an interlocking plant at the crossing whenever, in its judgment, it becomes necessary, without expense to itself. But should such alleged obstacles now have consideration, under the circumstances of this case? After the Yoakum letter of January 28, 1899, set out in the special findings of fact, was written, the plaintiff company, in good faith, and relying on that letter, purchased, at considerable expense, lands

lying north and west of the 18-acre tract, and graded its main line, wye, and switches thereon down to the north line of the 18-acre tract at the point designated for entering upon the same, and began laying its iron thereon, when for the first time it then discovered that defendant was laying a switch on its right of way along the east side of the 18-acre tract, and west of its main line, and also extending another switch, not in any general use or demand, on the east side of its main line, so as to obstruct, by both said switches, the point of crossing which had been agreed upon. If the point of crossing agreed upon should now be denied plaintiff, these lands and the money expended on the roadbed, switches, and wye is a dead loss to the plaintiff, not to say anything of the annoyance and delay in procuring another crossing, and the expense of procuring grounds and right of way for approaches thereto. In the opinion of the court the defendant company should be estopped from being heard to say that the crossing was not necessary, or that the point suggested was not a proper one, or that the 18-acre tract was not subject to condemnation, or that the crossing of the defendant's line at the point designated would materially injure its business or its yards. But, if it was not estopped, the court is of opinion, from the testimony, that such is the case, and so holds. This conclusion eliminates from consideration the question as to whether there are other eligible routes over which the plaintiff company could reach the same point by the expenditure of a sufficient sum of money. This, no doubt, is true. It might cross at the old intersection of the Bentonville road, and condemn its way through the residence property of citizens on the east side of the defendant's main line down to the north end of Arkansas street, and thence down that street to a point opposite the defendant's depot. The distance, however, would be greater, and the expense much larger. Moreover, the persons through whose lands the road would then run have the same right to object and protest against the condemnation of their homes as the defendant company has as to its 18-acre tract, and to urge, with greater reason and justice, that the route which is now sought is more economical and direct, and over land wholly unoccupied for any purpose, and therefore that their homes and property should not be destroyed.

But it may be said that the defendant did not agree to the point designated for a crossing except upon condition that an interlocking plant be put in. Where does the defendant acquire the right to demand an interlocking plant at the expense of plaintiff? Can it dictate its own terms, without regard to the rights of the plaintiff? Why should it have the exclusive right to do this, when it accepted its own right to do business in this state upon condition that its road might be crossed by other roads at such points as they might see fit? Of course, the statute giving the right to the plaintiff company to cross the defendant's road would not be so construed by the court as to permit a crossing at any point, without regard to the rights of the defendant. The defendant railroad company accepted its right in this state subject to its laws, and also its powers (within constitutional limitations) of changing its laws. One of the conditions imposed by law when it acquired its rights was that any other

road should cross it, and that it should offer all proper facilities therefor. In the opinion of the court, neither road had any other or greater right than the other as to the manner of crossing, or the appliances to be employed. Both should be reasonable, having regard for the common safety and rights of each other and the rights of the public; and, in the event they could not agree as to the amount of compensation and point of crossing, such questions must be remitted to the courts for determination. In the opinion of the court, the demand of the defendant company for an interlocking plant at Rogers was unjust, unreasonable, and oppressive, and should not be enforced. In the face of the admitted fact as to the practice of this large, well-regulated, and ably-conducted railroad system that nowhere on its 1,600 miles of railroad has it a single interlocking plant at any place similarly situated and of the size of Rogers (which is an interior town in the mountain regions of Arkansas), the expert testimony of the engineers as to the necessity of such a plant at Rogers is utterly impotent of any probative force. Such testimony challenges the humane and intelligent management of its large properties, and imputes to it neglect of duty to the public in not having constructed these plants at the numerous crossings on its own lines passing through large towns confessedly with much better prospects of growth and larger possibilities for the future. I am not willing to admit that the defendant corporation is open to such neglect of duty, nor that, if sued for an injury resulting at any crossing where no interlocking plant exists, alleging that the injury resulted from the absence of such plant which it was its duty to have provided, the defendant company would be willing to concede its failure to have such plant to be negligence, nor that the courts would hold, as a matter of law, that it was negligence; nor do I doubt, from the testimony in this case, that defendant company would be able to show that such plants were not usual, customary, or necessary at places such as Rogers, Ark. The demand made, therefore, of plaintiff company for a contract providing for an interlocking plant, was a demand the defendant company had no right to make under present conditions; nor can mere speculations as to the future growth of Rogers be made the basis for compensation for probable injuries resulting from the absence of an interlocking plant, or the basis for damages so purely speculative as the testimony develops in this case. It may be that the little mountain resort, now quietly and modestly nestling among the apple orchards of that prosperous and lovely region beyond the Ozarks, and chiefly, as well as justly, celebrated for its good water, pure air, red apples, and happy, contented, and rustic population, favored as it is by the somewhat familiar and euphonious name of "Rogers," will, in a few years, be metamorphosed into a great commercial metropolis, and that its unpretentious and rural people will give place to the surging, struggling masses of a busy mart of trade and commerce; but these optimistic speculations as to the future are altogether too dreamy and ethereal to become the basis of damages for land (though most favorably located in the event the prophetic destiny of Rogers shall be realized), now simply an abandoned common, and at most not worth

more than \$100 per acre. The courts, under the most favorable circumstances, do not deal with things so fanciful and visionary, and in this dry, hot, sultry weather, only things real, tangible, and practical command a patient consideration. Moreover, a glance at the blue-print map introduced by the defendant, and which was explained to the court, shows the route selected to be the only practicable route; since, if the road had been run on the west side of defendant's main line to a point opposite the defendant's depot, it would have been compelled to have condemned for right of way not only a part of the defendant's reservation for railway purposes, on which stand various railway improvements, in order to reach the point, but to condemn a part of said reservation for depot purposes, or else condemn a right of way along Douglas street, the principal business street of the town of Rogers, for nearly half a mile, and also locate its depot in that street in the very heart of the town. No court would entertain that proposition for a moment, unless there was an imperative necessity therefor. It will be observed, from an examination of the map, that on the east side of the line of the defendant company, and between its right of way and Arkansas street, there is a strip of property now occupied by various industries; and immediately opposite the depot, upon this strip, a vacant lot. It does not appear from the proof where the plaintiff company expects to build its depots, but it will be assumed, in the absence of proof, that it would not attempt to obtain, by condemnation proceedings, a line of road to the point mentioned in the complaint without having first examined into at least the question of procuring sufficient property upon which to establish its depots, and especially since the statutes of the state designate the character and kind of depots which every railroad company must maintain. Sand. & H. Dig. § 6219, as amended by the act of March 31, 1899 (Bound Acts, p. 152).

It is contended that the 18-acre tract constituted a part of the defendant's switch yards; that said tract and the right of way had been dedicated for railway purposes, and should not be condemned by plaintiff for a like purpose. This 18-acre tract, on which was constructed a roundhouse and some tracts leading thereto, had been used for a few years for that purpose, but as far back as 1886 or 1887 it was abandoned by the defendant company for all railway purposes. A single track, however, was left, leading to the roundhouse; and an oil company, for its convenience, built an oil tank and office by the track. The roundhouse became dilapidated, its walls crumbled down, roof rotted off or burned by tramps, who made it a rendezvous, and the whole tract stood for years an abandoned common, used for no other purpose than that above stated. It is at its nearest point nearly half a mile from the depot of the defendant company, and the switch yards of defendant are principally beyond the depot, and on the opposite side and south of town. When plaintiff company began negotiations early in 1898 for new arrangements for terminal facilities at Rogers, and until after the Yoakum letter dated January 28, 1899, this 18-acre tract remained in the condition I have described, used for no railroad purposes whatever, and there were no switches on either side of the defendant line obstructing the

crossing at the point designated in the complaint, and no apparent necessity for additional trackage seems to have urgently pressed itself upon the management of the defendant company. This is made to conclusively appear by the Yoakum letter bearing date January 28, 1899; but after the interview in St. Louis between the president of the plaintiff company and Mr. Yoakum, the vice president and general manager of the defendant company (which interview must have occurred in the month of February, 1899, and in which the former refused to stand the expense of an interlocking plant, and declared his purpose to force his way through the track, and to cross the defendant's line at the point designated in the complaint), ostensibly there sprung immediately into existence an urgent necessity for more trackage at Rogers. It does not appear that any appreciable increase in business had occurred between January 28, 1899, the date of the Yoakum letter, and March, 1899, a space of about 30 days, when this new trackage was put in; but, nevertheless, the necessity for the additional trackage was ostensibly necessary and urgently pressing,—so pressing that Mr. Bisbee, the defendant company's engineer, was authorized to put it in, using his discretion when and where it should go. Mr. Bisbee tries to make it appear that he had received instructions to put in more trackage at Rogers the previous year; but, if he did, the necessity for it does not appear to have occurred to Mr. Yoakum in his letter of January 28, 1899, and that it was necessary to put it in so as to obstruct the crossing at the point designated in the complaint. But Mr. Bisbee proceeded at once to put in the trackage, and he put it in, not on the 18-acre tract, but on the defendant's right of way, alongside thereof, and the full length of the track, and put it in in such a way as to make it the greatest possible obstruction to plaintiff's crossing at the point previously designated by plaintiff and agreed to by defendant. He also extended a spur switch on the east side of defendant's track about 136 feet, so as to make it also an obstruction to the plaintiff crossing at the point designated and agreed upon. This 136 feet must have given the defendant company great relief, for one of the witnesses who lives north of that switch, and who passes it every day in going to and from town, says that he has never seen the switch open nor a car on the track. Confessedly, these were obstructions put there in bad faith, and for no other purpose than to force defendant to terms, which, as we have seen, were unjustly and illegally demanded.

Plaintiff had a right, under the constitution and laws of Arkansas, to cross defendant's line, and it was defendant's duty to assist in making the crossing, and afford all necessary facilities. Instead of doing so, it set to work, in bad faith, to obstruct and defeat the plaintiff in doing what the law gave it the right to do, and in so doing it disobeyed the statutes of the state, to the detriment and injury of the plaintiff company, and now it seeks to defeat plaintiff in making its crossing at all, and, in the event it fails in that, to secure large damages for injury to the defendant's yards, claiming that the 18-acre tract is a part of its yards, when in truth it is not now, and has not been for 10 or 12 years; and also to secure damages because of crossing its two switches, put in as mere obstructions, and in or-

der to deter plaintiff from crossing, and, failing in that, to get additional damages therefor. Conduct like this does not commend itself either to the judgment or the conscience of the court. No one should be allowed to gain by his own wrong. The court is of opinion that the plaintiff company has a right to cross the road of the defendant at the point designated in the complaint, without reference to its switches, which were placed there as mere obstructions; and that, if it shall become necessary, in future, for the defendant company to use any portion of the remainder of its 18-acre tract for switches, it will be time enough then to determine how and on what terms the crossing of plaintiff company's prospective line of road should be made. The court is of opinion that a strip of 100 feet in width should be condemned across the 18-acre tract to the use of the plaintiff company as a right of way for its railroad, and that the plaintiff company should pay for said land, and for the damage to the remainder of the track the sum of \$550; and that an easement should be condemned across the right of way and track and switches of the defendant company, as described in the complaint, to the use of the plaintiff, of a width sufficient for one standard-gauge railway track; and that for said easement and damages which the defendant sustains by reason thereof the plaintiff should pay the sum of \$450, making damages in the aggregate of \$1,000. The court is of the opinion, also, that the labor, material, and all appliances necessary to be furnished for crossing at grade the defendant company's railway and mill switch should be furnished by the plaintiff, and that in making said crossing the rail furnished should correspond to the rail used at that point by the defendant company, and the work should be done in a safe and workmanlike manner, and that the defendant company should furnish the necessary facilities for the same, as the statute requires. The court is further of the opinion that the crossing should be what is usually known as a "grade" crossing, with such facilities as are usual and necessary under like or ordinary circumstances, and without any interlocking plant, and that the \$1,000 hereinbefore assessed as damages should be paid to the defendant company, or into the treasury of this court for the use of the defendant, as the plaintiff may elect, within 30 days next after the rendition of this judgment; and upon its failure to do so all of its rights herein adjudged should be forfeited, and the judgment in its favor held for naught. The court is further of the opinion that, under the circumstances of this case, each party should pay its own costs.

MILLAN v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, W. D. Virginia. July 20, 1900.)

1. PROCESS—SERVICE ON FOREIGN INSURANCE COMPANY—VALIDITY.

Under Code Va. §§ 1265-1267, providing that no insurance company which is not incorporated under the laws of the state shall make any contracts of insurance within this state until such company shall appoint a citizen of the state its agent upon whom may be served all lawful process against the company, and that until such appointment is made service

of process may be served upon the auditor of public accounts, service of process upon the auditor, in an action against a foreign insurance company conducted upon the assessment plan, and which has no agent or attorney in this state upon whom service of process may be made, is void, since such corporations are controlled by Act May 18, 1887, and amendments thereto, which makes no provision for the service of process upon a foreign assessment company during the existence of a vacancy in the office of such agent or attorney.

2. SAME—INSUFFICIENCY OF COPY SENT TO DEFENDANT.

A copy of process mailed to a foreign insurance company, pursuant to Code Va. § 1267, in which the day, month, and year of its issuance are left blank, is not sufficient to constitute a legal service under the statute.

3. SAME—JURISDICTION.

Upon a foreign insurance company ceasing to do business in the state of Virginia, it is no longer amenable to the jurisdiction of the courts of that state, under Code Va. § 1267, providing that service of process in actions against a foreign insurance company may be made upon the agent of the company, or, in the absence of the appointment of an agent for such purpose, then upon the auditor of public accounts.

On the Motion to Quash the Service of the Writ.

Downing & Richards, for plaintiff.

Charles S. Stringfellow, for defendant.

PAUL, District Judge. In this case the plaintiff, on the 16th day of April, 1900, brought an action of assumpsit in the circuit court of Rappahannock county, Va., to recover the sum of \$3,000 on a life insurance policy issued on the 8th day of April, 1896, to Lyle J. Millan, who died on the 28th of September, 1899. Being a nonresident, the defendant removed the case here. The writ was directed to the sergeant of the city of Richmond. The return is as follows:

"Executed in the city of Richmond on the 26th day of April, 1900, by delivering a true copy of the within process to Morton Marye, auditor of public accounts of Virginia, and immediately transmitting by mail a copy to the home office of the Mutual Reserve Fund Life Association, no citizen of this state having been appointed by said association its agent upon whom lawful process may be served."

The service of process was had in this case under the provisions of sections 1265-1267, c. 53, Code Va., 1887:

"Sec. 1265. When Foreign Companies not to Insure.—No insurance company which is not incorporated under the laws of this state, shall make any contracts of insurance within this state, until such insurance company shall have complied with the provisions of this chapter.

"Sec. 1266. Appointment of Agent on whom Process may be Served.—Every such company shall, by a written power of attorney, appoint a citizen of this state, residing in the city of Richmond, its agent upon whom may be served all lawful process against such company, and who shall be authorized to enter an appearance in its behalf. A copy of such power of attorney, duly certified and authenticated, shall be filed with the auditor of public accounts, and copies thereof duly certified by the auditor shall be received as evidence in all courts of this state.

"Sec. 1267. If Agent Die, etc., Another to be Appointed; When Service of Process may be on Auditor.—If any such agent shall be removed, resign, die, become insane, or otherwise incapable of acting, it shall be the duty of the company to appoint another agent in his place, as prescribed in the preceding section, and until such appointment is made, or during the absence of any agent of such company from the state, service of process may be upon the auditor of public accounts with like effect as upon an agent appointed by the company. The officer serving such process upon the auditor shall immediately

transmit a copy thereof, by mail, to the company, and state such fact in his return."

It is contended on behalf of the plaintiff that, in the absence of an agent designated by the provisions of section 1266, on whom process could be served, the auditor of public accounts was the proper and only person on whom the summons could be executed. The defendant is a life insurance company conducted on the mutual assessment plan. It insists that it is not subject to the provisions of chapter 53 of the Code and the acts amendatory thereof; that the provisions of that chapter apply to old line and not to assessment companies. It claims that an assessment company is controlled by the act of the general assembly of Virginia approved May 18, 1887, as amended by an act approved February 24, 1890. Section 1 of that act provides:

"That it shall not be lawful for any corporation or association, organized under the authority of the laws of this or any other state, for the purpose of furnishing life or accident indemnity or insurance upon the assessment plan, by its agents, to do any business in this state, or for any person to act within this state as agent in soliciting, procuring, receiving, or transmitting any application for membership or insurance, in or for or on behalf of any such corporation or association, unless such corporation or association shall be authorized to do business in this state, and such agent licensed by the auditor of public accounts, as hereinafter provided."

With reference to the service of process under this act section 3 provides:

"No such corporation or association mentioned in the preceding section shall transact any business in this state, by an agent, unless it shall first file with the auditor a written instrument or power of attorney, duly signed, sealed and acknowledged, authorizing some person who is resident of this state, to be named in such instrument or power of attorney, to act as its attorney and to acknowledge service of process, or upon whom process may be served for and on behalf thereof, which service shall be taken and held to be as valid as if served upon such corporation or association according to the laws of this or any other state: provided that if such attorney shall die, be removed, or resign, or cease to be a resident of this state, it shall be the duty of such corporation or association in like manner to appoint and designate another person, a resident of this state, to act as such attorney, within thirty days after being notified by the auditor of the vacancy in said office."

The act of 1887 was the first distinct legislation in Virginia relative to assessment companies. Why they were not embraced within provisions of chapter 53 of the Code it is not necessary to inquire. The provisions of that chapter are inapplicable to companies conducted on the assessment plan, if for no other reason than that they have no capital with which they can secure their policy holders. This was one of the principal objects the legislature had in view in enacting the provisions of chapter 53. This is seen in section 1270, requiring foreign companies to give bonds with security to the auditor of public accounts, conditioned to make returns, and pay the taxes required by law. Section 1271 requires the company to deliver, under oath, to the treasurer of the state, a statement showing the amount of its capital stock, and to deposit with the treasurer certain designated bonds to an amount equal to 5 per cent. of its capital stock. Section 1272 provides for the companies drawing the interest on the bonds so deposited. Section 1273 provides for a sale of the securities to pay liabilities. Section

1274 gives to policy holders a lien on the securities deposited with the treasurer for any amount due them under their policies, and provides the remedy for enforcing such lien. None of these provisions are found in the act of 1887. Again, chapter 53 of the Code applies to insurance companies not incorporated under the laws of the state of Virginia (section 1265); while the act of 1887 applies alike to corporations or associations organized under the authority of the laws of Virginia, or any other state, for the purpose of furnishing life or accident insurance upon the assessment plan (section 1). A comparison of section 1267 of the Code with section 3 of the Act of 1887 shows a wide difference in the means provided for securing service of process. Section 1267 provides that the agent of the foreign company shall appoint a citizen of the state of Virginia residing in the city of Richmond, and, if such agent become incapable of acting, it is made the duty of the company to appoint another agent in his place; and until such agent is appointed, or during the absence of the agent from the state, service of process may be upon the auditor of public accounts. Section 3 of the act of 1887 provides that the assessment company shall appoint a citizen of this state, and, if the agency becomes vacant by any of the means named, it is made the duty of the company to designate another person, a resident of the state of Virginia, to act as such agent, within 30 days after being notified by the auditor of such vacancy. No provision is made by the act for the service of process during the existence of the vacancy, the legislature perhaps regarding the penalty of fine and imprisonment by section 6 of the act of 1887 upon any person transacting business for an assessment company without a license, and the requirement of section 4 that the license to agents must be renewed annually, as sufficiently coercive to secure the prompt appointment of an agent upon whom process could be served. Many other differences in the provisions of chapter 53 of the Code and those of the act of 1887 might be pointed out, but those referred to are sufficient to show the legislative intent in the enactment of chapter 53 of the Code, and in the passage of the act of 1887. It intended the former to apply alone to foreign life insurance companies doing business on the old line plan, and the latter to foreign and domestic companies engaged in furnishing life and accident insurance upon the assessment plan. The legislature intended the act of 1887, as it does, to cover the whole subject of insurance on the assessment plan; and it is, as amended, the law governing companies furnishing such insurance. It has no connection with, and makes no reference to, the law embodied in chapter 53 of the Code. It contains no provision authorizing service of process on the auditor of public accounts. It follows that the service of process in this case was null and void. The copy of the process which the return shows was transmitted to the defendant company is not a true copy of the original. The day, month, and year of its issuance are left blank. It is conceded by counsel for the plaintiff that these defects are fatal to a legal service, and in the view of the court as to the original writ it is not necessary to discuss the deficiency of the copy.

There is one other ground urged by the defendant in support of its motion to quash the process. It is thus stated in the written motion to quash:

"Because before and at the time of the issuance of the said writ of process herein, to wit, on the 16th day of April, 1900, and before and at the time of the alleged service of the same upon Morton Marye, auditor of public accounts of the state of Virginia, to wit, on the 26th day of April, 1900, the said Mutual Reserve Fund Life Association was, and thence hitherto has been, and still is, a foreign insurance company, on the assessment plan, chartered and incorporated by and under the laws of the state of New York, and a citizen and resident of the city of New York, in the state of New York, and not a resident or citizen of the state of Virginia, and not then or since carrying on any business or having any property, office, officer, or agent in the said state of Virginia; and that it cannot legally be made a defendant in this action by service of the writ or process aforesaid on said Morton Marye, auditor, as aforesaid, as the plaintiff has assumed to do, as appears by the record herein."

In support of its motion to quash on the ground that it had ceased to do business in the state of Virginia at the time the writ was issued and served, the defendant files the following affidavit of its vice president:

"State of New York, County of New York. George D. Eldridge, being duly sworn, deposes and says: That he is of full age, and is, and for two years past has been, vice president and actuary of the Mutual Reserve Fund Life Association. That for several years prior to the 12th day of March, 1900, the said Mutual Reserve Fund Life Association was licensed to and was doing business in the state of Virginia as a life insurance company on the assessment plan under the statutes of said state in such case made and provided. That on the 12th day of March, 1900, by resolution of the board of directors of the said association duly adopted, said association withdrew from the state of Virginia, and ceased to do business in said state, and revoked the authority of each and every one of its agents or collectors in said state, and since said date has had no agent or collector in the state of Virginia, and has not been doing or transacting any business of any name or nature in said state, and has not been collecting any assessments, dues, or other premiums therein, or transacting any business of any kind.

George D. Eldridge.

"Subscribed and sworn to before me this 11 day of June, 1900.

"Sewell T. Tyng, Notary Public, N. Y. Co. No. 45."

It also files from the office of the auditor of public accounts copies of the following proceedings of the board of directors of the defendant company, and of the action of the company taken in pursuance thereof, and the auditor's certificate:

"Whereas, the Mutual Reserve Fund Life Association did, on the 11th day of May, 1895, duly appoint Major Chas. S. Stringfellow its agent and attorney to accept service of legal process for it in the state of Virginia, pursuant to the provisions of the statute in such cases made and provided; and whereas, said association has, by a resolution of its board of directors, this day withdrawn from the said state of Virginia, and does not intend henceforth to transact any business therein: Therefore, be it resolved, by the board of directors of the Mutual Reserve Fund Life Association, that the said appointment of said Maj. Chas. S. Stringfellow as its attorney and agent for the service of process in the state of Virginia be, and the same hereby is, revoked and annulled."

"I hereby certify that the foregoing is a true copy of a resolution adopted by the board of directors of the Mutual Reserve Fund Life Association at a meeting thereof regularly called and held on the 12th day of March, 1900.

"[Signed]

Charles W. Camp,

"Sec'y Mutual Reserve Fund Life Asso."

(Corporate seal annexed.)

"Whereas, the Mutual Reserve Fund Life Association has for a number of years last past been duly licensed to transact the business of life insurance on the assessment or co-operative plan in the state of Virginia; and whereas, the said association is desirous of withdrawing from the said state, and of transacting no further business therein: Therefore, be it resolved, by the board of directors of the Mutual Reserve Fund Life Association, that said association does hereby withdraw from the state of Virginia, and hereafter and from this date that no business be written in the said state. And be it further resolved, that the appointments and contracts of agents, general agents, managers, and collectors be, and they are, terminated, canceled, and annulled as of this date. Be it further resolved, that a certified copy of this resolution be transmitted to the auditor of public accounts for the state of Virginia."

"I hereby certify that the foregoing is a true copy of resolutions adopted by the board of directors of the Mutual Reserve Fund Life Association at a meeting thereof regularly called and held on the 12th day of March, 1900.

"[Signed]

Charles W. Camp,

"Sec'y Mutual Reserve Fund Life Asso."

(Corporate seal of the association attached.)

"Commonwealth of Virginia.

"Office of the Auditor of Public Accounts, June 2nd, 1900.

"I, Morton Marye, auditor of public accounts of the state of Virginia, do hereby certify that the Mutual Reserve Fund Life Association, a foreign association chartered under the laws of the state of New York, was, on the 19th day of December, 1894, duly licensed to do business in Virginia as a foreign insurance company on the assessment plan, under section 3 of the act of the extra assembly of the legislature of Virginia of 1887, approved May 18th, 1887, chap. 271, page 384; and was in like manner, and only in such manner, licensed each succeeding year down to and including the present year; the last license as aforesaid having been granted to said Mutual Reserve Fund Life Association on the 2nd day of January, 1900. I further certify that on the 14th day of March, 1900, I received by mail the resolutions and revocation of the power of Maj. Chas. S. Stringfellow as the statutory agent of the said Mutual Reserve Fund Life Association, copies of which are hereto attached (certificates of acknowledgment and proof being omitted), marked 'A,' 'B,' and 'C'; and that the same were duly signed and proved, under the corporate seal of the said association, and acknowledged and certified according to law.

"Given under my hand this 2nd day of June, in the year one thousand nine hundred.

Morton Marye, Auditor Public Accounts."

It thus clearly appears that more than one month before the issuance and service of the writ the defendant association had withdrawn from the state of Virginia, had revoked the authority of its agent Charles S. Stringfellow, who had been appointed to accept legal process, and of all others its agents, and had ceased to do business in the state. This presents the question, can an action be maintained on the policy sued on against the defendant, a foreign corporation, in a Virginia court?

That jurisdiction to render a personal judgment against a non-resident can only be acquired by personal service of the writ or summons on the party or by his voluntary appearance is too well established to admit of question. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222. In the last case the court said, referring to *Pennoyer v. Neff*:

"The doctrine of that case applies in all its force to personal judgments of state courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is

only this difference: a corporation, being an artificial person, can act only through agents, and only through them can be reached, and process must, therefore, be served upon them."

People v. Commercial Alliance Life Ins. Co., 7 App. Div. 297, 40 N. Y. Supp. 269, was a case arising under a statute of the state of Maine providing for the service of process in an action against a foreign insurance company. The statute provided that, where an action was brought against a foreign insurance company, service of the summons might be made on any authorized agent of the company, and that, if no such agent could be found, then service might be on the insurance commissioner. The corporation ceased to do business in the state of Maine on July 1, 1894. On July 3, 1894, a summons was served on the insurance commissioner, and on July 23, 1894, on a person claimed to be an agent of the foreign corporation. It was held that the statute affected only foreign insurance companies doing business within the state of Maine, and that, as the corporation ceased to do business in that state on July 1, 1894, the service was ineffective, and would not sustain a judgment entered thereon. Patterson, J., said:

"When a foreign corporation undertakes to transact business in a state other than that in which it is incorporated, it undoubtedly submits to the authority of the courts of that other state, and will be bound by the statutory provisions respecting the method of such courts obtaining jurisdiction over it. * * * While this Commercial Alliance Company was transacting business in the state of Maine it was subject to the provisions of the statute of Maine respecting the service of process in an action against it on the state commissioner of insurance, in the absence of any authorized agent of the company upon whom service might be made. But that subjection does not last forever. As the Commercial Alliance Insurance Company had ceased to do business on the 1st day of July, 1894, had withdrawn from the state, and had no authorized agent upon whom service might be made after that date, the substituted service on the state commissioner would not bind it as the equivalent of personal service."

A statute of the state of Kentucky provided that before authority should be granted to any foreign insurance company to do business in that state it should consent that service of process upon any agent of the company in that state or upon the commissioner of insurance in any action brought in that state should be a valid service. On the 10th of May, 1894, the Mutual Reserve Fund Life Association Insurance Company of New York adopted a resolution in compliance with the requirements of the statute, and did business in Kentucky until October 10, 1899. At the latter date the insurance commissioner revoked the authority granted the insurance company, and all licenses issued to its agents. Subsequently an action was brought against the company, and process was served on the commissioner of insurance. The court held that the consent of the company to the service of process upon its agents or upon the commissioner of insurance ceased to be effective upon the revocation of the company's license to do business in that state, and that service of a summons thereafter on the insurance commissioner in a suit brought against the insurance company in a state court conferred no jurisdiction upon that court over the defendant company. *Swann v. Association* (C. C.) 100 Fed. 922.

Another case arising under the same statute as that referred to in the case just cited is *Friedman v. Insurance Co.* (C. C.) 101 Fed. 535. In rendering this decision, Barr, J., said:

"While it is true that the act authorizes the service of process upon any agent of the foreign insurance company, whatever may be the character of the agency, and also authorizes service upon the insurance commissioner, still the agents of the company and the insurance commissioner are so connected, we think, as to make the authority of the insurance commissioner cease when there is no agent whatever of the insurance company, and no business done in the state, so as to give, under the law, either residence or legal presence of the insurance company."

The authorities cited fully sustain the position of the defendant in the second ground assigned for quashing the service. When the defendant ceased to do business in Virginia, and revoked the authority of its local agents, it was no longer amenable to the jurisdiction of the state courts. The right to serve process on any of its former agents or on the auditor of public accounts—even had the right to serve process on this official ever existed—was terminated by the withdrawal of the company from the state. The motion to quash will be sustained, and the case dismissed, without prejudice.

EMMONS v. UNITED STATES.

(Circuit Court, D. Oregon. August 15, 1900.)

No. 1,655.

1. PUBLIC LANDS—CANCELLATION OF TIMBER LAND ENTRY—ACTION TO RECOVER PRICE.

In an action under Act June 16, 1880, to recover from the United States sums of money paid by plaintiff's assignors for lands entered under the timber act, upon the ground that the entries were subsequently canceled by the land department because the lands were not subject to entry as timber lands, an answer alleging that the entries were canceled because they were not made in good faith, but were fraudulent, and were allowed upon false affidavits made by the entrymen, states a good defense.

2. SAME—RES JUDICATA—ACTION OF LAND DEPARTMENT.

The refusal by the commissioner of the general land office of an application by an entryman for the refunding of the money paid for public lands, after his entry was canceled, does not render his claim *res judicata* so as to bar an action thereon in the courts, nor is his right to maintain such action affected by his conveyance of the land.

On Demurrer to Answer.

Zera Snow, for plaintiff.

John H. Hall, U. S. Atty.

BELLINGER, District Judge. On September 7, 1883, A. B. Graham entered, under the timber-land act, a quarter section of land in Columbia county, and paid \$400, plus fees amounting to \$10, therefor, and received his final receipt. On the 25th of August and the 19th of November in the same year Falk Steinhardt and Walter F. Jones made similar entries of one quarter section of land each, paying therefor, including fees, \$410 each. These entries were subsequently canceled by the land department on the ground that the lands were not

chiefly valuable for timber. The plaintiff brings this action, as the assignee of the several claims, for repayment of the amounts so paid as aforesaid. It is alleged in the complaint that the commissioner of the general land office, after the entries were made, undertook to and did receive, in behalf of the United States, certain evidence touching the nature and character of the lands so severally entered, and that thereupon, upon consideration of the evidence so taken, it was found and determined by said commissioner that the said several pieces of land were not timber land, within the meaning of the act of congress, upon the ground that such land, or the greater part thereof, was fit for cultivation when the timber thereon was removed, and that the entry thereof, and the allowance of such entries, had been made and permitted through a mistake as to the nature and character of the lands, and thereupon the several entries were canceled. The answer denies that the commissioner and secretary of the interior, or either of them, found or determined that said entries, or any of them, were made or permitted through a mistake as to the nature and character of the lands, but avers that such entries were canceled upon the further ground that they were not in good faith, but were fraudulent, and that each of the entrymen had never seen the land in question, but had sworn falsely in that respect; and, further, that their said alleged final proof was insufficient. Further answering, it is alleged that each of the entrymen, except Jones, who appeared by I. H. Taffe, to whom he had transferred his interest, appeared in person at the hearing, and testimony was given, and it was shown that the lands were not subject to entry; that the parties had never seen the land, and had no personal information as to its character, and that the affidavits on which the applications for purchase were based were false, and that each of said entries was not made in good faith; that the decision of the local land office was examined and approved by the commissioner in each case, and that, no appeals being taken, the decisions became final, and all rights between the parties became adjudicated. For a further and separate defense the defendant, reaffirming all matters theretofore alleged, avers that each of the entrymen well knew that the several tracts were not subject to entry under the timber act; that each of said tracts was not chiefly valuable for its timber, but was fit for cultivation; that neither of them had ever seen the land sought to be entered by him, and had no personal knowledge of its character; and that their entries were not made in good faith, and each of said entrymen swore falsely in respect to said matters. And as to said Jones, in addition to each of the matters aforesaid, he did swear falsely that he was entering the land for his own exclusive use and benefit, when in fact he was taking the same for one I. H. Taffe, who was in reality the applicant for said land under the name of said Jones; and the witnesses as to the character of the land did not show by their testimony that they were well or at all acquainted with the smallest subdivisions of the tracts about which they respectively testified, by reason of all of which the money paid on account of each of said tracts of land became and was forfeited. For a further and separate answer as to that portion of the alleged claim growing out of the payment made by the said Steinhardt, the defendant, reaffirming all the matters hereinbefore

set forth, says that after the cancellation of Steinhardt's entry he made application to the commissioner for the repayment of the \$410 so paid by him; that said application was duly considered and refused, and the matter thereby became adjudicated. For a further and separate defense as to the claim growing out of Steinhardt's payment, defendant avers that prior to the alleged transfer of said claim to plaintiff, and prior to the filing of the petition herein, said Steinhardt duly conveyed said land by deed to another person, and thereby ceased to have any interest in said land, or any claim growing out of his payment on account thereof.

The contention of the plaintiff is that the action of the commissioner of the general land office was erroneous in holding that land fit for cultivation after the timber thereon has been cut and removed cannot be taken under the timber act, and he relies upon the rule adopted in *U. S. v. Budd*, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384. But that question does not arise on the answer, to which plaintiff demurs. The answer alleges that the entries were canceled because it was found that they were not made in good faith, but were fraudulent; that the lands were not subject to entry. For a further answer it is alleged, reaffirming what is before alleged, that the entrymen knew that the land was not subject to entry under the timber act; that each of said tracts was not chiefly valuable for its timber, etc.; that as to Jones' entry, in addition to the matters so alleged, the fact is that Jones took the land for one Taffe, who was in reality the applicant to purchase under the name of Jones. If all these allegations of fact are true, the plaintiff is not entitled to recover, under the act of June 16, 1880 (21 Stat. 287). Upon demurrer it must be assumed that it appeared on the hearing before the commissioner that the land in question is not chiefly valuable for its timber as alleged; that the entrymen made false statements in that behalf; that they did not act in good faith, but acted fraudulently in making application to purchase; and that Jones was making his entry for another. There can be no recovery if the commissioner's action was warranted, and upon the facts as alleged it was warranted. The demurrer as to these defenses is overruled.

As to the defenses that the matter as to Steinhardt's claim is res adjudicata by reason of his application to have the money paid by him refunded, and the commissioner's refusal to direct such repayment, and that Steinhardt conveyed his land to another before he assigned his claim, the demurrer is sustained.

BRINKMANN v. TAYLOR.

(Circuit Court, D. Connecticut. July 19, 1900.)

No. 490.

LIBEL—PLEADING—SPECIAL DAMAGES.

In an action for libel, to entitle the plaintiff to prove special damages on account of the loss of business contracts alleged to have been prevented by the libel, he must set out the names of the persons with whom such contracts would have been made.

Action for Libel. On motion to make complaint more specific and to strike out certain words.

Elisha K. Camp, for complainant.
Howard Knapp, for defendant.

TOWNSEND, District Judge. In this action, claiming \$50,000 damages, the complainant alleges that the defendant published a libelous circular or letter, which "was received and read by many of the plaintiff's business customers, acquaintances, friends, and associates, and by the trade generally, and led many of them to decline to enter into certain business engagements, and to sell or to offer for sale the plaintiff's style of wire bustles bearing the brand 'Victor,' which said engagements they otherwise would have entered into, and which said goods they would otherwise have sold or offered for sale; whereby plaintiff suffered heavy pecuniary loss." Defendant moves that the names of such persons be set forth. I understand that the rule in this circuit, in accordance with the decided preponderance of authority, requires that under such an allegation the names of the persons who, on account of said libel, declined to enter into business engagements with the plaintiff, should be given; otherwise, the plaintiff will be confined to proof of general damages on the trial. The motion is granted. The motion to strike out certain words in the seventh paragraph of the complaint is denied.

In re WHITE.

(District Court, D. Vermont. May 12, 1900.)

BANKRUPTCY—EXEMPTIONS—AUTHORITY OF COURT TO SET APART.

While it is the duty of the trustee, under Bankr. Act 1898, to set apart the homestead exemption of the bankrupt, his action is not final, but the courts of bankruptcy are expressly given jurisdiction, by section 2, subd. 11, to determine all claims to exemptions; nor does rule 17 of the general orders (89 Fed. viii., 32 C. C. A. xix.), allowing 20 days for exceptions to the setting apart, apply to the bankrupt, who may petition the court in relation to his claim to exemption at any time while the property is still unadministered.

In Bankruptcy. On review of order dismissing petition for setting apart homestead exemption.

Frank Stowe, for bankrupt.
Kittridge Haskins, for trustee.

WHEELER, District Judge. This is a review of the dismissal of a petition of the bankrupt for a further setting apart of his homestead. The trustee is required to set apart the exemptions in the first instance, and to report the items and estimated value, but his action is not final. By section 2 of the act the courts of bankruptcy are expressly given jurisdiction to "(11) determine all claims of bankrupts to their exemptions." The provision of rule 17 of the general orders (89 Fed. viii., 32 C. C. A. xix.), allowing 20 days for exceptions to the setting apart, applies only to creditors, and not to

the bankrupt. Determination of claims to exemptions by the court is left without limitations, except such as the progress of the settlement of the estate, by disposition of property left, or otherwise, might impose. Nothing of this kind appears, and the petition must be retained. The just values, respectively, of the whole homestead premises,—of the part set out and of the part remaining,—are necessary to be known, for a proper determination of this claim, and these are proper subjects of special reference, which is made. Petition restored, and specially referred to referee for report of just values in the premises.

In re PLIMPTON.

(District Court, D. Vermont. May 31, 1900.)

BANKRUPTCY—DISCHARGE—REQUIRING PAYMENT ON FEE.

Where a bankrupt files an affidavit of inability with his petition, a referee has no authority, under Bankr. Act 1898, to require him to pay the statutory fee, as a condition to the granting of a discharge; such power being given to the court alone by rule 35, subd. 4, General Orders (89 Fed. xiii., 32 C. C. A. xxxiv.), to be exercised on proof of ability only.

In Bankruptcy. On application for discharge.

Waterman & Martin, for bankrupt.

WHEELER, District Judge. The bankrupt filed an affidavit of inability with his petition, and did not deposit the statutory fees. The referee reports, upon the application of the bankrupt for a discharge, that no creditor appeared in opposition thereto; that he has notified the bankrupt to deposit the statutory fee, which the bankrupt has refused to do, except as to the actual filing fees of the clerk; and that he has ruled "that, before the bankrupt is entitled to his discharge, he must pay said \$25." The rules of this court authorize the clerk, when an affidavit of inability is presented, instead of a deposit of the statutory fees, to require payment in advance of the ordinary fees for his services in filing and entering papers and proceedings, not exceeding \$10 in the whole. Rule 10 of the general orders in bankruptcy (89 Fed. vi., 32 C. C. A. xiii.), authorizes the clerks and referees to require indemnity for expense before incurring it from the bankrupt or other person in whose behalf the duty is to be performed. And rule 35, subd. 4, provides, as to the statutory fees, that the judge "may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed." 89 Fed. xiii., 32 C. C. A. xxxiv. There is no law or rule authorizing a referee to make such order. Of course, failure to comply with such an order made by a referee would not affect the right to a discharge, or other proceedings. The referee could apply for such an order, in his own behalf, and would have opportunity of ascertaining any probable ground for it from examination of the bankrupt. On this review the bankrupt has shown, by receipt from the referee, that

he has paid referee's expenses to the amount of \$32.95, of which \$14.70 relate to the settlement of the trustee's account, which are not chargeable to the bankrupt, some of which need, and none of which have had, allowance by special order of the judge. After the first meeting of creditors the proceedings relating to the assets are for their benefit, and those relating to his discharge are for his. Under these circumstances, as the bankrupt has paid to the referee more than \$10 for which he was not liable, the proceedings should not be retained, as they, under proper circumstances, might be, to afford opportunity now for application to the judge for such an order. As no specification of grounds of opposition to the discharge has been filed, or appearance entered entitling any one to file any, or to apply now for leave to file any under the rules, there is no occasion for requiring further report. Discharge granted.

In re LIBBY.

(District Court, D. Vermont. June 11, 1900.)

1. BANKRUPTCY—EXEMPTIONS—STATE STATUTE.

Under a state statute exempting to a debtor his "best swine or meat of a swine," the fact that a bankrupt has a part of the meat of a swine does not deprive him of the right to select his best remaining swine as exempt.

2. SAME.

Under the Vermont statute exempting to a debtor "two horses kept and used for team work," a bankrupt is not entitled to claim as exempt a horse kept and used as a racer, and not otherwise, although he had been casually used on a few occasions for work, and also in carrying members of the bankrupt's family to and from work or school.

In Bankruptcy. On report of referee on bankrupt's claim for exemptions.

A. G. Cox, for bankrupt.

J. G. Harvey, for trustee.

WHEELER, District Judge. The bankrupt had a horse, six swine, and a considerable part, but not the whole, of the meat of a swine. The statutes of the state exempt "the best swine or meat of a swine," and "one yoke of oxen or steers as the debtor may select, two horses kept and used for team work, and such as the debtor may select in lieu of oxen or steers." The bankrupt claimed one of the six swine, as the best, and the horse. The trustee refused to set out either. On special reference in review, the referee has found that the bankrupt is entitled to the swine claimed, but not to the horse, on the facts reported as to each.

As to the swine, there does not seem to be any fair question but that the finding of the referee is correct. The meat of a swine is all the meat of a swine; and a part of that does not exclude the exemption of a swine, if the debtor has one, nor of the best swine, if he has more than one. *Church v. Fairbrother*, 38 Vt. 33.

The report shows that the horse has been a racer, and had been

kept and used as such. It had not been used otherwise by the bankrupt, for anything that could be called team work for himself, nor for any one, but the carrying of milk from the farm where he worked, a few times, for his employer, without the latter's knowledge. This was not a use, nor a keeping for use, for himself or for his benefit, such as the statute contemplates, but was a mere casual use for another, which the horse was not kept for. The only other use made of the horse by the bankrupt was the carrying of his children to school, and a member of his family to work. This would be a use of the horse as a part of what is sometimes called a "team," which includes the horse, vehicle, and outfit; but the use of such a team for riding to or from work or study would not be a use in team work, which is more than a use for mere getting about for pleasure, or going to or from work or business. *Hickok v. Thayer*, 49 Vt. 372. If the exemption had been of a horse or horses kept and used for a team, without further word of limitation on the meaning, it might have been broad enough to include a team, in every sense, and so reach this horse. But the word "work" is added, which excludes teams not for use in team work. The conclusion of the referee as to the horse seems, therefore, to be correct. If this was doubtful as a matter of fact, the conclusion of the referee, which the bankrupt act authorizes the court to take, would be followed, as is usual in such matters.

As neither party has wholly prevailed, no costs should be taxed in favor of either against the other; but, as this proceeding has been made necessary by the refusal of the trustee to set out the swine, the referee's fees (\$10) should be paid out of the estate. Report of referee accepted and confirmed, without costs; referee's fees, of \$10, to be paid out of the estate.

In re MARQUETTE.

(District Court, D. Vermont. July 10, 1900.)

BANKRUPTCY—HOMESTEAD EXEMPTION—VERMONT STATUTES.

Under the statutes of Vermont, as at common law, prior to Acts 1896, p. 34, a husband entitled to curtesy became vested with an estate for life in property conveyed to his wife; and such act, which provided that he should, on the death of his wife, be entitled to one-third in value of the property in fee, in lieu of curtesy, did not affect the life estates of husbands, which had previously vested. Also, under the statutes of the state, a husband is entitled to a homestead exemption, to the extent of \$500 in value, to be allowed from the estate he holds in the property occupied by him and his family as a homestead, without regard to the value of the fee where his interest is less, and such homestead interest is subject only to debts contracted before its acquisition. *Held*, that the homestead right of a bankrupt in property occupied by him as a homestead, the title to which was conveyed to his deceased wife prior to 1896, dated from the time of such conveyance, and not from the taking effect of a devise to him of a life estate in the property made by the will of his wife.

In Bankruptcy.

Elmer Johnson, for bankrupt.

Emmet McFeeters, for trustee.

WHEELER, District Judge. This is a review, on a special report of the referee, of the setting out of a homestead to the bankrupt by the trustee. The statutes of the state (V. S. § 2179) exempt a homestead, used or kept as such, not exceeding \$500 in value, together with the rents, issues, profits, and products thereof, from attachment and execution. It appears that the bankrupt was the husband of Susan Marquette, and they had children who might inherit lands from either. The premises in question were conveyed to her by deed recorded March 17, 1880, under which they had possession. She died in October, 1897, leaving a will by which she devised the use of the premises to him during life; and he was actually occupying them November 21, 1899, when the bankruptcy proceedings were commenced, although he had for a time been out of possession. By the common law and the state statutes, he became vested with an estate for his life at once in the premises,—as husband during their joint lives, and by the curtesy if he should outlive her. Co. Litt. 20a, 29a, 29b; 4 Kent, Comm. 27; Gen. St. Vt. c. 55, § 15; R. L. Vt. § 2229. A homestead right exists in such estate as the head of the family has in the premises, although less than a fee. 15 Am. & Eng. Enc. Law, 558; McClary v. Bixby, 36 Vt. 254; Danforth v. Beattie, 43 Vt. 138. A homestead in Vermont is liable for debts existing at the time of the recording of the deed by which it is acquired, and not for those accruing afterwards, although it is not always occupied as a homestead meanwhile. Lamb v. Mason, 45 Vt. 500; V. S. § 2186. This homestead in the estate for life of the bankrupt was acquired by the deed to the wife. The case shows no debts existing at that time. It is therefore as free from all debts as from any.

Since 1847 the rents, issues, and profits of the wife's real estate, and the husband's interest therein, have been exempt from his debts; and he could not make conveyance of them without her joining with him, but this did not deprive him of his interest as husband. Peck v. Walton, 26 Vt. 82. And it left the annual products liable for his debts. Bruce v. Thompson, 26 Vt. 741. In 1861 these products were made exempt, except for necessities of the family or improvement of the real estate. R. L. § 2324. In 1884 an act was passed limiting a wife's personal property to her sole and separate use, and providing that neither her separate property, nor the rents, issues, income, or products thereof, should be subject to the disposal of the husband, or liable for his debts (Acts 1884, p. 119; V. S. § 2647); and in 1896 one providing that "when a man and his wife are seised in her right of real estate in fee simple, and the wife dies, the husband shall be entitled to one third in value of said estate in fee in lieu of curtesy." Acts 1896, p. 34. The act of 1884 was probably not intended to affect vested life estates of husbands, and would seem to be inoperative to divest them if it was. Peck v. Walton, 26 Vt. 82; Hitz v. Bank, 111 U. S. 723; 4 Sup. Ct. 613, 28 L. Ed. 577. The same considerations affect the act of 1896. It could not give this wife the power to dispose of the husband's curtesy by will. She could not will it to any one but her husband, for it was not hers, and her devise to him of the life estate he had before did

not affect the date of the acquisition of his title before in existence.

The premises are found to be of the value of \$1,000, and that of the life estate of the bankrupt in the whole to be less than \$500. At first it was supposed that the homestead, under the law, would extend to not exceeding \$500 of fee value, and that when the right was less than a fee the qualified title would exist in that value of fee only. Such was the decision below in *McClary v. Bixby*, 36 Vt. 254. But that was reversed, and the homestead right was held to extend to not exceeding \$500 in value of the right of the person entitled to the homestead. The same principle was applied in *Danforth v. Beattie*, 43 Vt. 138. Accordingly the bankrupt appears to be entitled to his life estate, as tenant by the curtesy, in the whole of the premises in question, against the claim of the trustee for any creditors. Life estate of bankrupt in whole premises set out as a homestead, free of all claims in bankruptcy proceedings.

In re SPEAR et al.

(District Court, D. Vermont. July 16, 1900.)

No. 116.

BANKRUPTCY—DISCHARGE—FAILURE TO KEEP BOOKS.

Unless the failure of a bankrupt to keep books of account or records is found to have been "with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy," it cannot be made the ground for refusing him a discharge under Bankr. Act 1898, § 14b.

In Bankruptcy. On application of bankrupts for discharge.

William Batchelder, for bankrupts.

Warren C. French, for opposing creditors.

WHEELER, District Judge. Not failure to keep books of account or records, merely, is a bar to a discharge, but only such failure "with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy" is made such. Bankr. Act, § 14b. No such intent is found or alleged here, or any other statutory cause. Without such, by the terms of the act, a discharge is required. No room is left for a refusal for any other than statutory reasons, however salutary they might be claimed or thought to be. Discharges granted.

In re ODERKIRK.

(District Court, D. Vermont. July 16, 1900.)

No. 458.

1. BANKRUPTCY—PROCEEDINGS FOR SALE OF HOMESTEAD.

Where a trustee finds the homestead property of the bankrupt, which exceeds in value the homestead exemption, indivisible, he may apply to the referee for an order of sale, and it is not essential to the validity of a sale so ordered that the proceedings should be filed with the clerk of the bankruptcy court.

2. SAME.—HOMESTEAD EXEMPTION.

Where a bankrupt made no application to retain his homestead and pay the excess in value over the statutory exemption, and no objection to an order for its sale by the referee, he cannot thereafter attack the validity of such sale; nor has he any ground for objecting to the deduction from his share of the proceeds of the value of other assets, not exempt, which he has received without objection from the trustee.

In Bankruptcy.

Harland B. Howe, for bankrupt.

WHEELER, District Judge. This is a review of the proceedings of the trustee and referee relating to the homestead exemptions. This court has jurisdiction of determining all claims of bankrupts to their exemptions. Bankr. Act, §§ 2, 11. This is a part of the jurisdiction committed to the referees on report of trustees. The proceedings are initiated by the trustee, whose duty is to set apart the exemptions. *Id.* § 47a, subd. 11. An inseparable homestead may be sold or assigned to one or another of the parties in interest, on conditions of payment to the others, by any court having jurisdiction. *Lindsey v. Brewer*, 60 Vt. 627, 15 Atl. 329; 15 Am. & Eng. Enc. Law (2d Ed.) 734. When the trustee found the property in which the homestead existed indivisible, he could only apply for an order of sale, which he appears to have done. Objection is made that the proceedings were not filed in the clerk's office, but this was not necessary. Referees are their own filing and recording officers in proceedings before themselves, and are so recognized by rule 2, General Orders in Bankruptcy (89 Fed. iv., 32 C. C. A. vii.). An order of sale appears to have been made and executed without proceedings by the bankrupt for review, or for having the property assigned to him. The exemption was thus transferred from the property to the proceeds in money. The right of the bankrupt to the amount of his exemptions in the proceeds appears to have been well provided for and secured to him. He appears to have received from the trustee, without question, other property of the bankrupt estate to the amount of \$67.15; and \$432.83 to have been deposited, without objection as to place, for his benefit. The avails of the exemption might not be the subject of an ordinary set-off; but reduction of a bankrupt's estate to money for distribution is not a proceeding for creation of debts to the trustee, and dues from the bankrupt for assets would be subject to control by the court, including the referee, for this purpose. The most that the bankrupt could have claimed at any time would have been the amount of his exemption in money, or to have the property assigned to him on payment of the remainder of its value. The former he now gets. The latter he did not apply for, but, rather, appears to have given the trustee and referee to understand he waived, till after the order of sale. He could have secured the property by bidding at the sale, and paying over the excess above his exemption. Proceedings affirmed.

In re TERRILL.

(District Court, D. Vermont. April 10, 1900.)

No. 13.

BANKRUPTCY—ALLOWANCE OF ATTORNEY'S FEE.

Under Bankr. Act 1898, § 64b, no attorney's fee can be allowed in voluntary proceedings, except upon proof of services actually rendered to the bankrupt, in doing the things which the law requires of him.

In Bankruptcy. On report of referee.

W. L. Burnap and J. J. Monahan, for petitioners.

E. B. Taft, for trustee.

WHEELER, District Judge. Attorneys have presented claims for services in priority. The bankrupt act provides for "one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow." Section 64b. This is a voluntary case, and the law refers to what services are actually rendered by an attorney for the bankrupt in assisting him about what the law requires him to do, such as preparing the petition and schedules. In re Kross (D. C.) 3 Am. Bankr. R. 187, 96 Fed. 816. The report of the referee shows that the bankrupt filled out his petition and made his own schedules with his own hand, and that no proof was offered of anything that the attorneys did about them. The actual performance of necessary and proper services must be shown, in order that the court "may allow." None is so shown. The one examination of the bankrupt appears from the report to have been attended by these attorneys in the interest of a preferred creditor, and in opposition to the estate, and that this is all that was done by them about the discharge before the death of the bankrupt. What was done after his death would not be anything required of him to be done, but would be done for those interested in his property acquired after adjudication. As the case now stands, the report would have to be accepted, and the claims rejected. There may have been services of an attorney about the preparation of the petition and schedules, by way of advice, besides writing them out. On motion of claimants, the report is recommended for further finding and report as to any such services. Report recommitted.

In re HOPKINS.

(District Court, D. Vermont. August 21, 1900.)

BANKRUPTCY—HOMESTEAD EXEMPTION.

It is the duty of a trustee to set out the bankrupt's homestead; and where it is subject to debts, so as to render a sale necessary, the cost of converting it into money should be borne by the trustee, and the entire proceeds above the amount of such debts paid to the bankrupt.

In Bankruptcy. Review of order made by referee.

Geo. N. Dale, for petitioner.

J. D. Bates, for bankrupt.

WHEELER, District Judge. This is a review of the proceedings of the referee in ordering the sale of the homestead which is subject to a prior debt of \$223.84, and understood to be inseparable. The bankrupt should have, if he has not had, the privilege of retaining the homestead on payment to the trustee of that sum. It is the duty of the trustee to set out the homestead. The sale and setting out the right in money are a part of the proceedings for that purpose, which it is the duty of the trustee, and not of the bankrupt, to pay for. The homestead right extends to all there is besides the value of \$223.84, and that right is not chargeable with converting the trustee's right into money. Therefore the avails of the sale, after deducting that sum, should be paid over to the bankrupt. Order modified accordingly, and then affirmed.

In re GIBBS.

(District Court, D. Vermont. August 15, 1900.)

No. 463.

BANKRUPTCY—JURISDICTION OF COURT OF BANKRUPTCY—INSOLVENCY PROCEEDINGS IN STATE COURT.

Property of which a bankrupt was in the actual occupancy as a homestead at the time of the adjudication, and to which he had some title which had not been divested by pending proceedings in insolvency against him in a state court, was brought, by the adjudication, within the jurisdiction of the court of bankruptcy.

In Bankruptcy. On report of referee on application of bankrupt for setting apart of homestead.

Farrington & Post, for bankrupt.

C. D. Watson, in pro. per.

WHEELER, District Judge. Upon report of the referee the premises in question are apparently the homestead of the bankrupt, in which he has some title remaining from the original redeemable lease to him, of which he was not divested by the state insolvency proceedings, nor by the decree of foreclosure which was redeemed, and upon which his daughters, as heirs of their mother, have an equitable lien through the paying off of the incumbrance by her to save her supposed right, or an equitable title in proportion to the amount paid as a resulting trust arising from payment of so much of the price upon which the deed was made to him instead of to her. *Williams v. Wager*, 64 Vt. 326, 24 Atl. 765; *Walker v. King*, 44 Vt. 601. As the bankruptcy was in actual occupation at the time of adjudication, this property came within the jurisdiction of this court as a court of bankruptcy. *White v. Schloerb* (May 28, 1900) 178 U. S. 542, 20 Sup. Ct. 1007, Adv. S. U. S. 1007, 44 L. Ed. —. If the value of the premises, which is not stated, is not \$500 greater than the mortgage given by the bank-

rupt and the amount paid by the mother on the decree, the whole should be set off as a homestead; and the question whether she held by virtue of the incumbrance or by a resulting trust would be immaterial to the bankrupt estate. As this fact, and others which may be material, do not appear, the report is recommitted for further findings to be made upon notice. Report recommitted.

In re BOARDMAN.

(District Court, D. Massachusetts. May 23, 1900.)

BANKRUPTCY—ASSETS—LIFE INSURANCE POLICY.

An endowment policy of insurance on the life of a bankrupt, payable to him, or, in case of his death before its maturity, to his mother, if living, and, if not, to his assigns or legal representatives, has a cash surrender value, within the meaning of Bankr. Act 1898, § 70a, cl. 5, where the company issuing it offers to pay a sum in cash for its surrender, although it contains no provision requiring such payment, and passes to the trustee as assets, unless the bankrupt pays the surrender value, subject to such rights therein as may be established by the bankrupt's mother.

In Bankruptcy. On petition by bankrupt for the delivery to him by the trustee of a life insurance policy.

The following is the opinion of LEWIS G. FARMER, Referee:

On December 24, 1889, the Equitable Life Assurance Society of the United States issued to the bankrupt, in Cleveland, Ohio, its "free tontine" policy, No. 452,167, whereby, in consideration of an annual premium of one hundred twenty-one and $\frac{75}{100}$ dollars (\$121.75), it promised to pay either to him, his executors, administrators, or assigns, on the 23d day of December, 1909, or, should he die before, then to his mother, Flavilla T. Boardman, if living,—if not, then to him, his executors, administrators, or assigns,—at the office of the society, in the city of New York, twenty-five hundred (\$2,500), upon satisfactory proofs of his death; and the same has been delivered to the trustee, who retains it in his possession, claiming that it has a cash surrender value, which he is entitled to receive before delivering the policy to the bankrupt. The trustee has received from the actuary of the society the following communication:

"Dear Sir: On return, with proper release, of policy No. 452,167, on the life of Boardman, on Nov. 1, 1899, or within six months thereafter (if premiums be paid to Dec. 23, 1899, and the premiums due on said date not paid), we will pay in cash the sum of six hundred ninety-two and $\frac{50}{100}$ dollars (\$692.50), or give paid-up policy for fixed amount of twelve hundred and fifty dollars (\$1,250); but, unless otherwise expressly agreed, this offer will not be binding after the termination of the said six months. These values are inclusive of all dividends."

This communication was inclosed in a letter from said actuary to the trustee, in which it was stated that, if the policy should be surrendered for cash, the receipt should be signed by the life assured, and also by the beneficiary; and it appears that the beneficiary, so called (that is, the mother of the bankrupt), refuses to sign such a receipt. The bankrupt also claims that the policy has no cash surrender value, within the meaning of the bankruptcy act, and has filed a petition that the trustee be ordered to deliver the policy to him. After hearing the trustee and the bankrupt's attorney upon this petition, I filed the following memorandum, ordering that the same be denied:

I think that this policy has a "cash surrender value," within the meaning of the bankruptcy act. I do not find that there is any exact definition of this term, as a matter of judicial determination, but it seems to me to mean the sum the company will pay upon the surrender and discharge of the policy; and it makes no difference whether the amount is an arbitrary one fixed by the stat-

ute, or one settled by the terms of the policy, or merely a voluntary matter on the company's part. In *re Grahs*, 1 Nat. Bankr. N. 164, 1 Am. Bankr. R. 465. If this amount is payable to the bankrupt, his estate, or his personal representatives, then the trustee is entitled to the policy, as a part of the assets of the estate, unless such an amount is paid by him to the trustee, as provided by section 70 (5). This question appears to be governed by the following decisions: In *re Lange*, 1 Nat. Bankr. N. 60, 1 Am. Bankr. R. 189, 91 Fed. 361; In *re Grahs*, 1 Nat. Bankr. N. 164, 1 Am. Bankr. R. 465; In *re Steele*, 2 Nat. Bankr. N. 281, 3 Am. Bankr. R. 549, 98 Fed. 78. In *re Hernich*, 1 Am. Bankr. R. 713, is opposed to the above decisions, but I must regard their weight as controlling. In *re Buelow*, 2 Nat. Bankr. N. 230, 3 Am. Bankr. R. 389, 98 Fed. 86, it did not appear what the terms of the policies were; and the decision of the referee in *re Diack*, 2 Nat. Bankr. N. 354, is opposed to that of Judge Thomas in the same case. See, also, *Brigham v. Insurance Co.*, 131 Mass. 319; *Pierce v. Insurance Co.*, 138 Mass. 151. I think, therefore, that the trustee is entitled to the possession of the policy as an asset of the estate, redeemable in the manner provided by the act. It may be that the bankrupt's interest in it is so involved with the rights of his mother that it cannot be reached by the trustee, but that question must be determined in another tribunal.

Upon petition by the bankrupt the question presented by the foregoing petition was certified to the court.

Walter N. Buffum, for petitioner.

Frederic F. Haskell, trustee, pro se.

LOWELL, District Judge. In this case I agree with the referee. The policy has a cash surrender value within the intent of the statute. The fact that this value is not stated in the policy is immaterial. If in the ordinary course of business the bankrupt can obtain cash from the company by a surrender of the policy, his creditors are entitled to the cash. Again, I think the interest of the bankrupt's trustee is not defeated by the claim of Mrs. Boardman, though I am not required to determine at the present time precisely what Mrs. Boardman's rights are. In addition to the cases cited by the referee, see *In re Diack* (D. C.) 100 Fed. 770. In that case the policy was issued by the company which issued the policy in the case at bar. The policy was payable in 15 years to the bankrupt, "should he then survive, or; should he die before, then his wife, Susan M. Diack, if living; if not, then to the said William Diack's executors, administrators, or assigns." This is substantially the language used in the Boardman policy. Some of the premiums were paid by Mrs. Diack, and so she was held entitled by the law of New York to a contingent legal interest in the policy, and could not be required to surrender her interest therein. The bankrupt was therefore ordered to execute an assignment to the trustee of his interest in the surrender value of the policy. The learned judge thus treated the trustee as having some rights in the proceeds of the policy. With this case I agree, rather than with *In re Hernich*, 1 Am. Bankr. R. 713, if, indeed, the note to that case correctly states Judge Morris' opinion. If the trustee in this case is entitled to the whole or part of the value of the policy, he cannot be compelled to deliver it up to the bankrupt. The decision of the referee is therefore affirmed.

UNITED STATES v. BEEBE et al.
(Circuit Court, D. Massachusetts. August 27, 1900.)

No. 858.

1. CUSTOMS DUTIES—VALUATION OF FOREIGN COINS—PROCLAIMED VALUE THE BASIS OF ESTIMATE.

Under Tariff Act 1894, § 25 (28 Stat. 552), providing that the values of standard foreign coins shall be estimated quarterly by the director of the mint, and be proclaimed by the secretary of the treasury, and that the values so proclaimed shall be followed in estimating the value of all foreign merchandise exported to the United States, the secretary of the treasury has no authority to direct the liquidation of an entry for customs duties on the basis of the exchange value of the foreign coin as declared by the consular certificate.

2. SAME—APPROVAL OF WRONG ESTIMATE—EFFECT.

The approval by the secretary of the treasury of the liquidation of an entry for customs duties by the collector of the port upon the basis of the exchange value of the foreign coin specified in the invoice, as declared in the consular certificate, does not amount to a reliquidation of the entry under Tariff Act 1894, § 25 (28 Stat. 552), providing that the secretary of the treasury may order the reliquidation of any entry at a different value, upon satisfactory evidence that the value in United States currency of the foreign money specified in the invoice was at the date of certification at least 10 per cent. more or less than the value proclaimed during the quarter in which the consular certification occurred.

3. SAME—REVIEW OF ESTIMATE BY CIRCUIT COURT.

The action of the collector of a port, declining to accept the proclaimed value of a foreign standard coin, and in adopting the value declared in the consular certificate, thereby increasing the amount of customs duty to be paid upon imported merchandise, although approved by the secretary of the treasury, is reviewable, on the protest of the importer, by the board of general appraisers and by the circuit court under Customs Administrative Act June 10, 1890, §§ 14, 15, providing for an appeal by an importer from a liquidation by the collector of a port to the board of general appraisers, and from the board to the circuit court.

Boyd B. Jones, U. S. Atty., and A. H. Washburn, Asst. U. S. Atty.
Whipple, Sears & Ogden, for importers.

COLT, Circuit Judge. This petition for review is governed by the principles laid down in *U. S. v. Newhall & Co.* (C. C.) 91 Fed. 525. In that case this court reached the following conclusions: (1) In reducing foreign standard coins to United States currency, for the assessment of duties, the basis in all cases is the value of the pure metal in such coins, and not their exchange value. (2) This long-established rule was not changed by the proviso to section 25 of the tariff act of 1894 (28 Stat. 552) as to reliquidations where it appeared that the value of the foreign money specified in an invoice had varied at the time of the invoice more than 10 per cent. from that proclaimed by the secretary of the treasury for that quarter. (3) A collector is not authorized, because the consular certificate accompanying an invoice shows the current exchange value of the money of the invoice to be more than 10 per cent. greater or less than the proclaimed value for the quarter, to depart from such proclaimed value, and adopt, for the purpose of assessing the duty, the exchange value shown by the certificate. (4) The action of a collector in declining to accept the proclaimed value of a foreign standard coin, and in adopting another

standard, thereby increasing the amount of duty on imported merchandise, does not relate to a disputed appraisement, but to the amount of duties; and under Customs Administrative Act June 10, 1890, §§ 14, 15, is reviewable, on the protest of the importer, by the board of general appraisers and the circuit court.

The present case presents the same state of facts as *U. S. v. Newhall & Co.*, except in two particulars:

First. To the estimate of the pure-metal value of foreign coins, including the rupee, in United States money, by the director of the mint, as proclaimed by the secretary of the treasury on July 1, 1898, was appended the following note: "Value of the rupee to be determined by consular certificate." This annotation was clearly unauthorized and void under section 25 of the tariff act of 1894, as construed by the court in *U. S. v. Newhall & Co.*

Second. The secretary of the treasury wrote a letter to the collector, approving his action in liquidating the entry on the basis of the exchange value of the rupee, as certified by the United States consul in the invoice, as follows:

"Washington, D. C., March 31, 1899.

"Collector of Customs, Boston, Mass.—Sir: The department is in receipt of your letter of the 20th ultimo, transmitting the following described protest against your action in estimating the value of the India rupee in certain importations from Madras, India, on the basis of the values shown in the U. S. consular certificates attached to the invoices: Protest 111, of Messrs. Lucius Beebe & Sons, dated Boston, Feb. 17, 1899; importation, 27 bales of tanned goat skins, per Columbian, Oct. 18, 1898; entry liquidated Feb. 17, 1899. You submit the invoices, Nos. 1,610 and 1,611, dated Madras, India, August 11 and September 1, 1898, respectively, for the inspection of the department, and call attention to the fact that the U. S. consular certificates attached thereto state that the exchange value of the rupee, in which currency the said invoices are made out, was, at the date of shipment, 32.11 cents, estimated in U. S. gold dollars, and that inasmuch as said valuation is more than ten per centum greater than the value of the India rupee as estimated by the director of the mint for the quarter covering said shipment, you have, following department's rulings, synopses 17,766 and 18,110, assessed duties on the basis of the valuation of the India rupee as certified by the U. S. consul on said invoices. In reply, I have to inform you that from an inspection of the invoices, and of the U. S. consular certificates attached thereto, the department is satisfied that the correct and true value of the India rupee was, at the date of shipment of the said merchandise, in fact more than ten per centum greater than that estimated by the director of the mint for the quarter covering said shipments. Your action in liquidating the entry on the basis of this higher valuation for the India rupee is therefore hereby approved, under the authority conferred upon the secretary of the treasury by section 25 of the act of August 28, 1894."

The consular certificate bearing the date of August 11, 1898, reads:

"I further certify that the exchange value of the rupee, in which currency the annexed invoice of merchandise is made out, is at this date 32.11 cents, estimated in United States gold dollars."

The collector liquidated the entry February 17, 1899. The entry bears this stamp:

"Custom House, Boston, February 17, 1899. Liquidated."

The proviso in section 25 is as follows:

"The secretary of the treasury may order the reliquidation of any entry at a different value, whenever satisfactory evidence shall be produced to him

showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred."

The contention of the government is that the approval by the secretary of the treasury in his letter of March 31, 1899, of the action of the collector was a reliquidation of the entry under this proviso, and that such reliquidation is conclusive, and not subject to review by the board of general appraisers or by the circuit court. The proviso says that "the secretary of the treasury may order the reliquidation of any entry at a different value." If we are to give any signification to the words "reliquidation" and "different value," they mean, in connection with the preceding part of the section, that there must have been a liquidation of the entry at the proclaimed value before the secretary can direct a reliquidation at a different value. We do not find in this case any order of the secretary directing a reliquidation of the entry at a different value from the proclaimed value, nor any reliquidation by the collector. The record discloses a single liquidation by the collector upon a basis not in conformity with law, as held by this court in *U. S. v. Newhall & Co.*, and an approval of such action by the secretary. To hold such approval of the collector's liquidation based upon a wrong principle, a reliquidation under the proviso of section 25 would, in my opinion, do violence to the express language of the statute. To adopt such a construction is to declare that the collector, in the first instance, may liquidate an entry, not upon the proclaimed value in pure metal of the foreign coin as required by section 25, but upon any standard of value he chooses to adopt, and that such liquidation is lawful and binding, provided the secretary of the treasury ratifies his action under the authority conferred by the proviso. I am unable to assent to the able and ingenious argument of the government's counsel in support of this interpretation of the statute. Whether this case is reviewable by the board of general appraisers or by the circuit court depends upon whether there has been a reliquidation under the proviso of section 25. A valid reliquidation under this proviso would seem to be as conclusive as the proclaimed value under the preceding part of the section. *Cramer v. Arthur*, 102 U. S. 612, 619, 26 L. Ed. 259; *Hadden v. Merritt*, 115 U. S. 25, 27, 29 L. Ed. 333; *U. S. v. Klingenberg*, 153 U. S. 93, 99, 14 Sup. Ct. 790, 38 L. Ed. 647. The decision of the board of general appraisers is affirmed.

The court makes the following findings of fact:

(1) The importation in this case consists of 27 bales of tanned goat skins, shipped to Boston, Mass., from Madras, India. Said merchandise was included in two invoices, one dated August 11, 1898, for 13 bales of skins, and the second dated August 31, 1898, for 14 bales of skins.

(2) The invoice dated August 11th showed a total value for the merchandise therein referred to, including certain nondutiable charges, amounting to rupees (silver) 290./6./4, as follows: Rupees (silver) 9,187./15./4.

(3) The invoice dated August 31st showed a total value for merchandise therein referred to, including certain nondutiable charges,

amounting to rupees (silver) 337./15./5, as follows: Rupees (silver) 9,150./5./10.

(4) The total value of the merchandise included in both of said invoices, including nondutiable charges, the total of which is rupees 628./5./9, amounts to: Rupees (silver) 18,338./5./2.

(5) Said 27 bales of goat skins were entered for consumption by Lucius Beebe & Sons, the respondents and owners of said merchandise, in the port of Boston and Charlestown, October 18, 1898. After deducting from the invoice value the sum of rupees 628./5./9, for nondutiable charges, the dutiable value, as ascertained at the custom house, Boston, is as follows: Rupees (silver) 17,709./15./5, and also in dollars \$5,687, reduced at the rate of 32.11 cents per rupee. Duties were paid by the respondents on October 19, 1898, at the rate of 10 per cent. ad valorem on said \$5,687.

(6) On July 1, 1898, the secretary of the treasury issued a circular, the material parts of which are as follows:

"Value of Foreign Coins. 1898.

"Department Circular No. 124.

"Treasury Department, Bureau of the Mint.

"Washington, D. C., July 1, 1898.

"Hon. Lyman J. Gage, Secretary of the Treasury—Sir: In pursuance of the provisions of section 25 of the act of August 23, 1894, I present in the following table an estimate of the values of the standard coins of the nations of the world:

Country.	Standard.	Mon. Unit.	Value in terms of U. S. gold dollar.	Coins.
India.	Silver.	Rupee.	.199	Gold, mohur (7.105) Silver; rupee and divisions.

"(Appended to the estimates is the following footnote):

"Value of the rupee to be determined by consular certificate.

"Respectfully yours,

"B. F. Butler, Acting Director of the Mint.

"Treasury Department. Office of the Secretary.

"Washington, D. C., July 1, 1898.

"The foregoing estimate by the director of the mint, of the values of foreign coins, I hereby proclaim to be the values of such coins in terms of the money of account of the United States, to be followed in estimating the value of all foreign merchandise exported to the United States on or after July 1, 1898, expressed in any of such metallic currencies.

"L. J. Gage, Secretary of the Treasury."

(7) Attached to the invoice of August 11 was the following consular certificate, dated August 11, 1898:

"I further certify that the exchange value of the rupee, in which currency the annexed notice of merchandise is made out, is at this date 32.11 cents, estimated in United States gold dollars."

(8) Attached to the invoice of August 31st was a similar consular certificate, under date of September 1st.

(9) The entry was liquidated by the collector on February 17, 1899, at the exchange value of the rupee, namely, 32.11 cents, as certified

by the consul. Thereafter, on the same day, the protest and notice of appeal from said liquidation was duly filed by the respondents.

(10) Reduced into United States money at the rate proclaimed July 1, 1898, namely, 19.9 cents, the entered value of said merchandise, namely, rupees (silver) 17,709./15./5, would amount to \$3,524, and the amount of duties payable thereon at 10 per cent. ad valorem would amount to \$352.40.

Under the facts, the court makes the following rulings of law:

(1) The court rules that the note appearing at the foot of the quarterly estimate of coin value, on July 1, 1898, "The value of the rupee to be determined by consular certificate," gave no right, power, or authority to the collector to liquidate the entry in question at the value of the rupee stated by the United States acting consul in the certificates attached to the two invoices.

(2) The collector, in adopting the exchange value of the rupee as certified by the United States consul, and in not adopting the proclaimed value for the rupee, in liquidating the entry in question, acted illegally, and the board of general appraisers had jurisdiction to order a reliquidation at the proclaimed value.

(3) The decision of the board of general appraisers must be sustained unless it is shown that there has been a valid reliquidation of the entry in question under the authority conferred upon the secretary of the treasury by the proviso of section 25 of the tariff act of August 28, 1894.

(4) The court rules that there is no evidence of the reliquidation of this entry, and that said entry has never been reliquidated.

(5) The court rules that the letter of the assistant secretary of the treasury, dated March 31, 1899, does not contain an order for the reliquidation of the entry in question, nor does it amount to a reliquidation of the same.

UNITED STATES v. DIECKERHOFF et al.

(Circuit Court, S. D. New York. April 6, 1900.)

CUSTOMS DUTIES—CUSTOM-HOUSE BONDS—DAMAGES FOR BREACH.

The amount recoverable for the breach of a custom-house bond taken under Rev. St. § 2899, by the refusal of the principal obligor to return packages on demand of the collector, is double the estimated value of the particular packages so withheld, as liquidated damages; and such amount is not a harsh or excessive penalty, the object of the statute in requiring the bond being to secure the return of the packages when demanded, to obviate the necessity and trouble of resorting to extrinsic evidence to ascertain their contents.

On Demurrer to Complaint on a Custom-House Bond.

W. Wickham Smith, for demurrant.

Charles D. Baker, Asst. U. S. Atty.

TOWNSEND, District Judge. The questions herein arise on a demurrer to the complaint in an action at law brought by the United States on a custom-house bond taken under section 2899 of the Re-

vised Statutes. The bond is for the sum of \$50,000. The essential part of the condition is as follows:

"The condition of this obligation is such that, if each and every package or packages of each and every importation made by the said principals at any time within six months from and after the date of these presents, and delivered from the custody of the officers of the customs, in pursuance of section 2899, Revised Statutes of the United States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined have been appraised and reported to him, be returned to the order of the collector without having been opened, except with the consent of the collector or surveyor given in writing, and then in the presence of one of the officers of the customs; or if the above-bounden obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned, then this obligation is to be void; otherwise, to remain in full force and virtue."

The question at issue is stated by the defendant as follows:

"The real question of law to be determined upon this demurrer is whether the amount stipulated in these bonds, given pursuant to section 2899, Rev. St., is to be regarded as a penalty to secure the payment of actual damages sustained and proved by the United States, or whether said amount is to be regarded as liquidated damages which the obligors of the bond may be compelled to pay, without proof that the United States has suffered any damage whatever, or as a statutory penalty in the nature of punishment for the violation of a statutory duty."

The complaint alleges that a certain package,—No. 420,—of the estimated value of \$185, was ordered to be returned, and that its return was refused. That such refusal was a breach of the bond is not disputed. The defendant claims that only such actual damage as the plaintiff can prove it has suffered can be recovered in this action. The purpose of the bond is manifestly to prevent packages from being sold or opened, except in the presence of the collector, until the amount of duty to be paid thereon has been finally ascertained. In case fraud in valuation is suspected, any package can be called for and examined. The plaintiff insists that the intent of the law will be made effective by construing the condition of the bond to mean that for any package not so returned upon demand there shall be paid twice its estimated value. The only actual injury suggested in defendants' brief, for which, on their theory, damages could be awarded, would seem to be the additional expense of proving the contents of the package, caused by its absence. Loss of duties by reason of fraudulent description of contents of the package could not well be considered as actual damage arising from the refusal to return the goods to the collector for inspection; and, even if they could be so considered, the result would not be satisfactory, for, if the government should fail to establish the fraud by reason of the absence of the package called for, it could not recover for any such damage. Defendants say that there can be other evidence as to the contents of the packages than such as is obtained by an inspection of the packages themselves by the collector, and add:

"The cases containing the goods are only one kind of evidence by which to establish the character of the goods. Many cases will be found in the books where the character of imported merchandise, in suits by the government for forfeiture or duties, has been established by the testimony of informers, and by the testimony of foreign shippers, by documentary evidence, and in many

other ways. It may be harder to get this kind of evidence than it would be to open the cases if they could be produced, but this is no reason for giving a harsh and unreasonable construction to a statute seventy years after its enactment."

The object of the bond is to dispense with the necessity of resorting to such evidence. Defendants throughout maintain that, if plaintiff is entitled to recover at all for anything except for actual damage alleged and proved, it must recover twice the value of the whole shipment of which the package formed a part, and that such a penalty would be too severe. Such is not the proper construction of the bond. Upon the complaint as it stands, plaintiff, unless further answer is made, is entitled to recover, as liquidated damages, double the estimated value of the packages called for and not returned; and this is not a harsh or excessive penalty. To sustain the demurrer would violate the plain intent of the statute, and render it practically useless. The demurrer is overruled.

UNITED STATES v. 246½ POUNDS OF TOBACCO (BARTO, Intervener).

(District Court, D. Washington, N. D. August 14, 1900.)

INTERNAL REVENUE—FORFEITURES—EXISTENCE OF MORTGAGE ON PROPERTY OF CIGAR MANUFACTURER.

Under Rev. St. § 3400, providing that a cigar manufacturer who violates the provisions of the internal revenue law shall, in addition to other penalties, forfeit to the United States all materials, machinery, tools, etc., "which shall be found in his possession, or in his manufactory, and used in his business as such manufacturer, together with his estate or interest" in the building, lot, etc., the existence of a bona fide mortgage on materials or other personal property which is allowed to remain in the possession of the manufacturer, and to be used by him in his business, will not prevent the forfeiture of such property, the risk of which the mortgagee must be held to have assumed, as the provision for forfeiture of such property is not limited, like that relating to real estate, to the interest of the offender therein.

On exceptions to petition of intervention filed in proceedings to condemn and forfeit property for a violation of the internal revenue laws.

E. E. Cushman, Asst. U. S. Atty., for the United States.

Tucker & Hyland and J. J. McCafferty, for intervener.

HANFORD, District Judge. This is a proceeding upon an information filed by the United States district attorney to condemn certain tobacco and other property as forfeited to the United States by force of section 3400, Rev. St. U. S. The information charges that all of said property was seized by a deputy collector of internal revenue, because found in the possession of one J. C. Zonig, who theretofore was engaged in the business of manufacturing cigars without having paid the special tax as a cigar manufacturer, and without having given bond as such. The intervener claims a lien upon all of said property by virtue of a chattel mortgage given to her by Zonig to secure a loan of money made to him before the infraction of any law in connection with his business as a cigar manufacturer. In her com-

plaint the intervenor alleges that the mortgage was taken in good faith for an actual loan of money, and that she was not at any time cognizant of any neglect on the part of Zonig to conform to the requirements of the statutes in the conduct of his business. The United States attorney has filed exceptions to the claim set forth in the intervenor's complaint, and the case has been argued and submitted upon the question raised by said exceptions whether the lien created by the mortgage has been extinguished by the forfeiture.

The material part of the statute upon which this proceeding is founded, reads as follows:

"Sec. 3400. Every manufacturer of cigars who removes or sells any cigars without payment of the special tax as a cigar-manufacturer, or without having given bond as such, * * * shall, in addition to the penalties elsewhere provided in this title for such offenses, forfeit to the United States all raw material and manufactured or partly manufactured tobacco and cigars, and all machinery, tools, implements, apparatus, fixtures, boxes, barrels, and all other materials which shall be found in his possession, or in his manufactory, and used in his business as such manufacturer, together with his estate or interest in the building or factory, and the lot or tract of ground on which such building or manufactory is located, and all appurtenances thereunto belonging."

Consistently with the purpose indicated by the words of the act, to punish the offending manufacturer by forfeiture of property, the law should not be extended so as to affect the property or rights of innocent persons. According to the statute, the manufacturer must forfeit, and manifestly he can only forfeit, property which he owns, or his right to the possession or use of property. *U. S. v. 398 Barrels of Distilled Spirits*, Fed. Cas. No. 16,504; *U. S. v. 372 Pipes Distilled Spirits*, Id. 16,505. On the other hand, a literal reading of the statute indicates a purpose to discriminate so as to make the forfeiture of personal property absolute, the mere possession of such property by the offender, or the use of it in connection with his business, being sufficient to close any controversy as to the ownership, or as to rights of everybody respecting the same; but real estate, including the building or factory, to be subjected only to forfeiture of the offender's estate or interest therein. The purpose first suggested, in so far as it restricts the forfeiture of personal property, is incompatible with the second; therefore it is obvious that, to interpret the law according to the true intent of congress, the general spirit and policy of the internal revenue statutes and the rules for interpretation of ambiguous statutes must be taken into consideration. The laws providing for forfeiture by violators of revenue laws are not to be governed by the rule of strict construction applied to penal statutes in general, but are to have a reasonable construction; and the difficulty here is to be overcome by giving section 3400 a reasonable construction harmonious with the provisions of the statutes relating to forfeitures for other offenses. The sixteenth section of the act of February 8, 1875, entitled "An act to amend existing customs and internal revenue laws, and for other purposes" (1 Supp. Rev. St. U. S. [2d Ed.] p. 60), is similar in scope and purpose to section 3400. In the case of *U. S. v. Stowell*, 133 U. S. 1-20, 10 Sup. Ct. 244, 33 L. Ed. 555, it was decided by the supreme court that the provisions of the revenue laws which impose penalties and forfeitures are to be construed fairly and reasonably so as to carry

out the intention of congress, instead of being construed strictly in favor of defendants; and in the same case a construction was given to that part of section 16 of the act of February 8, 1875, providing for the forfeiture of personal property found in an illicit distillery, or in any building, room, or yard, or inclosure connected therewith, and used with or constituting a part of the premises, as follows:

"It will be convenient, in the first place, to ascertain the construction and effect of the provisions of section 16 of the act of 1875, by which, if any person carries on the business of a distiller without having given bond, or with intent to defraud the United States of the tax on the spirits distilled by him, he shall be punished by fine and imprisonment, and there shall be forfeited to the United States: (1) 'All distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation of spirits, owned by such person, wherever found;' (2) 'all distilled spirits or wines and personal property, found in the distillery, or in any building, room, yard or enclosure connected therewith, and used with or constituting a part of the premises;' (3) 'all the right, title and interest of such person in the lot or tract of land on which such distillery is situated;' (4) 'all right, title and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same,' * * * The second provision forfeits 'all distilled spirits or wines and personal property, found in the distillery, or in any building, room, yard, or enclosure connected therewith, and used with or constituting part of the premises.' * * * The first provision is restricted in point of ownership, and not in point of place. The second provision is restricted in point of place, and not in point of ownership. Nor can the second provision be restricted to property fit or intended to be used for the distillation of spirits; for, while the first provision contains such a restriction as regards apparatus, the second provision omits all requirements of fitness or intention for the unlawful use. Each of the two provisions clearly defines its own restrictions, and the restrictions inserted in the one cannot be imported into the other. The second provision must, therefore, extend to some property not owned by the distiller, and to some property not fit or intended to be used in distilling spirits. In order to give it such effect as will show any reason for its insertion in the statute, it must be construed to intend, at least, that all personal property which is knowingly and voluntarily permitted by its owner to remain on any part of the premises, and which is actually used, either in the unlawful business, or in any other business openly carried on upon the premises, shall be forfeited, even if he has no participation in or knowledge of the unlawful acts or intentions of the person carrying on business there; and that persons who intrust their personal property to the custody and control of another at his place of business shall take the risk of its being subject to forfeiture if he conducts, or consents to the conducting of, any business there in violation of the revenue laws, without regard to the question whether the owner of any particular article of such property is proved to have participated in or connived at any violation of those laws. * * * The significance of the omission of all restrictions in point of ownership and in point of fitness or intention for the unlawful use in the second provision concerning personal property is clearly brought out by contrasting that provision with the provisions immediately following it, concerning real estate. The third provision forfeits only 'all the right, title, or interest of' the distiller 'in the lot or tract of land on which the distillery is situated.' And the fourth provision forfeits only 'all right, title, and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be carried on, or has connived at the same.' Congress has thus clearly manifested its intention that the forfeiture of land and buildings shall not reach beyond the right, title, and interest of the distiller, or of such other persons as have consented to the carrying on of the business of a distiller upon the premises."

In her plea the intervener does not allege that she was ignorant of the fact that the property mortgaged was in the possession of Zonig

at the time of the commission of the offense, nor does she deny that she voluntarily permitted it to remain in his possession, knowing that it was the stock and implements necessary to be used in carrying on his business as a cigar manufacturer. The mortgage itself shows that the parties intended that the property should remain in the possession of and be used by Zonig in his business. By her plea, the intervenor presents herself before the court as an innocent party, and she will probably lose a part of the money which she loaned to Zonig, in consequence of the destruction of her lien. Therefore, in view of her situation, an absolute forfeiture of the property will work a hardship which I would rather avoid if I could see any way to do so consistently with due respect for the law. But the case of *U. S. v. Stowell* is so nearly analogous to the case in hand that I must regard it as an authoritative declaration of the principles which must control the decision of this case. It is essential to good government that laws be, as nearly as possible, uniform and certain in their operation. To attain this object is the paramount duty of courts, and, to insure justice without partiality, precedents and rules which have been approved by solemn decisions of the court of highest authority in the land must not be ignored. For the reasons stated, and upon the authority of the decision of the supreme court in the case of *U. S. v. Stowell*, I hold the plea in the intervenor's complaint to be insufficient, and the exceptions thereto are sustained.

UNITED STATES v. WONG LUNG.

(District Court, D. Vermont. May 4, 1900.)

ALIENS—DEPORTATION OF CHINESE—MERCHANTS.

Where a Chinese person is shown to have been a member of a firm of merchants in this country for seven years, with \$1,000 invested as his share of the capital, the fact that he has lately visited China, and returned from there, nothing being shown as to his manner of re-entry, does not warrant his arrest and deportation.

Appeal from Order of Commissioner for the Deportation of a Chinese Person.

Rufus E. Brown, for appellant.
James L. Martin, Dist. Atty.

WHEELER, District Judge. This case shows that the appellant has been a member of a firm of merchants dealing in groceries at Hartford, Conn., for seven years, having \$1,000 invested as his share of the capital. This entitles him to remain in the United States. *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340. The case also shows that he has lately visited China, and returned, but does not show the manner of his re-entry, nor any connection between his arrest for being unlawfully in the United States and his return, if that would be material as to his right to remain, when actually and peaceably here. Appellant discharged.

UNITED STATES v. JUE WY.

(District Court, D. Vermont. April 19, 1900.)

ALIENS—CHINESE EXCLUSION—EVIDENCE OF AMERICAN NATIVITY.

Unimpeached and uncontradicted testimony that a person of the Chinese race, seeking to enter the United States from China, was born in this country, when direct, positive, and circumstantial, cannot be disregarded, and must be held to overcome the presumption of his Chinese nativity.

Appeal from Order of Commissioner for the Deportation of a Chinese Person.

James L. Martin, U. S. Atty.

P. F. McManus, for respondent.

WHEELER, District Judge. The testimony as to the birth of the appellant in this country is direct, positive, and circumstantial, and is not unnatural or improbable. It is not contradicted or discredited, and cannot justly be disregarded. Although the burden of proof as to this birth is upon the appellant, coming now from China, this evidence seems to overcome the presumption arising from having been lately in that country, and to establish the fact of nativity in this country. Appellant discharged.

BRINKMANN v. TAYLOR.

(Circuit Court, D. Connecticut. August 9, 1900.)

No. 490.

PATENTS—PRIORITY OF INVENTION—WIRE BUSTLES.

In a suit by the owner of the Kiel patent, No. 626,207, for a wire bustle, for infringement by bustles manufactured by defendant under the Taylor & Hammond patent, No. 617,452, which apparently covers the same invention, and is prior in date of application and of issue, evidence offered by complainant to show priority of invention held insufficient, and the bill dismissed without prejudice.

In Equity. Suit for infringement of patent. On final hearing.

Elisha K. Camp, Philip Mauro, and Reeve Lewis, for complainant.

F. W. Smith, Jr., for defendant.

TOWNSEND, District Judge. It appeared at this final hearing on bill and answer that defendant manufactures bustles claimed by complainant to be covered by patent No. 617,452, and identical with those manufactured by complainant. Complainant is the assignee of patent No. 626,207, applied for October 20, 1898, by H. H. Kiel, and issued to him May 30, 1899. Defendant is the owner of patent No. 617,452, applied for August 31, 1893, by H. H. Taylor and M. B. Hammond, and issued to them January 10, 1899. Complainant is defendant in a suit brought in another circuit by this defendant for infringement of his (defendant's) said patent. The invention, if any, herein involved, seems to be covered by both patents. Therefore the first, and perhaps the decisive, question in these cases appears to be that

of priority of such alleged invention. This question of priority is not fully or satisfactorily presented herein. Complainant's counsel introduced two witnesses, complainant and one of his customers, to show a sale of one dozen of complainant's Victor bustles more than two months before the date of the application for defendant's said patent No. 617,542. Defendant's counsel did not cross-examine said witnesses on this point. He now claims, and, I think, justly, that neither of these witnesses testified that said Victor bustles were like those described in the patent in suit, and that the evidence of said sale is insufficient and unsatisfactory for various reasons, especially in view of the conduct of complainant in the patent office. Furthermore, by reason of the pendency of the other suit, neither party seemed desirous of having the question of invention now finally disposed of by reference to the prior art. In these circumstances it now seems best to formally dismiss the bill without prejudice on the ground that the complainant has through inadvertence failed to sufficiently establish priority of invention.

REED MFG. CO. v. SMITH & WINCHESTER CO. et al.

(Circuit Court, D. Connecticut. July 31, 1900.)

PATENTS—INFRINGEMENT—COLLAR-IRONING MACHINE.

The Shaw patent, No. 608,720, for a collar turning and ironing machine, held not anticipated, valid, and infringed on a motion for preliminary injunction against a defendant manufacturing machines under patent No. 627,889, issued to Asher, over whom Shaw obtained an adjudication of priority in interference proceedings.

In Equity. Suit for infringement of a patent. On motion for preliminary injunction.

H. C. Lord and James D. Dewell, Jr., for complainant.

William E. Simonds, for defendants.

TOWNSEND, District Judge. Complainant is the owner of patent No. 608,720, granted August 9, 1898, to W. C. Shaw. One of the defendants is the manufacturer and the other is the selling agent of the machine claimed to be manufactured under patent No. 627,889, granted June 27, 1899, to the defendant Asher. The validity of the patent has never been adjudicated, but complainant relies on an adjudication of priority on interference proceedings. Infringement is alleged only as to the first claim of the patent in suit, which claim is as follows:

"(1) In a collar turning and ironing machine, the combination of a curved, flange-shaped former, over which the collar is folded and curved into proper shape for wear, a grooved iron arranged opposite the former, and means for moving the grooved iron into engagement with the former, and for moving one of said parts upon the other, substantially as set forth."

The only evidence introduced by respondents in opposition to the motion consists of an affidavit of Herbert S. Bullard, a United States patent, No. 287,865, granted November 1, 1883, to Martin H. Ryder, for a hat-curling machine, and a German patent to Rudolph Mindt of 1883. This evidence is insufficient to support the respondents' con-

tentions of noninfringement and invalidity. The only question in the case appears to be whether the patent deserves a broad or a narrow construction. The Ryder machine belongs to a different art. It is designed to curl and set hat brims. Its construction differs from that of Shaw, the object sought to be secured is different, and it could not be adapted to use in laundering collars without radical alterations. Fig. 5 of the Mindt patent shows a "saddle-shaped" mold, whose ridges lay themselves into the depression of a heated ironing roller. It is clear from the Mindt specification that it was not, as constructed, designed to perform the function of the machine of the patent in suit. It is not clear that its scope was not merely to iron the band and the face of the collar. In operation it was "not desirable * * * to iron both parts of the collar at the same time." Nor is it clear that this machine was not merely designed to iron new collars for the market, and not to fit laundered collars to the neck. The Mindt patent issued 15 years ago. The patent in suit appears to be a marked improvement thereon. Apparently the essence of Shaw's invention is to provide a machine whereby collars can be laundered in a circular shape fitted to the neck of the wearer, without breaking the edge of the collar. The meager presentation of the prior art shows nothing which anticipates this alleged invention. The machine is apparently novel, and is of great utility. In these circumstances the patentee should not be deprived of the benefit of the decision of priority as against this defendant obtained by interference proceedings in the patent office.

Since the foregoing memorandum was written, counsel for complainant has filed a reply brief, in which he contends, *inter alia*, that the Mindt machine merely takes collars in the rough, and irons them in the curve following the cut of the fabric at the fold, causing opposite curves for the outside and inside of the collar, all of which is either preliminary to the operation of the machine of the patent in suit, or would cause the collar, when afterwards folded and curved, to be subjected to severe strain. It would be inexpedient at this time to definitely pass upon these contentions. They accord with the views which were entertained upon inspection of the Mindt patent. Let an order be entered for a preliminary injunction.

THE NUTMEG STATE.

(District Court, D. Connecticut. October 14, 1899.)

No. 1,238.

CARRIERS—LOSS BY FIRE—LIABILITY.

Under a contract of shipment providing that no carrier is bound to carry the property by a particular train or vessel, or otherwise than with as reasonable dispatch as its general business will permit, or shall be liable for loss thereof by fire, the carrier is not liable,—the fire destroying the vessel and cargo not arising from its fault,—though the goods would not have been destroyed if it had carried them on the night of their arrival; the capacity of the vessel not being sufficient for all the cargo.

Petition for Limitation of Liability.

Carpenter & Park, for petitioner.
James J. Macklin, for claimant.

TOWNSEND, District Judge. The steamboat Nutmeg State, on its regular trip between Bridgeport and New York, was destroyed by fire, with the loss of several lives and the entire cargo. The owners thereupon filed a libel for limitation of liability under the statute, denying all liability for damages. The steamboat was valued at the sum of \$1,000, which sum was put into the registry of the court. A monition issued out of the court, citing all persons to file their claims before the commissioner, and to file their answers in said case. The only answer filed is that of the present claimant. This claimant contends that the petitioner is not entitled to a limitation of liability as against it, because, if the goods had been transhipped on the night of their arrival at Bridgeport, they would have arrived at New York prior to the disaster. Both parties have appeared and introduced testimony as to the contract of affreightment, and have thereby waived their right to object to the jurisdiction of the court.

The claimant is not entitled to claim damages for the loss of said cargo, for the following reasons: It does not appear from the evidence, and is not contended, that the fire which was the proximate cause of the loss arose from the fault or negligence of the carrier or its agents or servants. *Craig v. Insurance Co.*, 141 U. S. 646, 12 Sup. Ct. 97, 35 L. Ed. 886. By the contract of shipment presented to the claimant and accepted by the carrier, it was expressly provided as follows:

"No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by fire."

See *Whitworth v. Railway Co.*, 87 N. Y. 413.

The evidence shows that the steamboat had been seriously delayed on the three nights preceding the injury by reason of fog; that it left a part of the freight on the dock, in accordance with a custom of the company when the capacity of the boat was not sufficient to carry all the cargo, which custom had been in force for many years. The petitioner was not negligent in not forwarding the goods earlier. These conclusions dispense with the necessity of considering the further claim, based on section 4281 of the Revised Statutes, that as the articles shipped were marked "clocks," but were in fact "watches," the carrier would not be liable for their loss in any event. A decree may be entered in favor of the petitioner.

THE WILLIAM H. BAILEY.

(District Court, D. Connecticut. July 20, 1900.)

1. COURT COMMISSIONER—SITTING OUTSIDE DISTRICT.

An award of damages on a reference in admiralty is not invalidated by the fact that the commissioner sat outside the territorial jurisdiction of the court.

2. COLLISION—SUIT FOR DAMAGES—EVIDENCE.

Book entries introduced to show the earnings of a vessel prior to collision are not inadmissible because not authenticated as original entries, as would be required if they were introduced to prove an account.

3. SAME—EXEMPLARY DAMAGES.

Exemplary damages are not recoverable in a suit in rem against a vessel for a maritime tort.

In Admiralty. On exceptions to commissioner's report.

James D. Dewell, Jr., for claimant.

Watrous & Day, for libellant.

TOWNSEND, District Judge. Exceptions by claimants to report of commissioner awarding \$2,500 damages to libellant; being the amount claimed in the libel for cost of repairs to libellant's vessel, and motion by libellant for the assessment of \$1,000, "in the nature of exemplary damages, to compensate libellant for expenses in this case." The facts herein, and the questions of law arising thereon, are discussed in 100 Fed. 115.

There are four exceptions to the report. The first is so general that it need not be considered. The third exception was not supported by any objection taken on the trial, and is overruled. The fourth exception is on the ground that the commissioner sat outside the territorial jurisdiction of the court. This exception is overruled on the authority of *In re Spofford* (C. C.) 62 Fed. 443; *Consolidated Fastener Co. v. Columbian Button & Fastener Co.* (C. C.) 85 Fed. 54.

The second exception is as follows:

"In that the commissioner finds that the libellant was compelled to send for the cable-repairing steamer Mackay-Bennett, lying at Halifax, to pick up and repair the cable, and that the average running daily expense of said Mackay-Bennett in 1898 was \$226.80; in 1899 it was \$256.90; her insurance a day was \$53.70; the coal cost \$511.70 on the trip."

The point of this objection is that certain books and vouchers were produced by the libellant, but that there was no evidence on the part of the persons who originally made the entries therein as to their correctness, and that the absence of said persons was not accounted for. This objection is not properly raised by the exception. Furthermore, the libellant introduced other sufficient evidence which showed the charge per day for the use of the steamer Mackay-Bennett, and the rental value of such a vessel. But, irrespective of these considerations, there is no force in the exception. The evidence from the books was not introduced for the purpose of proving an account, but in order to show the earnings of the vessel prior to the collision, in accordance with the ordinary practice in such cases. *The Conqueror*, 166 U. S. 110, 127, 17 Sup. Ct. 510, 41 L. Ed. 937. The second exception is overruled.

On his motion for punitive damages, libellant cites *The Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456; *Gallagher v. The Yankee*, Hoff. Op. 456, Fed. Cas. No. 5,196; *Publishing Co. v. Monroe*, 19 C. C. A. 429, 73 Fed. 196; *The Mascotte* (D. C.) 72 Fed. 684; *The Normannia* (D. C.) 62 Fed. 469. These cases do not support his contention. In none of them were any exemplary damages allowed against the vessel. In the only case where exemplary damages were allowed (*The Yankee v. Gallagher*, Fed. Cas. No. 18,124), the proceeding in rem was dismissed on exception to the jurisdiction, and damages were awarded against the individual respondents under the proceeding in personam. In *The Amiable Nancy* the court held that, while the actual wrongdoers in the maritime trespass might be responsible in exemplary damages, the owners of the privateer were not responsible, beyond the actual loss or injury sustained. This case is cited and approved in *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, where it was held that a corporation is not liable to exemplary or punitive damages in the absence of evidence that it actually participated in or ratified such act, or was guilty of such willfulness or recklessness as amounted to criminality and should be punished. No case has been cited to support the claim that in a proceeding in rem the offending thing can be made to answer for damages other than those actually received. Nor is any reason perceived why such damages should be allowed. In proceedings in rem in the English admiralty the very fact that damage was caused by the willful misconduct of the master of a vessel is sufficient reason for dismissing the libel, inasmuch as the English admiralty treats the process in rem as a mere means to enforce the jus in personam. In the American admiralty a tort creates a maritime lien or privilege,—a jus in re. This lien or privilege, however, is only as security for actual damages for the wrong done, for which the ship herself is bound to make compensation. *The John G. Stevens*, 170 U. S. 113, 122, 18 Sup. Ct. 544, 42 L. Ed. 969; *The China*, 7 Wall. 53, 19 L. Ed. 67. In the present case the commissioner has awarded libellant the full amount of damages claimed in his libel. The report of the commissioner is accepted, and the motion for exemplary damages is denied.

WILSON v. HASTINGS LUMBER CO.

(Circuit Court, D. New Hampshire. September 5, 1900.)

No. 463.

JURISDICTION OF FEDERAL COURT—DIVERSITY OF CITIZENSHIP—CITIZENSHIP OF ADMINISTRATOR.

An appointment as administrator by a probate court of a citizen and resident of another state does not change his citizenship, so as to confer jurisdiction on a federal court, on the ground of diverse citizenship, of an action brought by him, as such administrator, against a citizen of the state where he resides.¹

On Motion to Remand to State Court.

Crawford D. Herring, for plaintiff.

Chamberlain & Rich, for defendant.

ALDRICH, District Judge. Jurisdiction in a case like this results, if at all, from diverse citizenship of the parties. The defendant is a Maine corporation, and a citizen of that state; and the plaintiff is a resident and citizen of the same state, appointed as administrator in New Hampshire. The New Hampshire judge of probate, by appointing the plaintiff administrator of the estate in question, did not confer New Hampshire citizenship. Diverse citizenship is therefore wanting, and this court is without jurisdiction. The case is remanded.

MONTGOMERY v. McDERMOTT et al. (two cases).

(Circuit Court of Appeals, Second Circuit. July 25, 1900.)

Nos. 163, 164.

1. ATTACHMENT—INTERESTS SUBJECT TO LEVY—GRANTOR OF PROPERTY IN TRUST.

An absolute conveyance by two persons of property owned in severalty to trustees, the trust agreement providing for the issuance by the trustees of certificates to the beneficiaries, which shall be transferable, and that all income from the trust property and the proceeds of its sale shall be divided ratably among the certificate holders, leaves no interest in a grantor in any specific property conveyed which can be the subject of an attachment; his only interest being as a certificate holder, which he can only enforce by an enforcement of the trust in a court of equity.

2. SAME—EQUITABLE INTERESTS.

Under Code Civ. Proc. N. Y. § 645 et seq., relating to attachments, as construed by the highest court of the state, a lien cannot be acquired by an attachment on the equitable interest of a defendant in property, which will operate through an intermediate legal title in another; and where a defendant has transferred a chose in action, or an instrument evidencing an equitable interest in property, although such transfer is claimed to be fraudulent or colorable, a creditor cannot obtain a lien on his interest therein by attachment.

3. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Where conflicting decisions construing a state statute have been rendered by the highest court of a state and a commission created by law

¹ Diverse citizenship as ground for federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249, and *Mason v. Dullaghan*, 27 C. C. A. 298.

to assist such court, a federal court will follow the construction adopted by the permanent court.

4. ATTACHMENT—LIEN ON EQUITABLE INTERESTS—ANCILLARY SUITS.

Two persons made an absolute conveyance of property, both personal and real, to trustees; the interests of the beneficiaries to be evidenced by trust certificates issued by the trustees to the grantors and another; each certificate having a nominal value, and being transferable on books to be kept by the trustees. The trust agreement further provided that all net income from the property and all proceeds of any sold should be ratably divided between the certificate holders, and that, on demand of a specified proportion of such holders, the property remaining should be sold and the proceeds ratably divided. One of the grantors to whom certificates had been issued transferred a number of the same in trust for his wife. A creditor of such grantor commenced an action by attachment against him in New York, the defendant being a nonresident, and caused the attachment to be levied by serving notice on the trustees who held the title to the trust property. *Held* that, under the statutes of the state (Code Civ. Proc. § 645 et seq.), such attachment was ineffectual to create a lien upon any property of the defendant which would sustain an ancillary suit in equity to set aside his transfer of the trust certificates as in fraud of his creditors, or to reach his claimed interest in the trust property.

5. JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—ANCILLARY SUIT.

A federal court has jurisdiction of a suit in equity between citizens of the same state to reach equitable assets of a nonresident debtor, against whom the complainant has an action in attachment pending in the same court, only when the complainant has by his attachment acquired a lien on property of the defendant which will render the suit in equity ancillary to the action at law.

Appeals from the Circuit Court of the United States for the Southern District of New York.

These are two suits in equity in aid of two actions at law brought by the same plaintiff to enforce alleged liens of attachment upon property of James McHenry, which it is claimed were obtained by service of the warrants in the actions at law, and which "have become defective by the death of McHenry and the nonappearance of a personal representative" in such actions at law. The suits were heard on pleas and answers and proofs. The circuit court held that: "If no attachment had been issued in the action at law, it is manifest that there would be nothing on which to base the action in equity. It is only because of the lien alleged to have been acquired that the aid of equity is invoked. If the complainant had no lien, there was nothing for equity to aid. The mere fact that an attachment issued is of no consequence, unless it fastened itself upon some property of the defendant, and impounded it so that the plaintiff could reach it if he obtained a judgment." The circuit court further held, upon the question whether or not the attachments had become liens on any property of McHenry, that the complainant was concluded by an adverse decision of the state supreme court in an action of interpleader wherein the complainant and the defendants Perkins, Fowler, and Dunning were parties. The bills were dismissed (99 Fed. 502), and complainant appealed. The facts are sufficiently set out in the opinion.

W. W. MacFarland and Stephen H. Olin, for appellant.

C. C. Beaman and E. C. Perkins, for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges, and THOMAS, District Judge.

LACOMBE, Circuit Judge (after stating the facts as above). From 1871 to 1875 James McHenry became indebted to the law firm of Barlow, Larocque & MacFarland in a very considerable sum for profession-

al services, and also to Samuel L. M. Barlow for services rendered in 1872 and 1873 in the purchase of a large amount of railroad shares. These claims were assigned to the complainant, Montgomery, in December, 1886. They are the subject of suit No. 1. McHenry also became indebted, April 5, 1873, to Charles Day, in a considerable sum, on account of certain Atlantic & Great Western Railroad bonds. This claim, also, was assigned to Montgomery in December, 1886, and is the subject of suit No. 2. Montgomery brought two actions at law on these claims in the state court immediately after these assignments, and upon showing to the court that McHenry was a citizen of Pennsylvania, and a nonresident domiciled in England, obtained warrants of attachment against his property. McHenry appeared in both actions, and removed them into this court, where issue was finally joined in March, 1889. McHenry died in England May 26, 1891, leaving a will appointing the defendants McDermott and Boyd executors. They have never taken out, or caused to be taken out, letters of administration in this jurisdiction, wherefore no further proceedings were taken in the actions at law.

Before discussing the manner in which the sheriff served the warrants of attachment in these two actions,—which service, complainant claims, fastened a lien upon some property of McHenry,—it will be necessary to rehearse a series of events preceding the beginning of Montgomery's two actions in the state court, and, indeed, preceding the assignments of Barlow's and Day's claims to him: On October 2, 1871, McHenry and one Thomas William Kennard, as parties of the first and second parts, the defendant Bischoffsheim, as party of the third part, and Messrs. Barlow and Day, as parties of the fourth part, executed a certain indenture of trust. Thereby, or by conveyances made in advance for the purposes of the trust, McHenry and Kennard assigned, transferred, and set over to Barlow and Day, as trustees, certain "freeholds and leasehold hereditaments, stocks, funds, shares, and securities, and all other the real and personal estate specified in the schedule to [such indenture] annexed." The schedules do not appear in the record, nor is the property more particularly described; but from the phraseology of the indenture, which refers to the property as "conveyed and assigned * * * by the said James McHenry and Thomas William Kennard, or one of them," it may fairly be inferred that part of it was the joint or common property of the two, part the individual property of the one, and part the individual property of the other. Its value appears to have been considerable. The indenture recites that there was due by McHenry and Kennard to Bischoffsheim upwards of £53,000, and that prior to the incurring of such indebtedness it had been agreed between the three of them that the property enumerated in the schedules should be vested in the trustees as provided for in the deed. A further recital declares that "these presents shall extend to and be a security for any moneys hereafter advanced to the trustees by Bischoffsheim, or his firm, with interest." The trust deed is a voluminous document, but the following brief summary will sufficiently indicate its provisions. So long as there shall be due to Bischoffsheim, or his firm, any money on account of the original debt of £53,000, or on account of advances to the

trustees (which advances are for the purpose of paying off incumbrances on the trust premises, and taxes, charges, expenses, etc., thereon), the trustees, upon his request, "shall sell the said trust premises, or any part and so much thereof as may be necessary, to repay" the same. For the same purpose—viz. the repayment of Bischoffsheim or his firm—the trustees are authorized to borrow such sums as may be necessary, and pledge and mortgage the trust premises for the payment. In order to adjust the respective interests of the parties, it is further provided that the value of all of said lands and trust premises shall be represented by 400 shares or certificates, each representing the nominal sum or value of \$5,000. The form of certificate is set forth in the trust deed. It is to be signed by the trustees, and states upon its face that it "has been issued to ———, of ———, who, and those to whom it shall be transferred, shall be deemed the owners thereof." After a reference to the trust deed, the certificate proceeds: "The owner hereof is entitled to receive, subject and according to the provisions of said deed, one equal four-hundredth part of the net rents, issues, revenues, and profits, howsoever arising, according to the provisions of the said deed, and subject to the debts and obligations therein referred to. This certificate is to be held and construed in all courts and places as personal property, and cannot be sold" or transferred except in accordance with the provisions of said deed. The deed calls for an original division of these certificates,—150 to McHenry, 150 to Kennard, and 100 to Bischoffsheim. Elaborate provision is made for fixing a conventional value for the shares, and changing it from time to time; and the original distributees, and those to whom any shares may have been assigned, are forbidden to sell or transfer any shares until such shares shall first have been offered to the owners of the then remaining certificates at such conventional value. There are similar provisions applicable in the event of the decease or bankruptcy of any certificate holder. The trustees are to keep an office and transfer books, and all other necessary books, and to send every six months to each certificate holder an account and balance sheet showing their transactions for the previous six months, and once in each year a report of the estimated value of the several properties unsold, with the specific charges remaining thereon. By the sixth and seventh clauses of the deed the trustees are given "full and exclusive control and supervision of and over the said lands, property, and premises; * * * to sell and dispose of the same and any part thereof" for cash or on credit or in exchange; and to deal with and concerning the same, in all things, as freely, and according to their own discretion and will, as if they were seised and possessed thereof in their own right. Should, however, three-fourths in number and amount of the certificate holders give specific directions in writing as to such sale or disposition, the trustees shall conform to such directions. After paying all charges and expenses, including their own compensation, the trustees shall from time to time account for and pay over the balance then remaining of the proceeds, moneys, rents, issues, revenues, and profits,—one equal four-hundredth part to each of the holders and owners for each of the certificates by them respectively held. Whenever thereunto required by the owners of

at least three-fourths in number and value of the certificates, the trustees shall convey and assign the lands, premises, and property, or such portion of the same as may then remain unsold, and pay over the balance of moneys and other properties remaining in their hands "to the holders for the time being of said certificates, pro rata, and according to the number and value of said certificates by them respectively held." Provision is made for the appointment of new trustees in place of such as may die, resign, or be removed. Incidentally it may be stated that Barlow and Day, the original trustees, died in July and August, 1889, respectively. The defendant Perkins was appointed their successor June 19, 1890, and the defendant Fowler was appointed co-trustee January 4, 1892. Touching the further disposition of the property conveyed to the trustees, it is finally provided in the tenth clause of the trust deed that it shall be conveyed "upon the request of the holders for the time being of the said certificates, to the amount of three-fourths in value thereof, to sell, convey, and transfer all and every the said estate, property, and effects to them [the trustees] herein granted, sold, and conveyed as aforesaid, or the balance thereof then remaining in their hands, to one or more corporations or stock companies hereafter to be organized under and in accordance with the laws of the states of New York, Pennsylvania, and Ohio, or of either of said states, competent to receive the same, and to be substituted for and take the place of the said parties of the fourth part in relation to said property and estate, so far as the same can be lawfully done or may be deemed advisable, and to hold, manage, and sell said property and estate, upon the condition, understanding, and agreement, however, that the holders of said certificates shall severally be entitled to receive, and shall receive, the shares of the capital stock of the said corporation or corporations, when organized, in the same proportions and of the same nominal value as they then severally hold said certificates, and thereupon the said certificates shall be delivered up to the said parties of the fourth part, and shall become and be of no further effect and void." The property referred to in the deed of trust was duly conveyed and transferred to Barlow and Day, the original trustees. They entered upon the execution of their trust, and continued in the discharge of its duties until their death.

It is not understood that any one who has been heard on this appeal attacks the validity of this trust, or the conveyance of the property with which it is concerned. Our attention is called to no provision of law or statute which it offends. The conveyance was made before the transactions by reason of which the assignors of complainant, who were themselves the trustees, became creditors of McHenry. There is not a scintilla of evidence to show whether McHenry conveyed to the trustees the whole or only a part of his property, or how much property he had, or whether he was indebted to any one but Bischoffsheim, who was provided for in the trust deed to which he was a party. The conveyance, therefore, to the trustees of so much of McHenry's real and personal property as was enumerated in the schedule must be taken as valid. It was an absolute conveyance, and carried the full legal title, with no reservation whatsoever. Thereafter the

grantor had no specific individual interest in any specific piece of property so conveyed. Assuming that among the property conveyed by Kennard there was a parcel A, and among the property conveyed by McHenry there was a parcel B, both of which parcels were then of equal value, and that the next month an oil well had been opened on parcel B, which increased its value one hundred fold, McHenry would not be entitled to claim any individual profit thereby. All the certificate holders would share alike. If, under the terms of the deed, three-quarters of the certificate holders had terminated the trust, McHenry's original property (or what was left of it) would not be reconveyed specifically to him, but pro rata to the holders for the time being of the certificates, according to the number and value by them respectively held. The trustees were not indebted to him. He could maintain no action at law against them to recover the property he had conveyed, nor any specific portion of the proceeds of any property sold. His interest in the corpus of the trust was still property, but it was not tangible property. It was an equitable interest, which he could enforce only through the aid of a court of equity, constraining the trustees to carry out the trust, and thus get funds in their hands, and, having carried it out, to account for his proportion of the net proceeds of their operations.

As we have seen, McHenry received 150 of the trust certificates. At different times during the ensuing three years he transferred 50 of them, in small lots, to different individuals. No attack is made upon these transfers, which were duly registered on the books of the company. On May 16, 1874, McHenry transferred 100 trust certificates to Benjamin Moran, and the transfer was registered on the books of the company. On December 21, 1874, McHenry and Moran executed an indenture by which, in consideration of love and affection, the former settled the 100 certificates upon his wife, with power of appointment to their children, or, in default of children, a general power of appointment. In case no appointment was made, the certificates were to revert to McHenry. Moran undertook to hold the certificates as trustee under this settlement. On November 8, 1877, Leonard J. Woodman was duly substituted as trustee under this settlement in the place of Moran; and on January 11, 1878, Moran assigned the 100 trust certificates to Woodman, in whose name they still stand. Woodman died in 1895, and his wife, the defendant Julia, was appointed administratrix. On May 19, 1883, Mrs. McHenry executed an instrument of appointment of the certificates to William Coutts Keppel, Viscount Bury (afterwards Earl of Albermarle), and Edward McDermott. A few days afterwards she died, leaving no children. It is stated that after her death Mr. McHenry gave these gentlemen a sealed packet, which was not opened until some time later, which ran as follows:

"Of the funds arising from the realization of the American estates received by your lordship and Mr. McDermott from my wife, I wish that a disposition be made in the manner laid down in my will, as if they formed part of the property under my control at my death."

We do not find proof of this in the record. The reference in the brief is to a statement in the "opinion" of Mr. Justice North approving a compromise of the suit of McDermott v. Boyd. The same

"opinion" states that the appointees of Mrs. McHenry repudiated any suggestion of a secret trust, and insisted that the appointment was absolute, to be dealt with by them at their uncontrollable discretion. For the purposes of the appeal now before us, however, it may be assumed that McHenry did give such a packet to the appointees. As was stated before, McHenry died in London May 26, 1891.

Complainant contends that the conveyance of the 100 certificates to Moran and to Woodman in trust for McHenry's wife was without consideration, in fraud of creditors, and, as against his assignors, who were creditors before such conveyance, was wholly void, and that, in determining the question what lien was secured by the service of the warrants of attachment, the situation is the same as if McHenry had held these 100 certificates registered in his own name continuously from 1871 till his death. What happened in the actions at law was this: The deputy sheriff served on the trustees certified copies of the warrant of attachment, accompanied by the usual sheriff's notice, on December 23, 1886; and the question now to be decided is whether such service fastened a lien either upon any specific property, real or personal, in the possession of the trustees, and of which they held the legal title, or upon the equitable interest of McHenry in the property held by them, to the extent of the proportion which the 100 certificates bore to all the certificates outstanding. The first of these alternatives is already answered in the negative. The discussion and construction of the trust deed *supra* show quite plainly that neither attachment nor execution against McHenry could cut through the legal title of the trustees, and sever from the whole property held by them some specific parcel, upon any theory that it still remained his. The other suggested alternative remains to be considered. The subject of attachment as a provisional remedy in actions at law is regulated by statute in New York. The Code of Civil Procedure specifies the cases in which it shall be granted, upon what it shall be levied, and in what way such levy shall be made. This circumstance greatly simplifies the question. The dissertations of text writers and the opinions of judges sitting in other states may be interesting and instructive, but they are not authoritative, nor even persuasive, when opposed to the decisions of the state court of last resort construing a state statute. The several sections of the Code of Civil Procedure in force in 1886 provided that the real property which may be levied upon by virtue of a warrant of attachment includes any interest in real property, either vested or not vested, which is capable of being aliened by the defendant; that the rights or shares which the defendant has in the stock of an association or corporation, together with the interest and profits thereon, may be levied upon; that the attachment may also be levied upon a cause of action arising upon contract, including a bond, promissory note, or other instrument for the payment of money only, negotiable or otherwise, whether past due or yet to become due, which belongs to the defendant, and is found within the county,—the levy of the attachment thereupon to be deemed a levy upon the debt represented thereby. It provides that a levy under warrant of attachment must be made as follows: (1) Upon real property by filing a certain notice with the county clerk; (2) upon personal property,

capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, by taking the same into the sheriff's actual custody; (3) upon other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same, or if it consists of a demand, other than as specified in the last subdivision, with the person against whom it exists, or if it consists of a right or share in the stock of an association or corporation, or interests or profits thereon, with certain specified officers thereof. And the sheriff is expressly required to collect and receive all debts, effects, and things in action attached by him, and may maintain any action or special proceeding, in his name or in the name of the defendant, which is necessary for that purpose. Code Civ. Proc. §§ 645, 647-649, 655. The property which it is claimed was levied upon in Montgomery's actions at law was not an interest in real property which was capable of being aliened by McHenry, nor was it a right or share in the stock of an association or corporation, nor was it a bond or other instrument for the payment of money which was found within the county, nor was it personal property capable of manual delivery (and, indeed, if it were, it was never levied upon, for it was never taken into the sheriff's actual custody), nor was it a cause of action arising upon contract. No copy of the warrant of attachment and no notice were ever served upon the person who held the certificates, and neither the holder of the certificates nor McHenry owned any "demand against" the trustees which could be enforced in a court of law. From the careful enumeration in the sections above cited of property which may be levied on, it might be inferred that varieties of property not enumerated, were not subject to such lien. But we are not left to mere inference. The precise point has been passed upon by the New York court of appeals. In *Thurher v. Blanck*, 50 N. Y. 80, appeals from orders of the general term in two separate actions were discussed together. The first action was brought upon a Wisconsin judgment, and an attachment issued thereon against defendant as a nonresident. He had formerly resided in this state, and owned a house and lot in New York City. This he sold, receiving a bond and mortgage thereon for a portion of the purchase price. These he assigned to one Peter Cook, who on the same day assigned them to Sophia Blanck, defendant's wife, and left the state. It was claimed by plaintiff that the assignments were without consideration, and made with intent to defraud creditors. By virtue of the attachment the sheriff attempted to levy upon the bond and mortgage, by serving certified copies upon the obligors and mortgagors, with notice indicating the purpose to attach the same. Summons in that action was served by publication, and, in default of appearance, judgment was perfected therein against the defendant, and execution issued thereon. Thereupon plaintiff commenced a second action against Blanck, his wife, Cook, the mortgagors, and others, to set aside the alleged fraudulent assignment, and to subject the mortgage to the lien of the attachment, and apply the same to the lien of the judgment. Plaintiff obtained at special term an ex parte order appointing a receiver of the bond and mortgage. The general term set aside the order appointing the receiver and dismissed the second

action. The special term also entered an order vacating the judgment in the first action. Under the Code and rules of practice, judgment could be entered against a defendant in default who had been served by publication only, and who had not appeared, only upon proof that an attachment had been actually levied upon property of the defendant. The general term sustained the special term, and the court of appeals sustained the general term, in both actions. The opinion is by Chief Justice Church. It begins with a reference to *Lawrence v. Bank*, 35 N. Y. 320, in which "it was held that the proceeds deposited in a bank, of property fraudulently assigned, in the name of the fraudulent assignee, could not be attached as a debt due the assignor, and that the sheriff could not bring an action under the Code to recover such deposit or subject it to an attachment." Some conflicting decisions in the state supreme court are referred to, various sections of the Code then in force are cited (substantially the same as those set forth supra, except that the specific provisions as to a cause of action arising on contract, including a bond, note, or other instrument for the payment of money, which is found within the county, are not in the earlier Code), and the questions arising under the appeal in the second action are discussed. The opinion then proceeds:

"The more serious question relates to the first action in which the attachment was issued. The ground for commencing the action and for issuing the attachment was that the defendant was a nonresident, and had property within this state. The bond and mortgage was claimed to be levied upon by virtue of the attachment, by leaving a copy with the debtor and serving the required notice."

After discussing briefly the effect of the provisions authorizing the sheriff to maintain action in aid of the attachment (sections 232, 237, Old Code; sections 647, 655, 708, New Code), the court lays down the law as to levy of attachment under the Code:

"In the case of personal chattels, the sheriff seizes the property and takes it into his possession, and renders himself liable to an action by the claimant. He acquires by such seizure a specific lien, and this court has held that the creditor may defend the lien obtained by attachment and levy, and thus litigate the title of the claimant to the property. This decision does not violate the general rule that none but judgment creditors can attack a fraudulent transfer, but recognizes the exception in favor of those who have specific liens upon the property. In the case of choses in action and debts, the lien is constructive, and cannot operate through an intermediate legal title. That title to the bond and mortgage was in a third person [as were the 100 certificates assigned to Moran and Woodman in the case at bar], and the property was not, and could not be, interfered with. At law no debt was owing to the defendant [none certainly was owing from the trustees to McHenry, even if he still retained the 100 certificates], and there was nothing for the attachment to operate upon. Such a lien can only be created upon legal rights, and not mere equitable interests. Debts and choses in action are to be regarded as legal assets, under the attachment laws, whenever that process acts directly upon the legal title; but, whenever they are so situated as to require the exercise of the equitable powers of the court to place them in that situation, they must be treated, as they always are, as equitable assets only."

And the court sustains the order vacating the judgment in the first action, manifestly because there was no proof of a levy upon any property of defendant. This decision so closely covers the points raised on this appeal that it will be necessary only to examine later decisions of the same court, to see if it has been reversed or modified. Thurber

v. Blanck, *supra*, was argued June 10, 1872, and decided November 12, 1872, by the court of appeals. On October 3, 1872, the case of Bank v. Dakin, 51 N. Y. 519, was argued before the commission of appeals,—a temporary court of last resort, created to assist the court of appeals in disposing of an overcrowded calendar. It was decided January, 1873. Neither in the briefs of counsel nor in the opinion is there any reference to *Thurber v. Blanck*, which presumably had not yet appeared in the Reports. In *Bank v. Dakin* the plaintiff had commenced an action on a promissory note against Dakin, as a nonresident. An attachment was issued and served on one Miller for the purpose of attaching a debt claimed to be due from him to Dakin, and secured by bond and mortgage. The plaintiff obtained judgment in that suit, and issued execution, which remained unreturned. After giving the note, and before the commencement of the suit, Dakin assigned this bond and mortgage to his brother-in-law. This assignment was claimed to be without consideration and fraudulent as to creditors, and plaintiff thereupon commenced a second action to set the assignment aside. Relief was refused below, and from such refusal appeal was taken. The opinion of the commission refers to various kinds of creditors' bills, but holds that the action does not come within them. Nevertheless it accords relief, and does so on the sole ground that "it is an action to enforce a lien upon a particular security seized by an attachment proceeding." "The property seized," says the commission, "is held by the attachment and execution. * * * The plaintiff has a specific lien upon the mortgage." It further held that the sheriff might have brought a similar action, under the express authority of section 232, Old Code. The mere statement of the facts and the conclusion shows that the decision in the Dakin Case conflicts with that in the *Thurber Case*,—a circumstance which is alluded to in all later editions of 51 N. Y. The opinion in *Thurber v. Blanck*, referring to the decision of *Bank v. Dakin* in the lower court (33 How. Prac. 316), says that it "was precisely such a case as this." In a subsequent case (*People v. Van Buren*, 136 N. Y. 258, 32 N. E. 775, 20 L. R. A. 446), the opinion is expressed that there was no conflict between the two earlier cases; but the learned judge who wrote it discusses only the questions which arose in the *Thurber Case* upon the appeal in the second action, and either overlooked or ignored the decision upon the appeal in the first action, which distinctly held that a service of warrant and notice, precisely like that in the *Dakin Case*, the property sought to be affected being exactly similar, did not constitute a levy upon property of the defendant. We have therefore two co-ordinate courts of last resort, sitting in the same state at the same time, and deciding questions of the construction of state statutes in diametrically opposite ways. Under these circumstances, it would seem that the federal court might with greater propriety conform its decision to that of the permanent, rather than to that of the temporary, state court, unless some later decision should be found, casting doubt upon the authority of *Thurber v. Blanck*. Such is the practice in the state courts. *Smith v. Longmire*, 24 Hun, 257. *People v. Van Buren*, *supra*, does not qualify *Thurber v. Blanck*; for the property upon which attachment was levied in that case was the tangible property of the debtors,

which had been seized by the sheriff, and was advertised for sale under prior executions. Of the authorities cited upon the briefs of counsel, *O'Brien v. Insurance Co.* (1874) 56 N. Y. 52, deals exclusively with the degree of fullness of specification in the notice accompanying the certified copy of the warrant. The property levied on was the amount of a policy of insurance due and owing to the debtor. In *Greentree v. Rosenstock* (1875) 61 N. Y. 585, the point decided was the manner of serving process where the property sought to be attached was incapable of manual delivery. The property was a debt presently due to the defendant, and for which he might have recovered in an action at law. In *Castle v. Lewis* (1879) 78 N. Y. 135, the property attached consisted of goods and money. In *Bills v. Bank* (1882) 89 N. Y. 343, the property was a debt due from a bank to the attachment debtor, evidenced by a negotiable security which was held by the attachment debtor when levy was made. In *Anthony v. Wood* (1884) 96 N. Y. 180, the sheriff, seeking to levy upon a promissory note and a bond and mortgage given as collateral thereto, which were in the hands of an agent of the attachment debtor, served upon said agent a certified copy of the warrant and notice, and demanded the securities, which the agent refused to deliver. A few days later an assignment of the property was made, with the fraudulent intent to defeat the lien of the attachment. Subsequently the sheriff succeeded in reducing the instruments to possession. The court held that no lien was acquired by the mere service of the warrant and notice. Indeed, it is difficult to see how they could have reached any different conclusion, in view of the provisions of subdivision 2 of section 649, requiring custody by the sheriff in the case of an instrument for the payment of money. The bearing of the following excerpt may be better appreciated if it is borne in mind that the provisions of the second subdivision of section 649 were not in the Old Code of Procedure, which was in force when *Thurber v. Blanck* was decided:

"This court [has] held, as to the levy permitted to be made upon choses in action, that the attachment reached and became a lien upon only such debts as at the time belonged to the debtor by a legal title, and for the recovery of which he could maintain an action at law, and, as a consequence, where before levy of the attachment he had parted with the legal title, even if with intent to defraud his creditors, there remained in him for their benefit only an equity which the attachment could not reach, and so the sheriff could not assail the transfer as fraudulent. The doctrine of *Thurber v. Blanck* went to that extent, and has been since approved. The sheriff in the case before us could not assail as fraudulent the transfer of the note and its collateral made prior to his asserted levy [that is, prior to the second levy in which he got possession of the instruments], unless this doctrine is made inapplicable by the change in the provisions of the Code [section 649]. Where the property sought to be attached is 'capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money,' the levy is now to be made by 'taking' the same into the sheriff's actual custody. This provision changed merely the mode of making the levy, but in no respect altered the inherent character of the property sought to be attached. If the note or bond has been transferred, however fraudulently, no lien by attachment is possible, and it is of no consequence that the mode of executing the process has been changed."

The court therefore held that the second levy (made after fraudulent assignment), although accompanied with possession, "gave the officer no right to assail or contest it" (the fraudulent assignment).

Gibson v. Bank (1885) 98 N. Y. 87, is a subsequent appeal of *Bills v. Bank*, *supra*. It presents two questions: The first was as to the sufficiency of an attachment and notice duly served on a bank to fasten a lien upon money on deposit, against which a check had been drawn and certified, but which still remained in the possession of the drawer. The second presented a different state of facts. One Rodney, the assistant treasurer of a railroad, while the corporation's deposits in bank were under attachment, opened an account in his own name in the same bank, and deposited therein checks and drafts belonging to the railroad, which were made payable to his order as assistant cashier, and paid out the amounts of such deposits to creditors of the railroad. The court of appeals said:

"It is claimed by the plaintiffs that the service of the attachment gave them a lien upon the moneys so deposited, if they were in fact the moneys of the attachment debtor. * * * This claim cannot be maintained. By the voluntary consent of the owners of the fund deposited, the credit in question was given to Rodney, and the bank thereby became liable to pay the amount to him, and to him alone. It was competent for the parties to give such form to the transaction as they desired, subject only to the right of creditors, in a proper action, to impeach the validity of the transaction. Assuming that the deposit was made in this form for the express purpose of defeating the creditors of the railroad company, the legal title to the debt was nevertheless in Rodney, and any equitable right existing in favor of the creditors against the railroad company could be enforced only through an equitable action. * * * It necessarily follows that there was no property of the attachment debtor in the hands of the [bank] subject to be taken on attachment by its creditors."

The next case referred to is *Grain-Cleaner Co. v. Smith* (1888) 110 N. Y. 83, 17 N. E. 671. The grain company brought action against the firm of *Allis & Co.*, nonresidents, and procured a warrant of attachment. The sheriff undertook to levy upon a debt due *Allis & Co.* by *Smith* for some machinery, by serving copies and notice on *Smith*. The latter insisted that previous to the attempted levy *Allis & Co.* had transferred the debt he owed them to the *Farrell Company*. A second action was then brought in aid of the attachment. The court says:

"One of the main questions litigated upon the trial was whether the alleged transfer by *Allis & Co.* was made with the intent and design on their part of defeating an intended levy upon such debt by the plaintiffs. If this were proved, it was contended by the plaintiffs that the alleged transfer would be fraudulent and void as to them. It may be assumed that such was the intent of *Allis & Co.*, without affecting the result of this action, for the plaintiffs do not occupy a position which enables them to raise any question as to the bona fides of such transfer. This can be done only by a judgment creditor in an action to enforce the equity of the creditors of *Allis & Co.* *Anthony v. Wood*, 96 N. Y. 180; *Gibson v. Bank*, 98 N. Y. 96. This equity was not the subject of a levy under an attachment, even if an attempt had been made to effect it."

The quotation, however, is obiter; for the court subsequently proceeds to discuss the evidence, and to hold that a bona fide transfer had been made before the attempted levy.

In *Warner v. Bank* (1889) 115 N. Y. 251, 22 N. E. 172, the property was the interest of the attachment debtor in commercial paper which it had pledged with another bank as collateral to a loan; and the court held that lien was secured by serving attachment and a proper notice on the pledgee, without the sheriff's reducing the paper to his posses-

sion. The attachment debtor in the Warner Case could have recovered possession of his property by action at law, tendering the amount of his debt and interest. His interest in it was wholly different from McHenry's interest, as represented by the certificates. In *Hess v. Hess* (1889) 117 N. Y. 306, 22 N. E. 956, the attached property consisted of goods and merchandise. The decision in *Whitney v. Davis*, 148 N. Y. 257, 42 N. E. 661, turns upon an amendment to the Code adopted in 1889, relieving the difficulty which existed before its enactment, viz. that there was no way in which an action upon a money demand against a nonresident debtor who had not appeared could be brought to judgment, if the attachment issued therein had not been levied upon property of the debtor. The opinion follows *People v. Van Buren*, holding that "a court of equity was not without jurisdiction to interpose in aid of an attaching creditor, even where no specific lien had been gained, and to grant the equitable relief, if special circumstances existed." This is a familiar principle in the federal courts. See *Case v. Beauregard*, 101 U. S. 690, 25 L. Ed. 1004, and similar cases. But the difficulty of sustaining the bill in this case upon any such theory is the lack of jurisdiction. The attachment actions were brought by a citizen of New York against a citizen of Pennsylvania, nonresident in this district, and were properly removed here. Having jurisdiction of those actions, this court would have jurisdiction of suits ancillary thereto, whatever might be the citizenship of the parties to such suits. But, if the suits in equity cannot be sustained as ancillary to the original actions, this court would have no jurisdiction of the controversy, since the plaintiff and the two trustees—all necessary parties—are citizens of the state of New York. We have reached the conclusion, therefore, that the decision of the state court of appeals in *Thurber v. Blanck* has not been so modified by any subsequent decisions of that court as to warrant a finding that the service of attachment and notice on the trustees in the actions at law constituted a levy on any property of McHenry; that this suit is, therefore, not ancillary in aid of any specific lien acquired under the attachment, and that, if it could be maintained as an original suit, there is not the requisite diversity of citizenship to give this court jurisdiction. It may be noted that as to \$42,000, the proceeds of sales by the trustees of certain Ohio real estate, under stipulation, the bill is an original one to carry out the agreement embodied in the stipulation, and the citizenship of the parties thereto is not diverse. The decrees of the circuit court dismissing the bills are sustained, with costs.

REAVIS et al. v. REAVIS et al.

(Circuit Court, N. D. California. August 21, 1900.)

No. 12,158.

1. EQUITY—LACHES.

A delay of eight years by heirs residing in Missouri before taking steps for the appointment of an administrator, and to secure their share of the estate of a relative who died in California, does not constitute such laches as to debar them from maintaining a suit in equity to recover property of the estate alleged to have been fraudulently secured from the decedent

while insane, where they had no knowledge of the facts, and relied on a relative, who was also an heir, and resided where the property was situated, to look after the same and their interests, and where he had sent them sums of money from time to time as coming from the estate.

2. MORTGAGES—ABSOLUTE DEED AS SECURITY—EVIDENCE OF INTENTION OF PARTIES.

Where a conveyance of property as security, absolute in form, but not conveying the legal title, is made by statute a mortgage only, *held*, that whether a deed should be declared a mortgage depends upon the intention of the parties, and is a question of fact, in the determination of which evidence as to the existence of an indebtedness between the parties, and their subsequent transactions and conduct with reference to the property, is entitled to great, if not controlling, weight.

In Equity. On final hearing. For former opinion, see 98 Fed. 145, and 101 Fed. 19.

A. E. Bolton and Goodwin & Goodwin, for complainants.

Freeman & Bates and McKune & George, for respondent Clarke.

MORROW, Circuit Judge. This is an action in equity brought by complainants, as heirs at law of Andrew Reavis, deceased, against the respondents, to declare a trust in favor of the complainants in certain property, and for an accounting. The property which is the subject of litigation is known as the "Dixie Valley Ranch," and is situated in Lassen county, Cal. It comprises primarily a tract of swamp land of 2,320 acres, and a tract of 160 acres of agricultural land in township 35 N., range 8 E., Mt. Diablo base and meridian. The bill, however, describes by sectional subdivisions additional tracts of land in this township, aggregating 960 acres, and also other tracts by sectional subdivisions, scattered over five other townships, aggregating 1,220 acres, making the total area of the various tracts of land described in the bill 4,500 acres. The Dixie Valley ranch is estimated by complainants to be worth \$30,000, together with cattle, farming implements, and personal property, valued by complainants at \$50,000. The complainants are heirs at law of Andrew Reavis, and claim four-fifths of this property, as such heirs. The property now is, and ever since April 27, 1892, has been, in the possession and use of one Crawford W. Clarke, one of the respondents. The other respondents are D. M. Reavis, the brother of Andrew Reavis, his wife, Ann E. Reavis, and his son, James J. Reavis. The circumstances connected with the cause of action are as follows:

On November 3, 1873, Andrew Reavis, a resident of Lassen county, in this state, executed two deeds, whereby he conveyed certain real estate situated in that county to his brother D. M. Reavis, of Butte county, in this state. One of these deeds described the following land: The S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 20, and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 21, in township 35 N., of range 8 E., Mt. Diablo meridian, containing 160 acres, more or less, according to government surveys. The land described in this deed appears to be what was known as "agricultural land." The other deed described the following land: The S. W. $\frac{1}{4}$ and S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of section 20, the S. $\frac{1}{2}$ and S. $\frac{1}{2}$ of N. $\frac{1}{2}$ of section 21, the W. $\frac{1}{2}$ and the S. E. $\frac{1}{4}$ and S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 22, the S. $\frac{1}{2}$ and S. $\frac{1}{2}$ of N. $\frac{1}{2}$ of section 23, the W.

$\frac{1}{2}$ of S. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 24, the N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 26, the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 28, the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 29, township 35 N., of range 8 E., Mt. Diablo meridian, containing 2,320 acres, more or less, according to government surveys. The land described in this deed was what is known as "swamp land." The consideration named in the first deed was \$1,000; that in the latter deed, \$10,000. The land described in these two deeds, aggregating 2,480 acres, was known, as before stated, as the "Dixie Valley Ranch." On August 1, 1879, D. M. Reavis executed a written instrument which purported to convey to Andrew Reavis, for the consideration of \$20,000, a tract of land under the following general descriptions: Sections 21, 22, 23, 24, 26, 27, 28, and 29, township 35 N., range 8 E.; section 12, township 34 N., range 8 E.; and sections 21 and 24, township 36 N., range 8 E. This instrument reconveys to Andrew Reavis all the land mentioned in the deeds of November 3, 1873, except the 520 acres contained in section 20, township 35 N., range 8 E., and, under the general description of full sections, appears to add thereto 120 acres in section 21, 80 acres in section 22, 160 acres in section 23, 520 acres in section 24, 520 acres in section 26, 640 acres (or the whole) of section 27, 520 acres in section 28, 600 acres in section 29, all in township 35 N., range 8 E.; also, 640 acres in section 12, township 34 N., range 8 E., and 1,280 acres in sections 21 and 24, township 36 N., range 8 E.,—making a total addition of 5,080 acres. These full sections mentioned in this instrument contain about 7,040 acres. The land is further described as "including what is known as the 'Willow Springs,' including the Dixie Valley ranch and the water privileges thereunto belonging, and lands therein described, with all the rights, privileges, and appurtenances pertaining to and appurtenant to the Dixie Valley ranch." On August 10, 1879, D. M. Reavis executed a bill of sale to Andrew Reavis, which purported to convey the personal property on the Dixie Valley ranch for the consideration of \$10,000. On October 15, 1881, Andrew Reavis entered into an agreement with J. J. Reavis and W. A. Reavis, sons of D. M. Reavis, whereby Andrew Reavis bound himself to convey to J. J. Reavis and W. A. Reavis all lands owned by the grantor in township 35 N., of range 8 E., Mt. Diablo base and meridian, "being from three to four thousand acres of patented land, and all lands, water rights, and range thereto adjoining or connected therewith, owned or claimed by said obligor, being the entire Dixie Valley ranch and range, together with all improvements thereon, all personal property of every nature, including all cattle and horses now on or connected with said ranch or range." The consideration for this agreement was the payment by J. J. and W. A. Reavis of the sum of \$17,700, to be paid in four different installments, as follows: \$2,700 upon the signing of the agreement; \$5,000 on November 1, 1883; \$5,000 on November 1, 1885; and \$5,000 on November 1, 1887. On January 13, 1885, Andrew Reavis was committed to the State Asylum for the Insane at Stockton, Cal., by order of the superior court of this state in and for the county of Alameda, and D. M. Reavis was appointed as his guardian, and directed to pay his expenses at the asylum. D. M. Reavis, who owned a

tract of land near Chico, Butte county, Cal., and was engaged in the business of stock raising, was at the time of the commitment of Andrew Reavis to the insane asylum heavily indebted to the respondent Clarke, the amount of which indebtedness is stated by complainants to have been \$250,000. It appears that on November 1, 1882, Andrew Reavis and J. J. Reavis had joined with D. M. Reavis as accommodation makers in executing notes to Clarke for about \$40,000 of this indebtedness. On November 29, 1885, an instrument was drawn up which purported to be a conveyance of the Dixie Valley ranch by Andrew Reavis to D. M. and J. J. Reavis. On January 28, 1886, D. M. and J. J. Reavis visited the insane asylum at Stockton, and there obtained the consent of the superintendent of that institution to remove Andrew Reavis and give him care at home. Accordingly, about 4 o'clock in the morning of January 29, 1886, D. M. and J. J. Reavis took Andrew Reavis from the asylum to a hotel in Stockton; and there, in the presence of a notary public, Andrew Reavis signed the instrument prepared in the preceding November, which instrument was recorded in Lassen county on February 1, 1886. This instrument purports to convey real and personal property described as follows:

"That certain stock ranch and range known as the 'Reavis Dixie Valley Ranch and Range,' and situated in and adjacent to township No. thirty-five north, of range No. eight east, Mt. D. B. and M., and all lands owned by first party situated in said township, and consisting of three thousand acres, more or less, of patented lands, and all other lands, water rights, and range adjoining or connected therewith, and situated in said township or adjacent thereto, owned or claimed or heretofore possessed by first party, and being and composing the entire Dixie Valley ranch and range, together with all improvements thereon and all personal property of every nature, and especially all cattle, horses, and mules now on said ranch or range, or on any lands adjacent thereto or in any manner connected with or belonging to said ranch and range property."

Thereafter Andrew Reavis went to the Dixie Valley ranch, and there died on February 22, 1886. After the death of Andrew Reavis, J. J. and D. M. Reavis managed the affairs of the Dixie Valley ranch until April 27, 1892, on which date D. M. Reavis, his wife, Ann E. Reavis, and J. J. Reavis, their son, by deed conveyed to the respondent Clarke the swamp land and adjoining sections in township 35 N., range 8 E., constituting the Dixie Valley ranch, together with certain other tracts of land in adjoining townships; and on the same day the same parties executed and delivered to Clarke a bill of sale of all the personal property located in Lassen county, in or to which the grantors had any right, title, claim, or interest. The respondent Clarke thereupon entered upon the possession of all the property described in the deed and bill of sale, and has so continued in possession thereof until the present time. On January 2, 1885, Andrew Reavis made what purported to be his last will, by the terms of which he left D. M. Reavis \$6,000 "of the \$20,000 he owes me," to be distributed equally among himself and wife and children. To various relatives he left certain small legacies. He provided for a debt of \$250, other debts, and funeral expenses, and directed that the residue of his estate should be divided equally among his brother James Overton Reavis and his children, his sister Hannah Porter Rossell and her children, and the heirs of Ann Eliza Reavis, deceased. The complainants are

people of modest means, residing in Missouri. They were informed in March, 1886, by D. M. Reavis, that Andrew Reavis had died, and had disposed of his property as directed in the alleged will. Various small sums of money were forwarded to them by D. M. Reavis up to 1892, aggregating in all about \$3,500. In 1892 the complainants wrote to D. M. Reavis for the balance of their money. They were dissatisfied with his reply, and sent an attorney as their agent to California to ascertain the condition of the estate. His report caused them to take action to enforce their alleged rights. One Hine, a resident of Lassen county, at their request applied for letters of administration upon the estate of Andrew Reavis, and the superior court of that county issued these letters of administration to him on April 21, 1894. On August 28, 1894, after the time for presenting claims to the administrator had expired, the respondent Clarke presented the notes, aggregating \$40,000, in which Andrew Reavis had joined as accommodation maker, for payment. The notes, together with the interest, amounted to \$92,327.03. The date of the notes was November 1, 1882. These claims were rejected by the administrator. Complainants allege that these notes had been fully paid by D. M. Reavis in 1886, and that Clarke, with the consent of D. M. Reavis, kept them for the purpose of covering the property in case complainants discovered the frauds alleged to have been practiced upon them; that the respondents have no other claim to the property, except such as they have acquired from Andrew Reavis, and that the respondents therefore hold four-fifths of the property in trust for the complainants; also, that the respondents D. M. and J. J. Reavis have been insolvent ever since 1890, and that Clarke at all times knew that they were so. The prayer of the bill is that a decree be entered declaring the fraud through which the respondents acquired and held prior to April 27, 1892, and since which date Clarke has held and now holds four-fifths of the said property, with the rents, issues, and profits thereof; that four-fifths of the said property belong to complainants; that the respondents account fully for the property; and that Clarke make such conveyances as to vest in each of the complainants his or her title to the property in question.

The respondent Clarke alleges that Andrew Reavis was not the owner of the Dixie Valley ranch; the instrument of August 1, 1879, by which D. M. Reavis appeared to convey the property to Andrew Reavis, being not a deed, but a mortgage. He denies the intestacy of Andrew Reavis, and alleges that the mental condition of Andrew Reavis on January 29, 1886, was not such as to render the deed by which he conveyed the property to D. M. and J. J. Reavis void by reason of his insanity. He further contends that, owing to the laches of the complainants, their cause of action is barred by the statute of limitations of this state. The issue of law as to the statute of limitations was raised in the demurrer to the amended bill, and was decided against the respondent by the overruling of his demurrer. The allegations on the face of the amended bill, therefore, are sufficient to avoid the charge of laches, and the only ground upon which respondent could base this contention on a final hearing would be the failure of the complainants to prove the material allegations of their bill in re-

spect to this part of their case. Respondent, however, does not contend that there has been any such failure, and the testimony shows conclusively the truth of the allegations in this regard. The complainants lived a great distance from California. They had at first entire confidence and trust in D. M. Reavis, and the truth of his statements to them,—a confidence which was strengthened by the receipt of small sums of money from him; and finally, when they were apprised that the condition of their interests was not such as they had been led to believe, they took action to secure what they conceived to be their rights. In *Townsend v. Vanderweker*, 160 U. S. 171, 186, 16 Sup. Ct. 262, 40 L. Ed. 388, it is said:

"The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with the want of due diligence in failing to institute proceedings before he did. In this case we think the delay is fully explained;" citing *Guntton v. Carroll*, 101 U. S. 426, 25 L. Ed. 985.

See, also, *Lattailade v. Orena*, 91 Cal. 565, 27 Pac. 924, and *Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077.

It does not appear that in this case, in view of all the circumstances, the defense of laches has been maintained.

It is contended by the respondent Clarke that the instrument of August 1, 1879, which purports to be a conveyance of the Dixie Valley property to Andrew Reavis by D. M. Reavis, is not a deed, but was intended merely to secure certain pre-existing indebtedness, and was therefore a mortgage, and transferred no legal title to Andrew Reavis, in spite of the formal character of the document, which is that of a deed absolute. Authority for the construction of a deed absolute in form as a mortgage, where it is intended as security only, is found in the Civil Code of California (section 2924):

"Every transfer of interest in property, other than in trust, made as a security for the performance of another act, is deemed to be a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is deemed a pledge."

In the case of *Montgomery v. Spect*, 55 Cal. 352, the supreme court of this state said:

"Whether a deed absolute in form is a mortgage is a question of intention, to be inferred from all the facts and circumstances of the transaction in which the deed was executed, taken in connection with the conduct of the parties after its execution. In such cases the central fact to be found is the existence of an indebtedness at the time of the transaction, and a continuation of the character of debtor and creditor. If that fact be found, the inference deducible from it is that the deed was not made to transfer the title to the land described in it, but was made for the purpose of securing the debt which the grantor owed to the grantee."

In the case of *Brandt v. Thompson*, 91 Cal. 458, 27 Pac. 763, Justice McFarland, speaking for the supreme court, said:

"We think the evidence sufficient to warrant the findings of the court that the deed from plaintiff to his brother Herman was given to secure \$6,000 borrowed money; that it was, therefore, only a mortgage; and that Thompson knew the nature of said deed when he took his conveyance. And the court was correct in holding that it did not pass the title."

The character of the instrument of August 1, 1879, becomes, therefore, a question of fact, to be determined from the testimony and the circumstances of the case.

The deposition of J. B. Reavis, now a justice of the supreme court of the state of Washington, is to the effect that he drafted this instrument as the attorney for D. M. Reavis. He states further that the conveyance constituted a complete transfer of the property, and that the consideration given by Andrew Reavis therefor was the liquidation of the indebtedness of D. M. Reavis to Andrew Reavis, and the payment of a debt of \$15,000 then due from D. M. Reavis to a certain Mrs. Solomon, a widow residing in San Francisco. With regard to this indebtedness of D. M. Reavis, J. B. Reavis deposes:

"The indebtedness due to Andrew from D. M. Reavis, as near as I can recall, aggregated about \$20,000, or upward. The amount due Mrs. Solomon was about \$15,000, as far as I can remember. I believe I drafted a conveyance from D. M. Reavis to his brother Andrew. I had knowledge of the existence of the indebtedness from D. M. Reavis to Mrs. Solomon, and to his brother Andrew, for a number of years, and had conducted correspondence for D. M. Reavis with both Mrs. Solomon and his brother Andrew relative to the matters, and personally knew Mrs. Solomon. D. M. Reavis had originally purchased, prior to 1874, some rights and interests which his brother Andrew had acquired in Dixie Valley, and he had then engaged his brother to take charge of the properties in Dixie Valley. Andrew had continued in such engagement until the conveyances made to him in 1879 by his brother. The original purchase price, which I cannot now definitely state, was not paid by D. M. Reavis, and only partial payments were made to Andrew on account of wages and salary. In fact, with the exception, I think, of a few hundred dollars, the only payment that Andrew received on account of either the purchase price or for wages was his personal living expenses, which were small. The indebtedness to Mrs. Solomon was for money loaned to D. M. Reavis, and which had been outstanding for considerable time."

In answer to the cross interrogatories, J. B. Reavis testifies that his memory of the details of the transaction is not accurate, that it is 19 years since the execution of the conveyance, and that the matter had not been called to his attention for 15 years. He testifies further that the conveyance was drawn at Chico, in the absence of Andrew Reavis, who was at that time at the Dixie Valley ranch. D. M. Reavis requested the drafting of the conveyance, and gave all the instructions relative to it. The deed, after execution, was delivered to deponent, who forwarded it or took it in person to Susanville for record, and it was there recorded in the latter part of August, 1879. From Susanville deponent went to Dixie Valley ranch, and there discussed the conveyance with Andrew Reavis. Deponent thus testifies with regard to the sources of his information of the indebtedness of D. M. Reavis to Andrew Reavis:

"My knowledge of the consideration from D. M. Reavis to Andrew Reavis for the conveyance of the Dixie Valley real and personal property was received from each of them, but originally from D. M. Reavis. In the fall of 1875 D. M. Reavis told me of the business relations existing between himself and his brother Andrew, and mentioned at that time that he owed Andrew about \$15,000. This was just before my first visit to Dixie Valley, in the fall of 1875. I knew from D. M. Reavis and from his brother Andrew that this indebtedness was growing from that time until the time of the conveyances."

It thus appears from the deposition of J. B. Reavis that D. M. Reavis was the instigator of the entire proceedings connected with the convey-

ance of 1879; he directed the whole matter in the absence of his brother Andrew, to whom the property was conveyed; and such information as J. B. Reavis possessed with regard to the amount of indebtedness due to Andrew from D. M. Reavis, in consideration of which the deed was ostensibly executed, is derived mainly from D. M. Reavis. The conveyance itself appears to have been drawn in haste, as it does not accurately describe the land, which at that time stood in the name of D. M. Reavis, but purports to convey the full sections in which the various subdivisions were contained. By this method of description the instrument appears to convey 4,560 acres more than D. M. Reavis claimed to own in those sections in Dixie Valley. Furthermore, there is a repetition in the description of two sections of land, which adds another excess of 1,280 acres. These erroneous descriptions appear to have been sufficient to mislead the counsel for the respondent, as in their brief they say, "The conveyance from D. M. to Andrew Reavis, of August 1, 1879, is a grant, bargain, and sale deed, including eight thousand three hundred and twenty acres." Within the general description of this instrument, D. M. Reavis appears to have had only 2,480 acres standing in his name at that time; and had the instrument been an actual deed of conveyance, in accordance with an agreement of sale, in which the minds of both parties met in the transaction, it is to be presumed that the grantee would have required an accurate description of the lands included in the purchase. But, as appears from the testimony of J. B. Reavis, the grantee or mortgagee was not consulted about the conveyance, or knew of its existence, until after it was recorded. This haste is explained by the fact disclosed by the evidence that very soon thereafter, and during the month of August, 1879, the property of D. M. Reavis in Butte county was attached by his creditors, and proceedings in insolvency were instituted against him and one George W. Gridley, with whom he had been associated in some business transactions. It appears further that in these proceedings D. M. Reavis made a transfer of his property to trustees for the benefit of his creditors, and at a meeting of those creditors Reavis made a statement concerning the conveyance of the Dixie Valley property to his brother Andrew on August 1, 1879. F. C. Lusk, who was the attorney for the creditors after Reavis had made the assignment, testifies that Reavis' statement to the creditors was to the effect that the conveyance to Andrew Reavis was as a security for an indebtedness. The testimony of Lusk is as follows:

"Q. Do you remember what was commonly known as the 'Reavis Failure,' or the 'Reavis Trust,' in 1879? A. I remember the failure of Mr. David M. Reavis in the fall of 1879. Q. Did he at that time make a transfer to trustees? A. Soon after the failure, after the settlement with the creditors (he and Mr. Gridley failed together), they made an assignment to John Boggs, E. W. Pond, and C. W. Clarke, as trustees for the benefit of the creditors. Q. Who acted as attorney? A. I did, after the assignment. Q. Were you present at any meeting of the creditors in which statements were made by D. M. Reavis respecting the transfer of what is known as the 'Dixie Valley Stock and Property' to Andrew Reavis, and the purpose and consideration? A. I was present at all of the meetings of the creditors (they were all held in my office, except the first one, which was in the Chico Hotel), and heard Mr. David M. Reavis make a statement to the creditors in regard to the subjects you

speaking of. Q. What were these statements? A. He stated to the creditors that he had transferred his ranch in Tehama county, his stock ranch in Dixie Valley, and the stock on the Dixie Valley ranch, for his brother Andrew to hold as security for an indebtedness which he stated to the creditors he owed his brother Andrew, of about \$33,000, and of the indebtedness which he stated he owed a Mrs. Solomon (at Napa, I think she lived), of about \$16,000. * * * The creditors asked him if he could not get these properties back, and turn them in to the general trust. He told them that he could not get them back, and the creditors could not get them back unless they paid Andrew what was due, and paid Mrs. Solomon what was due her. This was the principal statement in reference to it that I remember. That was repeated a good many times in those meetings of creditors. Q. Did you hear J. J. Reavis or D. M. Reavis, or either of them, testify upon the subject at the subsequent trial,—the trial subsequent to the first event that you have spoken of? A. Yes; I heard them both testify at Oroville at the trial,—the action that was brought by G. W. Gridley in his lifetime, and continued by his administrators after his death, to settle the estate,—this whole settlement which had been made relating to the Reavis-Gridley failure. Q. What did they state, in their testimony, was the purpose of the transfer? A. They stated in their testimony substantially the same thing. They both stated that this property had been transferred to Andrew Reavis as security for that indebtedness of Mr. Reavis. In telling the amount in his testimony that he owed his brother Andrew Reavis, he placed it at about \$20,000,—about \$20,000 or near \$20,000. I don't think that he made out that he owed him just exactly \$20,000, but that was about the indebtedness to his brother. Otherwise, there was no change in their testimony on the trial, in their statement, from Mr. D. M. Reavis' statement in the meeting of the creditors."

J. J. Reavis, testifying with regard to the consideration of the transfer, says:

"The property was deeded out to Andrew Reavis to pay him all my father was owing him, and also to pay Mrs. M. S. Solomon, of San Francisco, \$16,000 that he owed her. Q. What amount, if you know, was then due from your father to Andrew Reavis? A. At that time, I don't know, but subsequently I heard father testify that he considered that he owed Andrew Reavis at that time \$20,000."

Testimony alleged to have been given by the same witness in the Gridley case, in which this property was involved, was read to him, as follows:

"I think I heard father say that he had turned it [the Dixie Valley property, complete] over to secure Uncle Andrew and Mrs. Solomon. Q. To secure what? A. Uncle Andrew and Mrs. Solomon, of Dixie Valley. Q. Did he say for what? A. No."

The witness admitted that such had been his testimony in the Gridley case.

The witness Lusk testified that Andrew Reavis had informed him as follows:

"Q. Did you subsequently have a conversation with Andrew Reavis upon the subject of the transfer to him of the Dixie Valley stock and real property? A. I had subsequently at least two conversations with Andrew Reavis upon that subject. * * * The first conversation was in my office at Chico, but the time I am utterly unable to recollect, except that I know it was after the failure, after the assignments were made, and before the summer of 1881. * * * Q. What did Andrew Reavis state was the purpose of the transfer to him? A. It was after the assignment to Andrew. I am not certain whether it was after the assignment to the trustees or before, but it was after the assignment to Andrew. He came to my office and stated to me that Mr. Reavis had transferred this property to him without his knowledge; that he knew nothing about it until after they were placed on record; that he didn't want

anything to do with it, but that he would do anything that Dave said for the purpose of helping (as he called her) Betty. It was Mrs. David M. Reavis. He told me that he wanted me to understand that, in case of any litigation, if he was put on the stand he would not swear to the statement Mr. David M. Reavis made. He said Mr. David M. Reavis didn't owe him any such amount of money as he had stated to the creditors, and that if he were put on the stand he should be obliged to tell the exact truth. He said that, after the assignments were made, they [referring to some of the Reavis family] had told him they had assigned him this to hold as a security for what Dave owed him, and for what Dave owed Mrs. Solomon."

Lusk further testifies that Andrew Reavis told him that he must not put him upon the stand in the Gridley case, as they might draw facts out of him to the detriment of D. M. Reavis. On the same occasion, according to this witness, Andrew Reavis informed him that D. M. Reavis' indebtedness to him did not exceed \$7,000, and said:

"There is a note that I have, that I had at the time of the failure. That is all he owed me. I have no interest in this place, any more than I ever had. I am working down there for wages. I don't want anything to do with it. I want to get it out of my hands. But if Dave wants me to keep it, for his children to have it, and Mrs. Solomon, I will do what he wishes. I will deed it, or anything. I don't want to be put on the stand. I am not interested in this place at all."

Carlton, the vaquero of the Dixie Valley ranch, says:

"He [Andrew Reavis] told me that Dave owed him about \$7,000, and that Dave had put that property into his hands to hold for that money."

Testifying further upon the same point, he says that the conversation in which the foregoing statement of Andrew Reavis occurred took place in 1879, and that Andrew subsequently said that his demand against D. M. Reavis had been paid. The statement of the payment of the demand against D. M. Reavis was, according to Carlton, made to him in the spring of 1882. This latter testimony of Carlton conflicts with that of W. A. Reavis, who testified that Andrew Reavis and Carlton were not on good terms and never spoke between the years 1880 and 1884; a dispute having arisen between them, in consequence of which Carlton left Dixie in March, 1880. The direct testimony as to the amount of the indebtedness of D. M. to Andrew Reavis, as given by J. B. Reavis, is thus contradicted by the testimony of Lusk and Carlton. The former claims to have derived his information with regard to the indebtedness being of the amount of \$20,000 from D. M. Reavis. The two latter refer the statement that the amount was \$7,000 to Andrew Reavis.

The dealings of Andrew Reavis, as regards the property, subsequent to the alleged conveyance of 1879, tend to show that his actions with respect to the Dixie Valley ranch were not those of an absolute owner, but that he rather occupied the position to which the relations of the parties, provided the transfer is to be regarded as security for indebtedness, would assign him. There is no question that Andrew had been a workman upon the ranch, laboring under the direction of D. M. Reavis, subsequent to the conveyance of the property in 1873, and he continued so to work subsequent to the conveyance of 1879. D. M. Reavis practically controlled the operations of the Dixie Valley ranch. Carlton, who worked with Andrew at the ranch, testifies that D. M. Reavis paid him for his work. W. A. Reavis, however, testifies that

the help was paid by Andrew Reavis. In March, 1880, Carlton quarreled with Andrew Reavis and left the ranch, or was discharged; the evidence being contradictory upon that point. At any rate, it is clear that there was a dispute between Carlton and Andrew Reavis, the subject of which throws some light upon the position which D. M. Reavis held with regard to the property after the transfer of 1879. With regard to this Carlton testifies as follows:

"Q. Well, do you recollect any particular reason for your leaving there in the spring of 1880? A. Well, me and Andy didn't exactly agree on the way the cattle had been handled that winter. Q. He was not satisfied with your work? A. He didn't say nothing about the work. The work was all right. * * * Q. And you left in consequence of it [quarrel with Andrew]? A. Yes, sir; I left. He told me that Dave wanted me down to the other ranch."

J. J. Reavis says that Carlton was working for Andrew at the time he was at Dixie in the fall of 1879, and upon the subject of Carlton's departure from Dixie, testifies:

"I went there in March, 1880. I met old Carlton. Uncle Andy discharged him—sent him away from there—in 1880, and I met him on the road by about Montgomery creek, coming out."

In view of these conflicting statements, Carlton's testimony cannot be regarded as entirely reliable; but the circumstances, as admitted by complainants' witnesses, tend to bear out his statement that D. M. Reavis was practically in control of the Dixie Valley ranch at the period subsequent to the transfer of the property by the deed of 1879, when, according to complainant's contention, Andrew Reavis was entirely and absolutely the master and owner. There is no question but that such pecuniary advantage as was reaped from the management of the ranch was gained by D. M. Reavis, that his necessities determined the policy with reference to the ranching operations, and that Andrew does not appear to have derived any increase in material prosperity from the sudden possession of an extensive and valuable property. It may be admitted that, as Andrew had for many years been in constant attendance at the ranch and familiar with its working, no immediate and remarkable change in its methods of management need have been anticipated from the transfer. But, from an owner and a practical rancher, as Andrew was, one might reasonably have expected some evidences of individuality and of personal opinion as to the conduct of things, which appear to be entirely wanting. As to the actual carrying on of the business, complainants endeavor to show that the supplies were purchased by Andrew for Dixie Valley, and were paid for by him. The testimony on this point, however, is very far from conclusive, and rests chiefly upon the evidence of J. J. Reavis. On May 1, 1882, Andrew Reavis mortgaged the 2,320 acres of swamp land to one L. C. Stiles, of Susanville, for the sum of \$4,000, giving a promissory note for that amount, payable on October 1, 1882, with interest at the rate of 1½ per cent. per month. This money, it is maintained by complainants, went in the payment of running expenses in connection with the Dixie Valley ranch, but there is no evidence to show that the money was so expended. W. A. Reavis says on this point:

"Q. I simply want to get that money that he gave the mortgage to Stiles for. I want to get what was done with that money. You can state it in

your own way. Just give me the name of the man it was paid to, and what for. A. Oh, I could not tell you directly what men it was paid to, but there was bills that were incurred there,—at Green & Asher's there was bills, and at Fall City, and bills at Adin. Q. How much was paid Green & Asher? A. I could not tell you how much. Q. When was it paid? A. I don't know when it was paid. It was paid before I went up there in 1882."

The witness then went on to say that he knew nothing personally of the disposal of the money that was derived from the Stiles mortgage, and that what information he had he derived from his uncle Andrew, although he had previously stated that the money had been expended by Andrew for the expenses of the ranch.

Complainants place in evidence that part of the assessment roll of Lassen county for the years 1880 to 1885 which relates to the Dixie Valley ranch. This assessment is made in the name of Andrew Reavis, but this fact of itself is immaterial, and is not evidence of ownership. The land was admittedly held in the name of Andrew Reavis, formal deed having been made to him of the property, and duly recorded. The patent to 2,320 acres of swamp land was issued to Andrew Reavis on March 3, 1880. He had paid \$556.80, or 20 per cent. of the purchase price, for this land on August 12, 1873, and the interest on the balance to January 1, 1874. The interest under the certificate of purchase was transferred by A. Reavis to D. M. Reavis on January 4, 1877, the consideration named being \$2,000, and back to A. Reavis by D. M. Reavis on August 1, 1879, simultaneously with the transfer of the Dixie Valley ranch by the alleged deed. Lusk testifies that D. M. Reavis retained possession of the certificate of the swamp land in Dixie Valley, and that he made the further payment necessary to procure the patent for the land. It cannot be said that the acts of Andrew Reavis evidence any real ownership of the property by him, or that they indicate any particular interest, any more than he had always been accustomed to show as the employé of D. M. Reavis, whose interests he always appears to have served zealously, out of regard for the family of the latter, for the members of which he evidently entertained a very warm affection. The complainants' principal witness, J. J. Reavis, fails to disclose any real difference in the mode of conducting the ranch under Andrew Reavis' management. An instance of the control exercised by D. M. Reavis over the Dixie Valley ranch at the time when Andrew Reavis was supposed to be the owner occurs on the sale of certain cattle to the Lynch Bros. These cattle were sold in the fall of 1879, the reason assigned for their sale being the fact that D. M. Reavis wanted the money, which he received forthwith, he being at the ranch at that time, and went off to Chico immediately after getting the check in payment of the cattle. Every fall such cattle as were fit for sale were sent to Chico, and there disposed of by D. M. Reavis, who managed the sales and received the money. This money was not deposited in the name of Andrew Reavis, as might have been expected, since the cattle came from the Dixie Valley ranch, but in the name of D. M. Reavis or his wife. J. J. Reavis, in testifying upon this point, says that he put the money, the proceeds of one of these sales, in the bank to the credit of his mother; that all the moneys then used at the Chico ranch were deposited in her name, and were really put

there for use by his father, D. M. Reavis. The money obtained from the sale of cattle from the Dixie Valley ranch appears, therefore, to have gone into the general fund used by D. M. Reavis in carrying on his business, and there seems to have been no method of distinguishing what was the product of sales of Dixie Valley stock from the sales of other stock possessed by D. M. Reavis and placed upon the market. J. J. Reavis testifies that he held power of attorney from Andrew Reavis, under the terms of which he made sales of cattle, and that he gave the money realized from such sales to D. M. Reavis, under the special orders of Andrew Reavis. Thus he says, "Uncle Andy Reavis told me to help my father, if I could,—to let him have whatever money he wanted,—and I did so." And, testifying further in the same behalf, he stated that his uncle gave D. M. Reavis the money from the sale of stock whenever he wanted it, or needed help. But there does not appear to have been any account kept of such money. Andrew Reavis apparently never demanded it, and there is no evidence of any settlement or accounting in the matter of these sales, and the money turned in therefrom to D. M. Reavis. In fact, the testimony goes directly to show that there was no such accounting. J. J. Reavis, when asked, "Was there ever a settlement from your father, accounting for that much money to pay it back to your uncle Andrew?" replied, "None that I know of, sir." In 1886 a lot of cattle were sold to Henry Hayes, of Oakland. J. J. Reavis testifies that he sold these cattle as the attorney of Andrew Reavis, and that D. M. Reavis got the check for the sale and paid it over to Clarke. He explains that this occurred in accordance with the general instructions of Andrew Reavis that D. M. Reavis should be helped with funds when necessary. Then when asked, "Was there ever a settlement from your father, accounting for that much money to pay it back to your uncle Andy?" he replied, "None that I know of," and still further testified that he never heard of any effort being made by Andrew Reavis to collect from D. M. Reavis the amount which would have been due to him by virtue of these repeated sales of cattle, the money for which was always absorbed by D. M. Reavis without any acknowledgment or account kept.

Complainants' counsel, in their opening brief, have drawn up what they denominate an "account of the output of the Dixie Valley ranch," according to which they make out a total indebtedness of D. M. Reavis to Andrew Reavis of \$10,350. This was made, according to the unsupported testimony of J. J. Reavis, after a long interval of time. This witness testified that an account of the output had been kept and placed in a trunk in a room at the Dixie Valley ranch, but was subsequently lost. Such account appears, at the most, to have been merely a memorandum of the amount of cattle sold, and not to have evidenced any indebtedness on the part of D. M. Reavis therefor. With regard to the Hayes transaction mentioned above, J. J. Reavis testified, in answer to an inquiry as to whether D. M. Reavis gave any receipt, or if any paper passed: "None that I know of, sir. Q. No account was taken of it? A. None that I know of,—only this memorandum that I kept of it." In fact, the entire testimony with regard to the management of the ranch goes to show that D. M. Reavis retained his authority over it as before, and that Andrew was after August 1, 1879, as he

had been ever since 1873, the subordinate of his brother, in no wise acting as if he were owner and in control of the property.

Reference is made in the testimony of J. J. Reavis to an alleged agreement with Andrew Reavis, under which the latter, upon the receipt of \$20,000, undertook to make a deed of the entire property to J. J. and W. A. Reavis. This agreement or bond to give a deed was made on October 15, 1881, and provided for payment in four different installments. The complainants contend that this bond shows the actual ownership of the property by Andrew Reavis. It is claimed that it was made for the purpose of giving the young men, in whom Andrew Reavis always took a great interest, an opportunity of purchasing the property. J. J. and W. A. Reavis both testify that they regarded the bond as genuine, and that they considered that under its provisions they were entitled to certain rights in the property. J. J. Reavis testifies that the bond was made at the suggestion of Andrew Reavis, and that he also proposed the terms upon compliance with which the transfer would be made by deed to them. This, also, is the gist of the testimony of W. A. Reavis in this regard. The bond was signed at Big Meadows, in Plumas county, to which place it was taken from the office of Lusk, an attorney who prepared it, by J. J. Reavis. W. A. Reavis assigned his interest under the bond to D. M. Reavis at the latter's instigation, being persuaded thereto by his mother. D. M. Reavis on November 5, 1885, in turn assigned it to Clarke. J. J. Reavis did not assign his interest under this instrument. Lusk testifies that the bond was made without the knowledge of J. J. and W. A. Reavis, and was intended merely to serve an immediate purpose. He says:

"That instrument, which is ordinarily called a 'bond,' was drawn by me in my office in Chico, with the exception of a change which has been made since I drew it. When it left my office the sum of \$5,000, I think, was in the first blank, which has been erased by somebody, and \$2,700 inserted in its place. It was drawn by me for an even \$20,000. I don't know anything about that erasure and insertion. It has been done after it left my hands."

He says further that Andrew Reavis was not present at the drawing of the bond, and that he received no instruction from Andrew Reavis to draw it; that neither J. J. nor W. A. Reavis was present, and that they gave him no such instruction; and that none of those three parties had any knowledge that the bond was to be drawn prior to its being drawn. The bond was made, according to the same witness, at his suggestion, and for the protection of D. M. Reavis. The \$20,000 was, he says, named without any regard to its representing anything. It was merely a fictitious sum. The reasons given for his drawing it are thus stated by Lusk:

"I had the bond drawn because the title to the property stood in the name of Andrew Reavis, which did not belong to him; and I thought, if he should happen to die, and his estate be probated, that that might trouble Mr. D. M. Reavis. So I suggested to Mr. D. M. Reavis the device of this bond. I could not take— I could not have Mr. Andrew Reavis give a bond or make a deed direct to Mr. D. M. Reavis, because Mr. D. M. Reavis, when he made a settlement with his creditors, had made a private settlement with some of them without my knowledge; and I knew that if it became known the balance of the creditors could break up the whole settlement, and come on him for the original amount of their debts. For that reason I could not take a

bond or have a deed made to him. I suggested this bond to his children, and drew it right up there at the time, and he accepted the idea."

As regards the statements of J. J. and W. A. Reavis that they regarded the bond as of great importance to them, it must be noted that there is no evidence showing any effort upon their part to live up to its terms. There does not appear to have been any accounting or settlement between them and Andrew Reavis under it. The only testimony that seems to imply that Andrew Reavis considered anything due to him under its provisions is a statement on the part of J. J. Reavis that Andrew complained that they were not living up to the contract, and one from W. A. Reavis that Andrew in 1882 talked about the payment of money on the bond. J. J. Reavis also says that in 1883 Andrew Reavis was desirous of purchasing some property, and was anxious that they should make a payment on the bond. On cross-examination this witness remembered no particulars as to Andrew Reavis asking him for money under the bond, and his excusing his nonpayment upon the ground that his father, D. M. Reavis, was absorbing all the money, which was the reason given in his direct testimony why Andrew Reavis had not been paid. The same witness testified that he received no wages, and had no settlement with Andrew Reavis for wages, and seems to desire to give the impression that the contract under the bond was the only arrangement between them. In fact, he says categorically, "I was there in possession under that contract;" and, when asked what contract, he replied, "That bond." He never rendered any account for wages to Andrew Reavis, nor asked for payment of them. But, according to J. J. Reavis' testimony, this nonreceipt of wages by him appears to have been not unusual. Thus, when asked, "How did you get your wages?" he replied:

"I got them wherever I could. The same way I say with Mr. Clarke when I was under contract with him,—his agent up there,—I was to receive nothing for my wages."

Upon this point Lusk testified, when asked if J. J. or W. A. Reavis had anything to do with the Dixie Valley ranch:

"Nothing whatever, except that J. J. Reavis stayed up there working for his father, representing his father up there at the ranch, in part, and representing Mr. Clarke, without any pay from Mr. Clarke. Mr. Clarke had bills and mortgages. There were not mortgages on the cattle, but there were bills of sale. He got Mr. J. J. Reavis to stay there to represent him and to be in possession for him, so that, if the creditors attached, he could say for J. J. Reavis that he was in possession."

It does not appear that the existence of this bond constitutes any proof of the real ownership of the Dixie Valley property by Andrew Reavis. The whole transaction is inexplicable upon the ground that it was a bona fide instrument, intended to accomplish the purposes which, according to the complainants' contention, were desired by Andrew Reavis. There is no satisfactory proof that Andrew Reavis ever regarded it seriously, and at least it has not been shown that he made any real effort to obtain any of the installments of money which he should have received according to its provisions.

On October 28, 1882, a check was drawn in favor of Andrew Reavis for \$4,500. This check was signed by C. W. Clarke, and indorsed,

"Andrew Reavis, by D. M. Reavis and E. B. Pond," and is stamped upon the face, "Receiving Teller, October 30, 1882, First National Gold Bank, San Francisco." On November 1, 1882, another check was drawn in favor of Andrew Reavis for the sum of \$5,000. This check is signed, "Clarke & Cox," and is stamped upon the face, "First National Gold Bank of San Francisco, please pay. November 1, 1882. California State Bank." It is indorsed, "Andrew Reavis." These two checks aggregate \$9,500, and the payment of this sum is regarded by the respondent in the light of a settlement which finally disposed of Andrew Reavis' interest by the complete payment of the amount in which D. M. Reavis is indebted to him. This transaction is referred to as the settlement of November 1, 1882. Complainants do not regard this transaction as a settlement of the nature contended for by respondents, but maintain that the money was advanced for the payment of what is known as the "Stiles Mortgage," and an installment upon the Solomon debt. The Stiles mortgage has been already referred to, and the \$4,000 borrowed from Stiles by Andrew Reavis, and secured by a mortgage on Dixie Valley ranch, fell due on October 1, 1882. The Solomon debt, which was originally \$16,000, had been reduced to \$12,000 by agreement, and was to be paid off in three installments, the first of which was due on November 1, 1882. At the end of October, 1882, Andrew Reavis left the Dixie Valley ranch for Chico, in company with W. A. Reavis. On the way a horse died, and they were delayed in their journey so that when they arrived at D. M. Reavis' ranch at Chico he was no longer there. Andrew Reavis, according to the testimony of W. A. Reavis, appeared to be disappointed at this, and remained only one day in Chico, whence he set out for Sacramento, whither D. M. Reavis had already gone. After the arrival of Andrew Reavis in Sacramento, the two checks above described were paid over,—the one on October 28, 1882, for \$4,500; the other on November 1, 1882, for \$5,000. On November 1, 1882, two notes were given to Clarke, signed by D. M. Reavis, Andrew Reavis, Mrs. Ann Reavis, and J. J. Reavis. One of these notes was for \$15,000, and the other for \$25,000, aggregating \$40,000. The witness Porter was present at these transactions, and states that there was a settlement then of the affairs of Andrew and D. M. Reavis, according to the terms of which Clarke was to advance the money for the payment of the debt of D. M. to Andrew Reavis, and thereupon Andrew Reavis would redeem the Dixie Valley ranch to D. M. Reavis, and that a check for \$5,000 given on that day was for the indebtedness of D. M. Reavis to Andrew Reavis. There is other testimony to the effect that this arrangement was entered into and so understood by Andrew Reavis. Carlton testified that Andrew told him at Chico, some time "during the summer or fall," that he was not going back to Dixie Valley ranch; that he had fixed up his business, and was waiting on D. M. Reavis to get his money from Mr. Clarke to pay him; that he had "sold Dixie Valley ranch, and was going to leave there forever." Again, testifying on the same point, Carlton says that Andrew told him that he had been paid, and that he was going to Oakland that winter. Some of these statements are, however, open to suspicion. There is no evidence that Andrew returned to Chico subsequent to his visit to

Sacramento until 1884, and he spent only one day in Chico on the way down to Sacramento in the fall of 1882. Moreover, W. A. Reavis has testified that Andrew Reavis and Carlton were not on speaking terms between the years 1880 and 1884, and the unfriendliness of their parting in 1880 seems to be beyond question. But Lusk, who was familiar with all the business transactions of Andrew and D. M. Reavis, testified as follows:

"Q. Do you know of any settlement or payment from D. M. to Andrew Reavis of the indebtedness existing from D. M. to Andrew? A. At a time after the giving of this bond? I could not tell the date unless something was to refresh my memory. Andrew Reavis was down there, and they had a settlement. Q. Down where? A. Down at Chico; down in that country. They had a settlement, but whether the settlement was made in my office or not, I don't remember. All I know is that Andrew Reavis told me that Dave had paid him up entirely, and Dave told me that he had paid Andrew entirely. They both told me that the money came from Mr. Clarke, but whether the payments or the checks were transferred in my office, I could not tell. * * * Q. Is there anything by which you can refresh your mind as to the settlement already testified to between D. M. and Andrew Reavis? A. Do you mean the time when D. M. Reavis paid Andrew Reavis what he owed him? Q. Yes; that they had a settlement. I ask you if you can fix the time."

This the witness was unable to do. He was satisfied that it occurred after 1881, but he was not sure whether it was within three years of the bonding of the property in that way.

The respondent Clarke testifies that he saw Andrew Reavis on October 27, 1882, at D. M. Reavis' place at Chico; that, in reply to his inquiries, Andrew Reavis declared that he and his brother had been talking with regard to a settlement, and that Andrew wanted some money at once, whereupon he (Clarke) drew a check for him in the sum of \$4,500; that there was no settlement arrived at until November 1st. He says that they "finally came to it."

"Q. Well, what was it finally fixed at, to name the amount? A. Well, then there was \$5,000 more coming to him. \$9,500 they claimed the settlement was. Q. That was a settlement for what? A. That was a settlement they had between them,—that Dave Reavis owed Andy Reavis. Q. Who paid that? A. I did."

On cross-examination the same witness testifies that he drew a check on October 28th in favor of Andrew Reavis, and gave it to him, and a check for \$5,000 in favor of Andrew Reavis on November 1st. In the course of his redirect examination Clarke corrects his testimony, and says he was mistaken in testifying that he went to the ranch with Andrew Reavis on October 28th, but that Andrew Reavis was in Sacramento at that date. The direct testimony as to there having been a final and complete settlement between the two brothers at this date cannot be considered as entirely conclusive of the fact, but the witnesses all agree, and the checks show that \$9,500 was paid over to Andrew Reavis on the dates named. The amount of indebtedness due from D. M. Reavis to Andrew Reavis at the time of the transfer of 1879 is stated by respondents' witness Carlton and by Lusk to have been \$7,000, as admitted to them by Andrew Reavis.

The complainants contend that the checks given to Andrew Reavis on October 28th and on November 1st were not given in settlement of the debt of D. M. Reavis to Andrew Reavis, but were advanced in

order to meet the Stiles mortgage and the first installment of the Solomon debt. It is urged, also, that they were given to Andrew Reavis in order to obtain his signature to the notes aggregating \$40,000 made to Clarke at that time, and signed by Andrew, D. M., J. J., and Ann Reavis. Complainants' witnesses testify that Andrew was particularly worried with regard to these two matters, and the fact that the Stiles mortgage was overdue seems to have given him much anxiety. But there is no evidence of any understanding between him and Clarke in this matter. The \$5,000 check paid to Andrew Reavis on November 1st was indorsed and cashed by him in Sacramento on November 1, 1882. From the copies of the waybills of Wells, Fargo & Co.'s Express, it appears that \$4,310 were sent from Sacramento to L. C. Stiles in November, 1882, in three amounts,—two of \$1,500 each, and one of \$1,310. The first of these amounts was shipped on November 1, 1882, and on November 25, 1882, satisfaction of the mortgage was acknowledged by Stiles. J. J. Reavis states that Andrew Reavis told him "that father had got the money on his account to pay Mrs. Solomon, and that he [Andrew Reavis] had got \$5,000 from Mr. Clarke to pay Mr. Stiles, and some other debts that he owed, and that he had paid Stiles, and sent the money through Wells, Fargo & Co., in three different amounts, of \$1,500." The contention of the complainants that Andrew Reavis applied a great portion of the \$5,000 received from Clarke to the satisfaction of the Stiles mortgage appears to be borne out by the facts.

It is claimed by the complainants that the \$4,500 advanced by check to Andrew Reavis by Clarke on October 28, 1882, was used by D. M. Reavis for the payment of the first installment of the Solomon debt. This debt was originally \$16,000, and the payment of it part of the consideration which, according to complainants' witnesses, Andrew Reavis gave for the transfer to him of the Dixie Valley property in 1879. Clarke testifies that this indebtedness had by compromise been reduced to \$12,000, payable in notes of \$4,000 each. The first of these notes fell due on November 1, 1882. Clarke promised Andrew Reavis to see that this note was paid, before the latter consented to become a surety upon the notes, aggregating \$40,000, which D. M. Reavis gave Clarke on November 1, 1882. Clarke says that he gave Andrew Reavis the check of \$4,500, with which to pay that part of Mrs. Solomon's indebtedness which was due on November 1, 1882. He says elsewhere, however, that the check of \$4,500 was for the purpose of making a settlement between D. M. and Andrew Reavis. Pond, one of the indorsees of the check for \$4,500 to Andrew Reavis, could not determine whether any of it was applied to the payment of Mrs. Solomon's first note. There is no direct evidence to show that it was so applied. It is evident, however, from the testimony, that Andrew Reavis was anxious with regard to the Solomon note; that he refused to become surety on the notes to Clarke, amounting to \$40,000, until he was assured that this indebtedness was met, and when the first Solomon note was paid he signed the notes accordingly. The testimony with regard to the first of these Solomon notes tends to show that it was not paid by Clarke, but was paid either by means of the \$4,500 check which Andrew received from Clarke on October 28, 1882,

or from the money which Clarke advanced to D. M. Reavis at that time.

With regard to the payment of the balance of the Solomon debt, the following facts are stipulated by counsel for both parties: In the early part of 1882 this indebtedness was settled by giving Mrs. Solomon three notes, for the sum of \$4,000 each, signed by D. M. Reavis and his wife, and also by J. J. Reavis and Andrew Reavis. Two of these notes were deposited by Mrs. Solomon for collection in the Santa Rosa bank, and this in turn sent them through to the London & San Francisco Bank of San Francisco; and the amount of principal and interest on the notes to that date, in the sum of \$8,213.33, was paid to the last-named bank on May 7, 1884. A check for this amount was put in evidence by respondents, signed by Clarke & Cox, dated May 7, 1884, and stamped on the face: "Paid May 8, 1884. California State Bank." It thus appears that Clarke paid the money to clear up the Solomon debt. In order to show that D. M. Reavis was sufficiently indebted to Andrew Reavis to warrant this advance of money on the part of Clarke, complainants' counsel referred to the alleged statement of account which has been already noticed, but it furnishes no proof with regard to this matter. There is no question but that this remainder of the Solomon debt was discharged by Clarke. Complainants' counsel say that it is admitted by Clarke that he promised Andrew Reavis, before the latter agreed to become surety upon the note to the extent of \$40,000, that he would pay the Solomon indebtedness. But this is not established by the testimony. Clarke agreed to see that the \$4,000 due to Mrs. Solomon on November 1, 1882, was paid, but there was no promise made by him with respect to the remainder of the debt. It appears, therefore, that Andrew Reavis did not pay the Solomon debt, the payment of which, according to complainants' contention, formed part of the consideration of the transfer of the Dixie Valley ranch to him in 1879. Whether the settlement of November 1st terminated the indebtedness of D. M. to Andrew Reavis or not, the payment of the two checks upon that day, and the arrangement for the payment of the Solomon notes, was followed by the departure of Andrew Reavis for Oakland, and the cessation of any active interest on his part in the affairs of the Dixie Valley ranch. Andrew Reavis first absented himself from the ranch in 1881, about December, when he went to Los Angeles. In February, 1882, he returned to the ranch, where he remained until after the settlement of November 1, 1882, after which he again went down to Oakland, and, according to the testimony of W. A. Reavis, returned in May or June of that year 1883, afterwards calling at Chico, and going down to Oakland again in the fall. W. A. Reavis also testifies that in 1884 Andrew returned to Dixie again, but this merely upon hearsay, for he was in Oakland again when W. A. Reavis returned from Washington Territory in that year. Carlton, however, testifies that he never saw Andrew Reavis at Dixie after his departure for Oakland in November, 1882, until he came up in 1886, during his last illness. The fact appears to be beyond doubt that Oakland was Andrew Reavis' home after the settlement in 1882, and that his connection with the ranch thereafter was merely incidental. Counsel for complainants rely upon

a letter written by Andrew Reavis December 22, 1884, to support their contention of his continued interest in the ranch; but the letter contains no anxious inquiry as to conditions at Dixie. In fact, the only reference to the ranch consists in the following sentence: "When do you return to Dixie, and are you coming down, as I'll be glad to see you." The contention of complainants in this respect that Andrew Reavis, after giving the bond to W. A. and J. J. Reavis, felt at liberty to leave the entire management of the property in their hands, is supported by the fact that Andrew went away—took his first vacation—soon after that transfer, and that thereafter his duties to the property absorbed but a small part of his interest and attention. But there is no evidence of any payment being made to him under the bond, and it does not appear that he derived any means of subsistence while in Oakland from the proceeds of the Dixie Valley ranch, with which his actual connection was severed subsequent to November 1, 1882. It appears from the evidence, therefore, that at no time after the transfers of 1879 did Andrew Reavis exercise the rights and powers of owner over the Dixie Valley property, and that after November 1, 1882, his connection therewith was dissolved, and his occasional visits to the ranch were not made in pursuance of any rights which he retained therein. From this evidence the conclusion follows that the mortgage and the bill of sale of 1879 were given to secure the indebtedness due from D. M. Reavis to Andrew Reavis, and operated only as a mortgage with regard to the realty, and a pledge with regard to the personality, of the Dixie Valley ranch. The legal title to the property continued, therefore, to be vested in D. M. Reavis, so that no reconveyance was necessary from Andrew to D. M. Reavis, if the indebtedness to secure which the mortgage had been placed upon the property was discharged by the settlement of November 1, 1882. But, if that settlement did not constitute a discharge of this indebtedness, the instrument of August 1, 1879, being a mortgage, became subject to the operation of the statute of limitations of the state of California within four years after its date, unless the indebtedness was evidenced by a writing making it payable at a future time. Section 337, Code Civ. Proc.; *Newhall v. Sherman*, 124 Cal. 510, 57 Pac. 387. The Dixie Valley ranch was therefore held by D. M. Reavis as his property until April 27, 1892, on which day he conveyed it to Clarke by deed and bill of sale, signed also by Ann E. Reavis and J. J. Reavis. The respondent Clarke was thus vested with the legal and equitable title to the property in controversy.

There remains to be considered the claim of the complainants that after the transaction concerning the Dixie Valley property between D. M. and Andrew Reavis, in August, 1879, and independent of the conveyance of August 1, 1879, the latter acquired title to certain tracts of land in township 35 N., range 8 E., amounting to 560 acres—First, by homestead entry, 160 acres; second, by pre-emption entry, 160 acres; and, third, by transfer of title from J. B. Reavis to Andrew Reavis to 240 acres of desert land. With respect to the first two tracts of land it is sufficient to say that the attention of the court has not been called to any evidence identifying them with certainty. The testimony of J. J. Reavis that Andrew Reavis did at some time acquire

160 acres of land by homestead entry and 160 acres by pre-emption entry is not sufficient. Andrew Reavis, on the 16th of August, 1873, writing from Dixie Valley to his brother D. M. Reavis concerning their affairs in Dixie Valley, refers to his own pre-emption of 160 acres, and the fact that his house stands upon this land. It has been suggested that the subsequent deed of November 3, 1873, wherein Andrew Reavis executed a separate conveyance to D. M. Reavis for 160 acres of land, was a conveyance of this land acquired by Andrew Reavis by pre-emption. This identification appears probable. The land is described as the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 20, and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 21, in township 35 N., range 8 E., containing 160 acres. This tract of land is, however, included in the mortgage of August 1, 1879, and is subject to the conditions of that instrument. With respect to the homestead entry the evidence is still more uncertain. It appears that Andrew Reavis first visited Dixie Valley in the early 60's, and that he resided there as early as 1872. There is therefore nothing improbable in the conjecture that he might have perfected a homestead entry and conveyed the title to D. M. Reavis before the latter executed the mortgage of August 1, 1879, and that the land was included in that conveyance. In any event, the evidence is not sufficient to establish the fact that Andrew Reavis, at the time of his death, on July 22, 1886, owned land in Dixie Valley acquired by homestead entry. The land should be identified, to enable the court to determine whether or not it is involved in this action. With respect to the desert land transferred to Andrew Reavis by J. B. Reavis, the land appears to be identified; but when the title was perfected, and who purchased the land from J. B. Reavis, and the date of the purchase, are uncertain. Judge J. B. Reavis, in his deposition, says:

"I made entry of some desert sagebrush lands adjoining the Dixie Valley ranch. Having no data to refresh my memory, I am unable to state the time of entry, but I perfected title to about 240 acres of sagebrush land adjoining Dixie Valley. The arrangement relative to this land was between Andrew Reavis and myself. The latter part of 1879 it was arranged between Andrew Reavis and myself that I should execute a conveyance of this land to himself. I have since been reminded, by inspection of the instrument, that I made a conveyance to Andrew Reavis of this land in August, 1883. In September, 1886, a deed conveying the land to defendant D. M. Reavis and his son J. J. Reavis was sent to me, in this state, by D. M. Reavis, requesting that I execute the same and return it to him, and I thereupon executed the deed and returned it to him."

This evidence is not sufficient to enable the court to determine whether or not the land belonged to Andrew Reavis at the time of his death.

This view of the questions presented up to this point renders it unnecessary to enter into the discussion of the further question as to the competency of Andrew Reavis to execute the deed of January 29, 1886, whereby he conveyed all the land in controversy to David M. and James J. Reavis. I am of the opinion, however, that the incompetency of Andrew Reavis to execute that deed has not been established; and while the circumstances connected with the execution of the deed in question are such as, unexplained, would excite the gravest suspicions, nevertheless, when it is understood that Andrew Reavis

must have known at that time that he had no beneficial interest in the property, and that he was, presumably, ready to execute any instrument with respect thereto that his brother or nephew might require, his conduct under such circumstances appears rational, and the action of the other parties excusable, or at least explainable, on the ground that they were not endeavoring to take advantage of a person whose capacity might be questioned. It follows from these views that the cause of action stated in the bill has not been established, and the bill must therefore be dismissed.

BROWN v. ELLIS.

(District Court, D. Vermont. June 1, 1900.)

1. NATIONAL BANKS—ACTION BY RECEIVER AGAINST STOCKHOLDER—EVIDENCE.
In an action by the receiver of a national bank to recover an assessment on stock alleged to be held by the defendant as executrix, a copy of entries in the stock book of the bank showing the issuance of a certificate of stock to the estate of the defendant's testator, identified as a true copy by the deposition of the former cashier, who testified with the book before him, is admissible against the defendant to prove such entries.
2. SAME—ENTRIES IN BANK BOOKS.
As between the shareholders of a national banking association, the books of the bank are public records, and the entries therein are admissible against them, as evidence of the facts they show.
3. SAME—CERTIFICATE OF COMPTROLLER.
The certificate of the comptroller of the currency, issued to a national bank, approving a reduction of its capital stock, is in itself proof of such reduction.
4. SAME—EVIDENCE OF LIABILITY FOR ASSESSMENT—DEMAND.
The original order of the comptroller of the currency levying an assessment on the shares of a national bank, over his official signature and seal, proves itself, and fixes the liability of the shareholders from its date, no demand being necessary.
5. DEPOSITIONS—AUTHENTICATION—NAME OF COMMISSIONER.
Depositions taken under a commission issued to "A. C. Strong," a notary public of a certain county, are not inadmissible because they were taken and certified by "Alfred C. Strong," as a notary public of such county, who is shown to be the same person.
6. SAME—FEDERAL STATUTE—SUFFICIENCY OF CERTIFICATE.
Where depositions are taken for use in a federal court under the provisions of Rev. St. §§ 863-865, upon a commission issued to a notary public, it is not essential that he should attach his official seal to his certificate.
7. SAME—REDUCTION TO WRITING—WAIVER OF IRREGULARITY.
Where, in the taking of depositions for use in a federal court under the provisions of Rev. St. §§ 863-865, both parties were present by counsel, and the testimony on both direct and cross examination was taken in shorthand and reduced to writing by the stenographer in the presence of the magistrate, witnesses, and counsel, a failure to object to such proceeding, either at the time of taking or when the depositions were offered in evidence, was a waiver of the right to have them excluded because the testimony was not reduced to writing by either the magistrate or the witness, as required by section 864.
8. NATIONAL BANKS—ASSESSMENTS ON STOCK—LIABILITY OF EXECUTRIX.
An executrix is liable as such, under Rev. St. § 5152, for assessments made by the comptroller on shares of stock in a national bank held by her, and issued to the estate of her testator in exchange for shares held by the testator in his lifetime, and surrendered by her on a reduction of the capital stock of the bank.

This was an action at law by the plaintiff, as receiver, to recover an assessment on shares of stock in a national bank.

Thomas J. Boynton, for plaintiff.

Hiram A. Huse and John H. Senter, for defendant.

WHEELER, District Judge. The plaintiff, as receiver of the Sioux National Bank, of Sioux City, Iowa, sues the defendant, as executrix of the will of Jabez W. Ellis, for an assessment of 75 per cent. on 24 shares, made by the comptroller of the currency upon the shareholders. The case stands upon the general issue, and has been tried by the court upon agreement of counsel, and waiver in writing of a jury. The statutes provide:

"Sec. 5152. Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be holden in like manner, and to the same extent as the testator, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name."

The state statutes requiring claims against estates to be presented to commissioners do not apply to suits in this court. They stand as at common law. The defendant has not interposed any plea of plene administravit, or otherwise set up any lack of assets; and the liability of the defendant for the assets by this mode of pleading admitted to be in her hands is, by the force of this statute, the same as that of the testator would be if he was living. To make out this liability the plaintiff must show that the defendant holds stock as executrix, and that it has been assessed by the comptroller to this extent. To prove that the defendant holds the stock as executrix, the plaintiff offered the deposition of the cashier, which was objected to for want of form in the taking, and admitted, who testified that the capital of the bank was \$500,000, of which the testator held 40 shares, of \$100 each; that the capital was reduced to \$300,000 February 5, 1895; that the defendant returned the certificates for the 40 shares held by the testator, which he produced, and that new certificates for 24 shares were issued to "J. W. Ellis' Estate"; and that a draft of \$48 for a dividend of 2 per cent. on the 24 shares, payable to "J. W. Ellis' Estate," was sent to her, and came round indorsed by her, as executrix, as paid. The original certificate made by the comptroller of the reduction of the capital stock in the sum of \$200,000, and reciting that since the reduction it is \$300,000; a copy of part of a page of the stock ledger, showing:

Date.	No. Cert.	Name.	Residence.	No. Shares.
Mar. 5, '95	889	J. W. Ellis' Estate	Montpelier, Vt.	24

—And a stub of certificate No. 889, dated March 5, 1895, and issued to J. W. Ellis' estate,—are attached to the deposition. This was all objected to, in many and all necessary forms, as incompetent, irrelevant, and immaterial, at the time of the taking of the deposition, and the objections are insisted upon now. The original certificates issued to the testator, of themselves, show that he was in his lifetime the holder of the 40 shares. By section 5143, Rev. St. U. S., the reduction of the capital would become valid only upon the approval of the comp-

troller obtained. His certificate of approval, obtained by the bank, of itself proved the reduction. The reduction of the capital, and of the number of shares of each shareholder proportionately, would not change the assets of the bank, nor the proportionate shares of the shareholders, respectively, in the assets or liabilities; but only the number of shares of each would be reduced proportionately, leaving the proportion of each to the whole the same as before. When the testator and the defendant, as executrix, held 40 shares of a capital of \$500,000, they had $\frac{1}{1250}$ part of the bank; and when she held the same shares, reduced to 24, of a capital reduced to \$300,000, she had the same share,— $\frac{1}{1250}$ part of the bank. She has, as executrix, held after him the same share in the bank, in the same right, all the while. If the capital had not been reduced, an assessment of only 45 per cent. on the par value of each share would have been needed. One of 75 per cent. on the par value of the reduced number of shares produces the same sum. The books of the bank are, among the shareholders, public records, and evidence of what they show. The entry from the stock ledger was testified to by the former cashier, with the book before him, and it shows that 24 shares of the reduced stock belongs to the estate of J. W. Ellis. *Hayden v. Williams*, 37 C. C. A. 479, 96 Fed. 279. The defendant, as executrix, holds all the assets of that estate, and so holds these shares. This much appears without considering the testimony of the cashier, merely as such, as to who were shareholders or otherwise, except as identifying the books and papers mentioned, and proving the copy of the entry in the stock ledger.

The original order of the comptroller, laying the assessment upon the shares, is attached to a deposition of the receiver, taken upon the same occasion and in the same manner as that of the cashier, and admitted subject to the same objections. This original order of that department of the government, under his official signature and seal, proves itself. It conclusively fixes the liability of the shareholders from its date. *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168; *Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448.

The point is made that no demand is shown. The deposition of the receiver shows a copy of a notice of the assessment, and request of payment sent by mail from the receiver to the defendant. It is objected to because the original is not accounted for. This objection may be well taken; but as no demand of or notice to the stockholders needs to be added to the order of the comptroller, to create the liability, the exclusion of the evidence of the notice will not affect it.

The principal objections to the admissibility of the depositions were that notice was given for taking them before, and a commission for taking them was issued to, "A. C. Strong, Notary Public of Woodbury County, Iowa," and they were taken by "Alfred C. Strong," as notary public of that county, and certified by him as such notary, without attaching his official seal to the certificate. The depositions were taken under the statutes of the United States. These objections were overruled, because Alfred C. Strong includes A. C. Strong, and is shown to be the same person; and the part of the statute authorizing the taking of depositions before a notary does not require a seal to its certification (section 863), and that part referring to a seal, which was followed

by the commission, only requires that the deposition and certificate be "sealed up" for transmission to the court (section 865).

The statute requires the testimony to be reduced to writing by the magistrate, or by the witness in the magistrate's presence, and by no other person, and, after it is reduced to writing, to be subscribed by the deponent. Section 864. The certificate shows the attendance of counsel for each party, and states that the depositions, as given, were "taken in shorthand and reduced to writing by my stenographer and clerk in my presence, and in the presence of such witnesses and the said counsel, and from the statements of the witness, and that the deposition of each witness was by me carefully read over to such witness, and subscribed by each witness in my presence, and in the presence of such of said counsel and parties in said cause as were in attendance." This is not such a strict compliance with the statutes as might be required, if not waived, to make a deposition so taken in invitum admissible. *Cook v. Burnley*, 11 Wall. 659, 20 L. Ed. 29. If the defendant had objected or not impliedly consented to the mode of taking followed, this objection to the admissibility of the deposition would apparently have been fatal. When this statute was passed, testimony out of court was taken down in longhand, and such a provision would be a safeguard against error and fraud. Now testimony is taken by stenographers and written out with quite as much safety. The defendant not only did not object to this method, but took part in it by cross-examining the witnesses, and having their cross-examination taken down in the same way. This was a waiver then, and the failure to object on this ground when the deposition was offered would be a waiver now. To hold otherwise, and exclude the evidence now, would leave the plaintiff without proof upon the points covered by the depositions, and, in justice, would require a continuance of the case to afford an opportunity to supply it.

These questions arising upon the depositions are technical, and related only to matters which might be supplied if excluded. The most important one, relating to the right of recovery, is whether shares standing in the name of an estate, merely, and not to any person, are so assessable as to create a liability at law. If these shares had been acquired by the executrix anew, and placed upon the books of the bank in the name of the estate, merely, there might be difficulty in maintaining an action for an assessment upon them; for, as they would never have been shares of the testator, they might not be held by her as executrix. The original shares were, however, held by the testator, and came to and were held by the defendant as executrix, and have always been so held by her in the right to which the statutes in terms applies, changed merely in number. The liability is placed by the statute upon the holding derived from the testator, and is limited to assets of the estate, as any liability of an executor for an obligation of the testator is limited at common law. The personal judgment follows only upon the admission of assets made by the pleading. Judgment for plaintiff.

DIAMOND GLUE CO. v. UNITED STATES GLUE CO.

(Circuit Court, E. D. Wisconsin. May 8, 1900.)

1. FOREIGN CORPORATIONS—STATE REGULATION—VALIDITY OF CONTRACTS.

A statutory enactment within the power of a state, which prohibits the transaction of business therein by foreign corporations except upon compliance with certain conditions, invalidates any contract entered into in violation of the statute, so that the contract cannot be enforced by any court administering the law in such state; and, where the prohibition is plain, this rule governs equally with or without express terms in the statute declaring the invalidity.

2. SAME—EFFECT OF FAILURE TO COMPLY WITH STATUTE.

A state statute prohibited any foreign corporation from transacting any business in the state without first complying with its requirements as to the filing a copy of its charter, etc., and further provided that any contract made by such a corporation affecting its personal liability or relating to property in the state before compliance should be wholly void on its behalf, but enforceable against it. After the enactment of such statute, but before it went into effect by its terms, a foreign corporation entered into an executory contract to be performed within the state. *Held*, that the statute, on taking effect, became applicable to anything done or to be done under the contract by such corporation thereafter, and constituted a defense to an action by the corporation for a breach of the contract by the other party by refusing to continue operations under it, such corporation having failed to comply with the requirements of the statute.

3. COMMERCE—RESTRICTION ON POWERS OF STATES—CONTRACT.

A contract to operate a factory and market the product on joint account is not one relating to interstate commerce in a constitutional sense, so as to exempt it from the operation of state laws, merely because the article manufactured is largely sold in other states.

At Law. On demurrer to matter set up in the answer of defendant as barring the action.

The plaintiff is an Illinois corporation, and the complaint alleges as a cause of action breach of a contract entered into between the parties which bears date June 25, 1898, providing, in substance, for the erection by the defendant, a Wisconsin corporation, of a glue factory, near Milwaukee, Wis., which was to be supervised and operated by the plaintiff for the defendant, through the officers and superintendent furnished by the former, for the term of five years from the completion of the plant; the plaintiff to have the handling and sale of the entire output, guarantying payment of such sales, and retaining a percentage on both sales and profits. In consideration of such arrangement the plaintiff, having numerous factories in various states engaged in manufacturing glue, with numerous branches and connections, and extensive experience in manufacture and trade, agreed to supervise the plans for the factory, and give to it the benefit of all its labor-saving devices, and of its knowledge and experience in the business, and should refrain from "manufacturing either hide or calf glue at any of its said factories" after the defendant's plant became operative. The complaint alleges the completion of the plant on or about July 25, 1899, with performance on the part of the plaintiff as agreed, and that it thereafter refrained from the manufacture of hide and calf glue, and closed down its factories theretofore engaged in such manufacture, and at great expense fitted one of them for the manufacture of other kinds of glue, and proceeded with the management of the business of the defendant's plant in accordance with said agreement up to December 2, 1899, when said defendant refused to permit further performance, to the damage of the plaintiff \$200,000. The answer states various matters by way of defense, but demurrer is interposed to that portion only which sets up the invalidity of the contract by reason of noncompliance by the plaintiff with the provisions of section 1770b of the Revised Statutes of Wisconsin for the year 1898, which prohibits

any foreign corporation from transacting business or acquiring or disposing of property in the state until it shall have filed in the office of the secretary of state "a duly-authenticated copy of its charter, articles of association or incorporation," and "all amendments thereto which may be made while it shall continue to do business therein"; such filing to have the effect of constituting "the secretary of state its true and lawful attorney upon whom all summons, notices, pleadings or process in any action or proceeding against it may be served in respect to any liability arising out of any business, contract or transaction in this state," to "continue in force irrevocably so long as any liability" remains outstanding in the state. Penalties are prescribed for violations of the statute, and it is further provided that "any contract made by or on behalf" of such corporation "affecting the personal liability thereof, or relating to property within the state" before compliance, "shall be wholly void on its behalf," but enforceable against it. This provision is contained in the revision of 1898, enacted at a special session in August, 1897, approved August 20, 1897, and made to go into effect September 1, 1898. The answer avers that prior to September 1, 1898, the defendant "had transacted no business with others than its members, except partially planning and making certain contracts for the construction of its said factory, and acquiring a site therefor, and that practically all things which were done or attempted to be done by the said plaintiff" under the contract in question were done by it after that date.

Miller, Noyes, Miller & Wahl, for plaintiff.
Quarles, Spence & Quarles, for defendant.

SEAMAN, District Judge. As stated in *Hooper v. State of California*, 155 U. S. 648, 652, 15 Sup. Ct. 207, 209, 39 L. Ed. 297, 299, the principle is well established "that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state," and the exceptions to the rule "embrace only cases where a corporation created by one state vests its right to enter another, and to engage in business therein, upon the federal nature of its business." A corporation is an artificial being, the mere creature of local law, and has no legal existence beyond the locality of its creation. Recognition of its existence in other states and enforcement of its contracts made therein rest upon comity, and not upon inherent right. *Bank v. Earle*, 13 Pet. 519, 588, 10 L. Ed. 274; *Paul v. Virginia*, 8 Wall. 168, 181, 19 L. Ed. 357. Dependent upon assent of the state, express or implied, it is clear that the assent may be granted upon such terms as the legislature may impose (*Paul v. Virginia*, *supra*), and that an enactment within the power of the state which prohibits the transaction of business therein by foreign corporations except upon compliance with certain conditions invalidates any contract entered into in violation of the statute, so that the contract cannot be enforced in any court administering the law in such state (*Manufacturing Co. v. Ferguson*, 113 U. S. 727, 733, 5 Sup. Ct. 739, 28 L. Ed. 1137, and cases cited). Where the prohibition is plain, this rule governs equally with or without express terms in the statute declaring the invalidity of the contract. *Bank v. Owens*, 2 Pet. 527, 539, 7 L. Ed. 508, and citations in 2 Notes on U. S. Reports, p. 870; *Miller v. Ammon*, 145 U. S. 421, 426, 12 Sup. Ct. 884, 36 L. Ed. 759; *Insurance Co. v. Harvey*, 11 Wis. 394, 396. Upon these premises the matter set up in the answer states a good defense, unless the statute referred to is inapplicable to the contract of which breach is alleged in the com-

plaint. This contract was entered into after the enactment of the statute, but before its inhibition became operative. It is manifest, therefore, that the contract was not void ab initio, as the statute is not retrospective in terms, and cannot be made retroactive by construction. The transaction of business by the plaintiff in Wisconsin was not made unlawful until the statute went into effect on September 1, 1898, and in the event of its qualification for a continuance of business by compliance with the statute no question could exist of its right to perform the contract, nor of the obligation of the defendant thereunder, so far as affected by this statute. But the contract as made was entirely executory, and its performance related to the management and control by the plaintiff of the proposed factory and its products after completion of the plant, and necessarily after the date then fixed for the statute to go into effect. The contention of the plaintiff is, in effect, that by the making of the contract before September 1, 1898, and entry upon performance with the preliminary advice and supervision of plans on its part, the statute became inapplicable to the transaction of business thereunder by the plaintiff during the term of the contract; in other words, that the doctrine of noninterference with contract obligations enabled the plaintiff to thus evade the impending prohibitory statute at will by means of its agreement previously entered into to that end. However the rule may be in reference to preserving rights, if any there be, which accrued through executed terms of the contract so made, it is clear that the statute cannot be thus set aside by the act of the parties, and that its provisions took effect on September 1, 1898, and incapacitated the plaintiff to transact business thereafter in the state, except on submission to the requirements of the statute; that performance became illegal without such compliance on the part of the plaintiff; and that refusal by the defendant to carry on the transactions in deliberate violation of the statute constituted no actionable breach of the contract. The complaint alleged as the first breach the refusal of the defendant to continue the arrangement on and after December 2, 1899. It rested with the plaintiff to fulfill the simple requirements of the statute, and become qualified for performance; and whether its failure in that regard, unless excusable, would constitute a breach on its part, need not be determined. It is sufficient that performance became illegal without fault or concurrence on the part of the defendant, and in such view the answer states a good defense. The further contention on behalf of the plaintiff that the statute, thus interpreted, is obnoxious to the interstate commerce provision of the constitution, is not deemed tenable. The fact that the products of the factory are largely sold and shipped to other localities does not make the contract in question a transaction of interstate commerce in the constitutional sense. The demurrer is overruled, without passing on the further question, argued on behalf of the defendant, as to the nature of the contract. So ordered.

BANK OF PALO ALTO v. PACIFIC POSTAL TEL. CABLE CO.

(Circuit Court, N. D. California. July 11, 1900.)

No. 12,760.

1. PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL FOR TORTS OF AGENT—SCOPE OF AGENCY.

Where it was a part of the regular business of a telegraph company to transmit money-order messages between banks, such company is liable, both under the general principles of law, and under Civ. Code Cal. § 2338, relating to the liability of principals, to a bank for a loss occasioned by its payment, without negligence, of such an order which was forged and transmitted in the usual manner, and through the company's regular agents, by an operator in its employ whose duty it was, under his employment, to transmit such messages. In such case the act of the agent in transmitting the false message, although fraudulent and unauthorized by his principal, was within the apparent scope of his employment, and, if the message had been genuine, would have been within his actual authority, and it was only by reason of his employment that he was enabled to consummate the fraud.

2. SAME—EXEMPLARY DAMAGES.

A principal, though liable to make compensation for the willful and fraudulent acts of an agent done within the scope of his employment, cannot be subjected to exemplary or punitive damages on account of such acts.

3. DAMAGES—CONVERSION—ATTORNEY'S FEES.

Under Civ. Code Cal. § 3336, providing that the damages recoverable for wrongful conversion shall include "a fair compensation for the time and money properly expended in pursuit of the property," reasonable attorney's fees properly expended by one in recovering a large part of a sum of money obtained from him through the fraud of another's agent, for which the principal is liable, are recoverable as an element of compensatory damages in an action against the principal.

Action at law for the recovery of money paid out on a fraudulent telegraphic order, and to obtain damages for fraudulent conversion.

Joseph Hutchinson, for plaintiff.

Lloyd & Wood, for defendant.

MORROW, Circuit Judge. This is an action at law brought by a California corporation, as plaintiff, to recover from a New York corporation, as defendant, (1) a sum of money paid out by the plaintiff upon a fraudulent telegraphic order sent over the defendant's wires by an employé of the defendant; (2) the amount expended by the plaintiff in counsel fees and sundry expenses incurred in the endeavor to recover the money; and (3) to obtain punitive damages. The suit was first brought in the superior court of the state of California for the county of Santa Clara. Thereafter the cause was removed to this court upon the petition of the defendant, stating the diverse citizenship of the parties and the jurisdictional amount in controversy. The suit was the outgrowth, as disclosed by the pleadings and proofs, of the following circumstances: On December 27, 1898, the plaintiff was carrying on a banking business in the town of Palo Alto, in this state; and the defendant was conducting the business of a telegraph company in California, with offices at Los Angeles, San Francisco, and Palo Alto, and other cities and towns. At about noon of the day mentioned, a telegram was received by the plaintiff, through the agent of the defendant at Palo Alto, dated at Los Angeles, Cal., December 27, 1898,

and reading: "To Bank of Palo Alto: Please pay Harry L. Cator eight hundred and forty dollars. Waive identification. We remit to-day. Farmers' and Merchants' Bank." Several times during the morning a man giving the name of Harry L. Cator had called at the bank and asked if a telegraphic order in his favor had been received; and he had at one time exhibited to the cashier of the defendant bank a telegram, written upon one of the ordinary blanks of the defendant, and in the handwriting of the agent of the defendant at Palo Alto, dated at Los Angeles, Cal., December 27, 1898, in these words: "To Harry L. Cator: Money sent through bank to-day. J. H. Fisher." A few minutes after the receipt by the defendant of the aforesaid telegraphic order, the man representing himself as Cator called at the bank, and was, without further identification, paid the amount specified in the telegram. The evidence shows that Cator, after receiving the \$840, went at once to San Francisco, and there acted in such a manner as to attract the attention of the police department, with the result that he was arrested that evening. On the following day his arrest was reported to the plaintiff. The plaintiff then made inquiry of the Farmers' & Merchants' Bank of Los Angeles, and learned that the telegraphic order on which the money had been paid was forged. It then instructed its attorney in San Francisco to take such steps as were necessary to recover the money, if it could be recovered. The attorney, acting with the police department, gave considerable attention to the matter, with the result that a confession was obtained from Cator that the money had been fraudulently secured by him, through a conspiracy between himself and one Minkler, a telegraph operator in the employ of the defendant at San Francisco. Cator then made an assignment of the amount still in his possession, some \$788, to the plaintiff. This assignment and the \$788 were left in the hands of the chief of police of San Francisco for some five or six months, pending a settlement between the parties. In June, 1899, by agreement, the amount was turned over to the plaintiff. Various other services were rendered by the plaintiff's said attorney in the endeavor to recover the entire \$840, for all of which services he was paid by the plaintiff the sum of \$250. Plaintiff now seeks to recover the entire sum of \$840 paid out upon the fraudulent telegram, with interest; the sum of \$250, counsel fees, as aforesaid; and the further sum of \$28.34, alleged to have been expended in the pursuit of said money; also, \$1,000 by way of punitive damages,—aggregating \$2,118.34.

The first question to be determined is whether, under the facts of the case, the telegraph company is responsible for the wrongful act of its employé in sending the false telegram. It appears that the defendant was holding itself out to the public as a telegraph company, and that the plaintiff bank had dealt with it in that capacity; that a part of its transactions with the defendant consisted in the paying out by the bank of money upon telegraphic orders received through the agent of the defendant at Palo Alto. In the San Francisco office of the defendant one Minkler was employed as an operator, and, among his duties, he was authorized to transmit the telegraphic money orders to operators employed by the defendant in other towns, including the one at Palo Alto; these operators having no knowledge of the origin

of the telegrams, other than that received from the operators in the San Francisco office. To the mind of Minkler, an opportunity was thus presented for fraudulently obtaining money. He concocted the message with which this suit is concerned, in simulation of those often passing through his hands, and transmitted it to the operator at Palo Alto as a genuine telegram from the Farmers' & Merchants' Bank of Los Angeles. There was nothing in the message or in the manner of its transmission to indicate to the operator there that it was not genuine, and it was therefore delivered to the plaintiff in the customary manner. Minkler's accomplice, a man representing himself as the payee mentioned in the telegram, presented himself at the bank to receive the money, exhibiting to the bank officials another telegram, purporting to come from Los Angeles over the defendant's wires, saying that the money had been sent that day. Although the telegraphic order particularly waived identification of the payee, the cashier of the bank took the precaution to make inquiries of the telegraph operator at Palo Alto as to whether the telegram was all right, and received a reply in the affirmative. He then paid the money to the supposed payee mentioned in the telegram. Plaintiff contends that the defendant is responsible for these acts of Minkler, under the law as contained in section 2338 of the Civil Code of California. This section provides that:

"Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business."

In support of this principle, plaintiff cites the cases of *Bank of California v. W. U. Tel. Co.*, 52 Cal. 280; *McCord v. Telegraph Co.*, 39 Minn. 181, 39 N. W. 315, 1 L. R. A. 143; and *Elwood v. Telegraph Co.*, 45 N. Y. 549, 6 Am. Rep. 140. The first of these cases presents a state of facts very similar to those involved in the case at bar. The regularly appointed agent of the telegraph company at Colusa, Cal., employed a man by the name of Crowell to assist him in his duties. Crowell frequently received and transmitted dispatches over the wires of the company in the place of the regular agent. During the absence of the agent he sent a false telegram to the Bank of California, in San Francisco, to pay Charles H. Crowley \$1,200 in gold, signing the telegram, "W. P. Harrington, Cashier." Harrington was then cashier of the Colusa County Bank, and frequently sent similar messages to the Bank of California. Crowell then went to San Francisco, procured a resident of San Francisco, who had made his acquaintance in Colusa, to go with him to the bank and identify him, and secured the money; the friend identifying him not noticing the difference between the names Crowley and Crowell. The court held that, if the fraudulent acts committed by Crowell had been done by the regularly appointed agent of the company, the company would have been liable, and that the principal was equally responsible, whether the placing of Crowell in charge by the agent was a wrongful act committed as a part of the transaction of the business, or was mere negligence, under the requirements of public policy.

The next case (*McCord v. Telegraph Co.*, 39 Minn. 181, 39 N. W. 315, 1 L. R. A. 143) follows the same rule. There the regularly appointed telegraph operator himself forged the telegram and secured the money. The court held the telegraph company responsible, under the rule that:

"Where the business with which the agent is intrusted involves a duty owed by the master to the public or third persons, if the agent, while so employed, by his own wrongful act occasions a violation of that duty, or an injury to the person interested in its faithful performance by or on behalf of the master, the master is liable for the breach of it, whether it be founded in contract, or be a common-law duty growing out of the relations of the parties. 1 *Shear. & R. Neg.* (4th Ed.) §§ 149, 150, 154; *Tayl. Corp.* (2d Ed.) § 145. And it is immaterial in such case that the wrongful act of the servant is in itself willful, malicious, or fraudulent."

The third case (*Elwood v. Telegraph Co.*, 45 N. Y. 549) was a suit brought to recover damages against the telegraph company for having paid \$10,000 on the faith of a fraudulent message transmitted to the plaintiffs. It was not determined as a fact that the operator of the defendant company was a party to the fraud; it being claimed by the telegraph company that the wires had been used by some outside party unknown to the agent, and the fraud thus accomplished. But the court held that:

"The act was done in the direct course of the employment of the agent. The agent was placed in the office, and in the control of the instruments, to use them in transmitting messages for a compensation. If the agent performed that duty in a negligent manner, whereby the plaintiff was injured, the principal is clearly liable. Transactions of the most important character are daily carried on by means of telegraphic communication, and the confidence which the public is invited to and does repose in the care with which the proprietors of these lines conduct the business is a source of large remuneration to such proprietors. They incur a corresponding degree of responsibility, and must be held to the exercise of such care and caution as it is in their power to employ, in order to avoid being made the instruments of deception and fraud."

It is contended by the defendant, on the other hand, that the act of Minkler was willful, wanton, and criminal, not committed in the service of the defendant, and not within the line of Minkler's duty or the scope of his employment, and therefore that the defendant should not be held liable. It is claimed that the California case cited by plaintiff (*Bank of California v. W. U. Tel. Co.*, 52 Cal. 280) is distinguished from the one at bar, in that the negligence of the regular agent of the telegraph company in allowing another to transact the business of the company was the underlying basis of the action, and that anything said by the court as to the liability of the company if the fraudulent act had been committed by the regular agent was wholly outside of the case, and must be considered as dictum. In support of this contention the defendant cites a later decision by the same court, in the case of *Stephenson v. Southern Pac. Co.*, 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, in which it claims a different rule of law is announced, as follows:

"The rule is, of course, well settled that the master is civilly liable for the wrongful or negligent act of the servant committed while in his service, and within the scope of his employment; that is, in the transaction of the master's business. And the converse of the rule is equally well settled,—

that when a servant acts without any reference to the service for which he is employed, and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the master is not responsible in that case for either the act or omission of the servant."

And in substantiation of this statement the court says:

"The rule of law which makes the master liable to respond in damages for the act or omission of the servant 'implies that the master will not in any case be liable for wrongs committed by the servant while not acting within the scope of his authority. This rule is so reasonable that the grounds on which it rests need scarcely be suggested. In all the affairs of life, men are constantly obliged to act by others, but no one could venture to so act if the mere circumstance that he employed another to act for him about any general or particular business made him an insurer against all wrongs which such person might possibly commit during the period of such employment. * * * In other words, if the servant steps aside from his master's business, for how short a time soever, to commit a wrong not connected with such business, the relation of master and servant will be for the time suspended. 2 Thomp. Neg. 885, 886.'"

Upon the state of facts presented in that case, the court decided that the employé committed a wanton act, entirely without the scope of his authority. Having reached that decision upon the facts, the application of the rule of law just quoted was undoubtedly correct. And, following that order of investigation in the case at bar, the question arises, was the employé, Minkler, acting within the scope of his authority when he committed the act complained of? In the case of *Reynolds v. Witte*, 13 S. C. 5, 36 Am. Rep. 678, an agent had fraudulently misappropriated negotiable collaterals deposited with him on a loan of his principal's money; and it was argued that, while masters are responsible for injuries done by the negligence of their servants while acting within the scope of their employment, they are never liable for injuries willfully committed, where the agents have other purposes than executing their masters' orders. The court, in discussing the question of the "scope of agency," said:

"It is difficult to understand upon what ground the principal should be held liable for the negligence of his agent, and not for his fraud, where the act is done or omitted to be done to the very property as to which the agency exists, and in the course of the agency. Fraud by which the property is lost is generally considered one of the forms of gross negligence. What is the proper understanding of the phrase 'within the scope of the agency'? Does 'the scope' include negligence and exclude fraud? It cannot properly be restricted to what the parties intended in the creation of the agency; for that would also exclude negligence, as no agent is appointed for the purpose of being negligent, any more than for the purpose of acting fraudulently. The question cannot be determined by the authority intended to be conferred by the principal. We must distinguish between the authority to commit a fraudulent act, and the authority to transact the business in the course of which the fraudulent act was committed. Tested by reference to the intention of the principal neither negligence nor fraud is within 'the scope of the agency'; but, tested by the connection of the act with the property and business of the agency, fraud in taking the very property is as much 'within the scope of the agency' as negligence in allowing others to take it. The proper inquiry is whether the act was done in the course of the agency, and by virtue of the authority as agent. If it was, then the principal is responsible, whether the act was merely negligent or fraudulent."

The same reasoning is followed in the case of *Dougherty v. Wells, Fargo & Co.*, 7 Nev. 368, 373, where the plaintiff delivered an old certificate of deposit to the agent of the express company for the purpose of having it sent to San Francisco to be renewed, and the agent fraudulently procured it to be cashed, and appropriated the money to his own use. The court held that the express company was liable, for the following reasons:

"The liability, however, in such case arises not upon the rule that the agent acted for the principal in that particular transaction, but because he is employed by the principal in that character of business, and is so held out as a person authorized and fully to be trusted therein. When the agent in such case does an act which is apparently within the general scope of his authority, although not so in fact, if the principal were not held liable for the act, a third person, who had reason to believe that the agent was reliable, and possessed authority in the particular matter, from the general character of his employment, might suffer loss. Hence the law holds the principal liable, upon the ground that he, rather than a third person equally innocent, should suffer."

Cooley, in his work on Torts (2d Ed.), very tersely states the rule governing this class of cases, on page 629, as follows:

"The test of the master's responsibility is not the motive of the servant, but whether that which he did was something his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name."

Viewing the facts of the case at bar in the light of the doctrines above enunciated, it is apparent that, although the act of Minkler in reality exceeded the scope of his employment, as contemplated by his employer, it was an act which would have been lawful if it had been honest. It was committed while he was engaged in and about the business assigned to him, and it was by reason of such assignment, and the character of the duties he was required to perform, that he was enabled, with the assistance of a confederate, to commit the fraud upon the plaintiff. The business with which he was intrusted involved a duty owed by the telegraph company to the public,—a duty which third persons dealing with the telegraph company in good faith were warranted in presuming would be faithfully performed. And, although the defendant's employé acted in violation of this duty and of his authority, yet the defendant would be held responsible, on account of its own obligation to the parties dealing with it. This principle is well stated in *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 195, 12 N. E. 433, and cases cited,—that, where an agent has been clothed by his principal with power to do an act, in case of the existence of some fact peculiarly within the knowledge of the agent, and where the doing of the act is in itself a representation of the existence of that fact, the principal is estopped from denying its existence, as against third parties dealing with the agent in good faith, and in reliance upon the representation. In the present case the plaintiff bank took the precaution to make special inquiry of the defendant's agent at Palo Alto as to the correctness of the telegraphic order in controversy, and, upon receiving an affirmative reply, relied upon such repre-

sensation, and acted accordingly. No further care or caution was obligatory upon it. If it had telegraphed to the purported sender of the message at Los Angeles, the telegram would probably have passed through the hands of the same operator in San Francisco, and the fraud could have been repeated. If inquiry by mail had been resorted to, the acknowledged object of the telegraphic service would be defeated, as no saving of time would be accomplished. Under such circumstances as these, if the principal could secure immunity from the fraudulent acts of its agent, the confidence and security necessarily reposed in the operations of telegraph companies would be utterly destroyed, and their service in transactions of importance be rendered worthless, as public corporations of that character would serve as a too ready means of subterfuge for the weak and criminal minded. Minkler was acting within the line of his known powers, and any loss arising from his dishonesty, when acting within the apparent scope of his agency, should be borne by those who enabled him to perpetrate the fraud, rather than by those who innocently suffered. *Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank*, 38 C. C. A. 108, 97 Fed. 181, 186.

The next question relates to the measure of damages. The plaintiff claims that, in addition to compensation for the actual loss suffered, it should be awarded punitive damages. Exemplary or punitive damages are always penal in theory, and are only imposed for the sake of punishment, or by way of example, in addition to compensatory damages, where the defendant has acted with malice or guilty intention. While the employé of the defendant in the present case is shown to have acted with intent to defraud in sending the forged telegram, he is personally punishable for that crime; and there the punishment must cease, as the defendant neither authorized nor ratified the employé's act, and cannot be held liable in exemplary damages, upon the principle that no person should be punished for that of which he is not guilty. This question is thoroughly discussed in the case of *Railway Co. v. Prentice*, 147 U. S. 101, 107, 13 Sup. Ct. 261, 37 L. Ed. 97, and the rule there announced has been unvaryingly followed in the consideration of similar cases. *Railway Co. v. Russ*, 6 C. C. A. 597, 57 Fed. 822; *McGehee v. McCarley*, 33 C. C. A. 629, 91 Fed. 462. Mr. Justice Gray said:

"Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though, of course, liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. * * * In *Keene v. Lizardi*, 8 La. 26, 33, Judge Martin said: 'It is true, juries sometimes very properly give what is called "smart money." They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct. But this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent.'"

Many cases from the various state courts are cited to the same effect. And, applying this rule to corporations as well as to indi-

viduals, the early case of *Hagan v. Railroad Co.*, 3 R. I. 88, 91, is cited, as follows:

"In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such willfulness, recklessness, or wickedness on the part of the party at fault, as amounted to criminality, which, for the good of society and warning to the individual, ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment, and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal, and make him particeps criminis of his agent's act. No man should be punished for that of which he is not guilty. * * * Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant."

The only injury that plaintiff, in its banking business, can have suffered by reason of the detention of its property, is the expense incurred in its recovery, and the loss of interest on the amount detained; and therefore the only damages that could be awarded would be in the nature of compensatory damages, comprising in amount the money originally paid out on the fraudulent telegraphic order, interest thereon until recovery, and the outlays in the pursuit of the recovery of the property. Civ. Code Cal. § 3336. In the latter class of expenditure the plaintiff includes \$250 paid out to its attorney as compensation for his services in the endeavor to recover the lost money prior to the commencement of this action. Section 3336, subd. 2, of the Civil Code of California, providing the measure of damages for detriment caused by the wrongful conversion of personal property, includes "a fair compensation for the time and money properly expended in pursuit of the property." The question whether this "compensation" may include counsel fees has not been clearly decided by the state court in its interpretation of this section, though in some instances such fees have been allowed as proper and necessary expenditures (*McDonald v. McConkey*, 57 Cal. 325; *Greenbaum v. Martinez*, 86 Cal. 459, 25 Pac. 12), even where expended in the prosecution of the action for damages. The principle is not only just in equity, however, but sound in law, that all the actual damages to which a party may be put by the fraud of another should be recoverable. From the evidence in the case at bar, it is clear that the attorney rendered services to the plaintiff of the reasonable value of \$250; that these services were largely instrumental in establishing the guilt of defendant's employé, and in saving the greater portion of the stolen money for the rightful owner, whoever that might be adjudged to be. The necessity for paying such counsel fees arose from the fraud of the defendant, through its employé, and the payment thereof is an actual damage the plaintiff has sustained. Under these circumstances, it is certainly "money properly expended in pursuit of the property," and recoverable, under section 3336 of the Civil Code. Let a judgment be entered in accordance with this opinion.

In re RICHARDS.

(District Court, N. D. New York. September 20, 1900.)

BANKRUPTCY—FAILURE TO SELECT TRUSTEE—APPOINTMENT BY REFEREE.

It is proper for a referee to require a letter of attorney before allowing another to vote on the claim of a creditor in the election of a trustee, and, when the creditors in attendance cannot make a selection,—a majority in number voting for one person, and a majority in amount for another,—to himself appoint the person favored by a majority of the creditors.

In Bankruptcy. On petition to review the action of the referee in appointing a trustee.

Eugene D. Flanigan, for petitioner.

COXE, District Judge. Strictly speaking, there is nothing for the court to decide, as the referee has not certified the question presented, but as this omission can probably be supplied, the matter may as well be disposed of without further delay. The controversy arises over the action of the referee in appointing a trustee after the creditors had failed to make a choice, a majority in number voting for one person and a majority in amount for another. The dissatisfied creditor insists that the referee erred in appointing the candidate of the majority in number. He also objects to the action of the referee in refusing to permit his attorney to vote at the meeting without producing a written proxy. The meeting was adjourned to enable the attorney to procure the necessary written authority, and as he did not return at the expiration of the stipulated time it was clearly in the discretion of the referee to proceed with the meeting without further delay. His action in requiring the production of a written letter of attorney was proper. In re Blankfein (D. C.) 3 Am. Bankr. R. 165, 97 Fed. 191. It seems, however, that the vote of the objecting creditor was received and considered by the referee, and that he decided to break the deadlock by appointing the trustee supported by the majority in number. He thought, and rightly thought, that further delay would be injurious to the interests of the creditors. It is manifest that he acted entirely within the scope of his duty in making the appointment. Creditors by disagreeing cannot block the administration of the estate. In re Kuffler (D. C.) 3 Am. Bankr. R. 162, 97 Fed. 187. Section 44 of the act expressly provides that if the creditors do not appoint a trustee the court shall do so, and section 56 limits the voters at the meeting to those whose claims are proved and who are actually in attendance. The referee was not called upon to consider the claims of creditors who were not present. There is nothing to show that the trustee is not a perfectly proper person to act. Vague and inconsequential accusations are made, but nothing is said affecting his ability or integrity which will justify the court in overruling the decision of the referee. The action of the referee is confirmed.

In re LEWIN.

(District Court, D. Vermont. July 21, 1900.)

No. 63.

1. **BANKRUPTCY—PETITION BY TRUSTEE AGAINST ATTORNEYS—SUFFICIENCY OF NOTICE.**

Under Bankr. Act 1898, § 60d, which requires a court of bankruptcy, on petition of a trustee, to re-examine a transaction by which the bankrupt, prior to the filing of a petition by or against him, paid money or transferred property to any attorney, and to order a repayment of any amount paid, beyond a reasonable fee, a proceeding for that purpose, had on petition of the trustee, is one administrative in character, in which the jurisdiction of the court is not dependent on the service of regular process, as in a suit, but is expressly given by the statute; and a notice of a hearing therein before a referee, given by mail to the attorneys interested, a reasonable time before such hearing, is sufficient.

2. **SAME—REFEREES—FURNISHING COPIES OF PROCEEDINGS.**

Referees in bankruptcy are required by Bankr. Act 1898, § 39a, cl. 3, to furnish parties in interest with such information as may be requested, as to proceedings before them, but they are not required to furnish copies of such proceedings; and the jurisdiction of a referee to proceed with a hearing on a reference made by the court is not affected by his refusal to furnish a party, on demand, with a copy of the petition on which the hearing is based, and of the order of reference.

In Bankruptcy. Proceedings on petition of trustee against attorneys to recover money paid them by the bankrupt.

Marshall Montgomery, for trustee.

Bates, May & Simonds, for attorneys.

WHEELER, District Judge. The bankrupt act provides (section 60d):

"If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

The trustee has preferred such a petition as to a firm of attorneys for the bankrupt, which was specially referred to the referee to find and report the facts, on notice to the attorneys named and the trustee. The report shows that the petition was shown by the referee to one of the attorneys before the reference; that 10 days' notice was given by the referee by mail (all in the same village) to the attorneys and the trustee, after the reference, of the reference and the time and place of hearing; that the attorneys, by mail, required of the referee "a copy of the complaint and order of court," and were by mail informed that the petition was the one examined before by one of them, which they could have, to examine, at any time they should wish to call for it; that one of the attorneys appeared at the hearing, denying the jurisdiction of the court, and suggesting in writing that the report show that no copy of the petition was ever given to any member of the firm of attorneys, that the evidence be sent up with any finding that might be made, and that the purpose of the suggestions was to avoid any

admission of jurisdiction. The referee complied with these suggestions, and reported that no copy of the petition or reference was furnished, and upon the evidence reported the finding that the bankrupt, after the petition and schedules were drawn, and before they were filed, gave the attorneys an order for wages, when due him, on which they soon after received \$82.65. The matter has now been heard upon the report, and the principal points made by the attorneys are as to the jurisdiction of the court, and the sufficiency of the notice of the hearing before the referee; and the case of *Bardes v. Bank*, 175 U. S. 526, 4 Am. Bankr. R. 163, 20 Sup. Ct. 1000, Adv. S. U. S. 1000, 44 L. Ed. —, is especially relied upon as to the general jurisdiction of the court; and that of *In re Rosser* (C. C. A.) 4 Am. Bankr. R. 153, 101 Fed. 562, as to the regularity of the proceedings. The decision in *Bardes v. Bank*, however, was as to the effect of clause "b" of section 23 of the act, limiting the place of bringing suits by the trustee, and does not appear to have any application to such proceedings as these, in which a re-examination of such transactions as that here in question is not only authorized, but expressly required, on such a petition as the one by which this proceeding was moved. This is not a suit such as is mentioned in that clause of section 23, but is an administrative proceeding, of which the bankruptcy court has express jurisdiction, given by this clause "d" of section 60, if it would not have any by the general grant of jurisdiction over bankrupts and their estates, and of their attorneys in the proceedings, as officers of the court. This specific provision seems to have been rather intended for requiring specific vigilance in this quarter, and for providing for a recovery of any excess from the attorneys, than for any special grant of jurisdiction, which, however, it plainly gives. The course of legal proceedings necessary to be had to affect private rights is well stated by Judge Sanborn in *Rosser's Case*, cited. He says at page 159, 4 Am. Bankr. R., and page 567, 101 Fed.:

"Such a course must be appropriate to the case, and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained."

There the proceedings against the bankrupt for contempt were held bad because no such course of proceedings was taken or notice given. Here the course of proceedings was by petition of the trustee, as the statute provides, and which fully sets forth the claim made and the relief sought. The notice of it was official, from the referee having the powers of the court in this respect given by the law. The complaint is not that sufficient time was not given, but that a copy was not furnished voluntarily, nor upon requirement. Courts do not furnish copies of proceedings pending before them; and referees, as such, are not required to, but only, by section 39a, cl. 3, to furnish such information as may be requested by parties in interest. Copies of bills in equity are not served in the federal courts, but only the subpœnas, which give notice merely that the bills are on file, to be answered; and the defendants may examine them and take copies, or procure

them from the clerk on payment of fees. No one is known to have ever pretended that this was not due process of law, or would not be if the court should decline, on request, to furnish a copy. This notice appears to have been ample, proper and fair.

The attorneys appear to have preferred to stand upon the objections of want of jurisdiction and of notice, rather than upon showing what would be a reasonable amount for which the transaction should be held valid. They were entitled to a priority for one reasonable attorney's fees for the professional services actually rendered to the bankrupt in performing the duties required by the act of the bankrupt, as the court might allow. Section 63b. This does not include services in hostility to the creditors for depleting the estate, but only those about the preparation and filing of the original petition and schedules and the petition for discharge, and the like, which the bankrupt must or may make. As no claim for such services was presented for allowance, none could be allowed, and no reasonable amount for which the transaction could be held valid was made to appear; and the recovery here cannot possibly be less than for the full amount received. It may, however, be without prejudice to the payment by the trustee of such sum for proper services and expenditures as may be allowed by the court. Report accepted, and judgment on report for \$82.65, with costs, without prejudice to allowance and payment of claim for services and expenditures.

In re LEWIN.

(District Court, D. Vermont. July 28, 1900.)

No. 63.

BANKRUPTCY—DISCHARGE—MAKING FALSE OATH IN PROCEEDINGS.

A voluntary bankrupt, before filing his petition, gave his attorneys an order for a sum of money due him for wages, but not yet payable, in payment of a past indebtedness to such attorneys, for their services in the bankruptcy proceedings, and to secure the payment of an installment of alimony which he was required by a decree of court to pay to his wife. He thereafter stated in his schedule, to which he made oath, that he had paid nothing to his attorneys for their services in the proceedings, and had assigned no property for the benefit of creditors. The amount so assigned was greater than the value of the assets scheduled. *Held*, that he was guilty of making a false oath, within the meaning of Bankr. Act 1898, § 29b, which was punishable by imprisonment, and deprived him of his right to a discharge under section 14, subd. 1.

In Bankruptcy.

Bates, May & Simonds, for bankrupt.
Marshall Montgomery, for trustee.

WHEELER, District Judge. On petition for discharge. The bankruptcy law provides (section 60d) that "if a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, * * * the transaction shall be re-examined by the court." The orders and forms established by the supreme court under the law re-

quire a statement of such transactions. The law also provides (section 29b) that "a person shall be punished by imprisonment for a period not to exceed two years upon conviction of the offense of having knowingly and fraudulently * * * (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy," and (section 14) that the judge shall, on proceedings for that purpose, discharge the applicant, unless he has "(1) committed an offense punishable by imprisonment as herein provided; or," etc. The bankrupt had, available to a trustee, according to his schedules, a colt valued at \$50, and a road cart at \$15, which were put in, and, according to the report of the referee, \$82.65 due him for wages, payable afterwards, not put in. After he had concluded to go into bankruptcy, and before filing his petition and schedules, he gave an order for the amount due for wages to his attorney; and in answer to the question in Schedule B, "What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy?" he answered, "None," and made oath to that schedule, with the others, that they were a true statement of his estate. The bankrupt owed the attorneys \$10, and was under an order of court to contribute \$30 alimony monthly to his wife, one installment of which was in default. The referee has found that the order was given to secure the attorneys for the \$10; for the payment of that and the next installment of alimony, which they undertook to pay; and for their expenses and services in the bankruptcy proceedings. The same schedule contains an inquiry as to what property has been assigned for the benefit of creditors, to which the bankrupt answered, "None." The alimony may not have been a debt, nor his wife a creditor, as such, and the order, so far as it secured payment of the alimony, not have been for the benefit of a creditor; but **it** none the less would deprive the trustee of a large part of the available assets of the estate, and place it where it would go for the benefit of the bankrupt himself, and work a fraud upon the law and the creditors. He must have known that he had given the order, and have intended to produce this result; and the statement that no sum or sums had been paid to counsel must have been knowingly and fraudulently false. He could lawfully put money into the hands of the attorneys to secure them for necessary services and expenses about what the law required of him to be done; but when he had done so, and also put comparatively much more there, he could not honestly swear that he had not put any there, nor that a statement of his estate, with this fact expressly denied, was a true statement. The bankrupt law is very free about the granting of discharges, but it requires first that the sworn proceedings of the bankrupt shall be honest, and that requirement is very necessary to the proper and just administration of the law, and should not be frittered away. To say that the bankrupt had not paid any sum of money to his attorneys, because they had not then actually received any, but only an order for some; that the sum due for which the order had been given need not be put in, because that transferred it away from him; that the alimony was not a debt, the securing of which would be for the benefit of creditors; and that therefore there was no false sworn statement,—would be too transparent for a cover to the real transaction. This part of his

sworn statements appears to be knowingly and fraudulently dishonest and false. He could not lawfully go into bankruptcy, and attempt to save his assets for his own benefit in this manner, and still be entitled to a discharge. Discharge denied.

ST. CYR v. DAIGNAULT et al.

(District Court, D. Vermont. September 5, 1900.)

BANKRUPTCY—JUDGMENTS AGAINST BANKRUPT—EFFECT OF ADJUDICATION.

Under Bankr. Act 1898, § 67f, which provides that all attachments, judgments, etc., taken against an insolvent within four months prior to the filing of a petition in bankruptcy against him are "to be deemed null and void in case he is adjudged a bankrupt," a judgment so taken is rendered void for all purposes by the adjudication, and no proceedings can ever be had thereon, even in case the bankrupt is refused a discharge, but the creditor is remitted to his original cause of action.

In Bankruptcy. On application for stay of proceedings on judgments against the bankrupt.

Hiram P. Dee, for bankrupt.

C. G. Austin, for defendant.

WHEELER, District Judge. The defendants have taken judgments by default, since the adjudication of bankruptcy, in trustee suits commenced before, and claim the right to proceed upon the judgments hereafter, in case of failure of the bankrupt to obtain a discharge. They can, of course, proceed upon their original causes of action, in case of such a failure; but the judgments, if valid, would be new causes of action arising after the adjudication, and could be proceeded upon at any time, against after-acquired property. But such judgments are, by the express provision of the bankrupt act (section 67f), "to be deemed null and void in case he is adjudged a bankrupt," and not merely in case the bankrupt is discharged; and there is no event upon which the plaintiffs can be entitled to proceed upon these judgments, as such, against the bankrupt. They are now, by force of the act, left to their original causes of action, which will be barred or not according to whether a discharge shall or shall not be granted. All proceedings upon the judgments should therefore be permanently stayed. Stay made permanent.

In re ANDERSON.

(District Court, D. South Carolina. August 2, 1900.)

1. BANKRUPTCY—BANKRUPT WITHHOLDING PROPERTY—CONTEMPT—POWER TO PUNISH.

An involuntary bankrupt who withholds property from his trustee in bankruptcy is liable to punishment as for contempt of court, notwithstanding Rev. St. § 990, providing that no person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where by the laws of the state imprisonment for debt has been abolished; but the power of the court to punish in such cases should be cautiously exercised.

2. SAME—EVIDENCE.

Where a bankrupt denies the possession or control of property alleged to be withheld by him from his trustee in bankruptcy, his possession of such property must be established by undisputable testimony, to render him liable to punishment for contempt because of such retention.

3. SAME.

An apparent deficiency of assets reported by a bankrupt, according to capital invested, goods purchased, and claims proved, will not warrant his punishment as for contempt of court, where his bank account shows that during the period covered by such computation the bankrupt paid within about \$700 of the amount of such deficiency upon the debts of a firm of which he was formerly a member, and that the balance not so accounted for may be attributed to the loose manner in which the business was conducted.

4. SAME—EXEMPTIONS—NOT ALLOWED OUT OF PERSONAL PROPERTY NOT PAID FOR.

Under Const. S. C. art. 2, § 32, which allows a debtor to hold personal property exempt from attachment to the amount of \$500, but provides that no property shall be exempt for payment of obligations contracted for the purchase of such property, a bankrupt is not entitled to such exemption out of the proceeds of a sale by the trustee in bankruptcy of merchandise which has not been paid for.

5. SAME—HOMESTEAD—PURCHASE MADE WITH PROCEEDS OF MERCHANDISE NOT PAID FOR.

Under Const. S. C. art. 2, allowing a debtor a homestead in lands to the value of \$1,000, which shall be exempt from attachment, except for debts for the purchase price, where it appears that the debtor had at least \$1,000 in money when he commenced business, he will be entitled to claim as exempt a homestead subsequently purchased with the proceeds of merchandise not paid for, if at the time of the purchase he had no such contemplation of bankruptcy as would constitute the purchase a fraudulent diversion of moneys properly belonging to his creditors.

6. SAME—APPRAISEMENT.

Where the evidence tends to show that the property claimed by a bankrupt as a homestead is worth more than the value allowed by the laws of the state, the same may be appraised, and, if it exceeds the legal value, it will be assigned as a homestead, upon payment to the trustee in bankruptcy of the sum above such value.

7. SAME—ALLOWANCE TO BANKRUPT'S ATTORNEY.

Under Bankr. Act 1898, § 64b, providing for the allowance of a reasonable attorney's fee to the bankrupt in involuntary proceedings, where the attorney for the bankrupt is required to prepare schedules of the bankrupt's assets and liabilities, and attend references before the referee in matters involving the conduct of the bankrupt's business prior to his bankruptcy, an allowance to the attorney of a fee of \$90 out of the estate in the hands of the trustee is not excessive.

In Bankruptcy.

Willcox & Willcox, for creditors.

W. F. Clayton, for bankrupt.

BRAWLEY, District Judge. The above-named was adjudged a bankrupt in involuntary proceedings November 18, 1899, upon the petition of certain creditors. The same creditors had previously instituted proceedings in attachment in the state court, early in October; and the stock of merchandise was seized in those proceedings, which attachment, however, has been dissolved in the state court. A trustee in bankruptcy was duly appointed, and in due course an accounting was had before the referee, and the bankrupt was examined. As the result of such examination and accounting, the referee, in a careful and

well-considered report, found that the bankrupt had failed to account for the sum of \$3,362.17, and that he had that sum in his possession or under his control. This result was reached by charging the bankrupt with \$3,700 of assets on hand, in goods and money, at the beginning of the year 1899, and the account of merchandise purchased during the year remaining unpaid, that amounted to \$9,381.63. The referee having allowed credit for the stock of goods on hand at invoice prices, and for sundry payments and credits, to the amount of \$10,219.46, the balance found due was as above stated. The bankrupt having failed to turn over the above-mentioned sum to his trustee, as directed by the previous order of the court, a motion is now made to commit him to jail as for contempt. It is contended that such order of commitment, being in effect an imprisonment for debt, is forbidden by the constitution of South Carolina, and by section 990 of the Revised Statutes. I give no weight to such contention. Upon an adjudication in bankruptcy, all the property of the bankrupt, of every kind and description whatsoever, falls at once in custodia legis. His estate belongs to the court, and any withholding of the property of the bankrupt by himself or others is in derogation of the rights of the trustee, who is entitled to hold it for distribution among the creditors. An order for the delivery of the property or for the payment of the money belonging to the estate is not in the nature of a judgment or execution for debt; for such money or property belongs to the court, and it is its duty to place it in the hands of the trustee for distribution pursuant to the law. The withholding of such money or property tends to obstruct the administration of justice, and it is a power inherent in all courts to enforce their orders against reculant parties. They could not effectually protect themselves against the assaults of the lawless, or enforce obedience to their orders, without a summary power to commit for contempt; for the power to make an order carries with it an equal power to punish for a disobedience of it. I have not, then, the slightest doubt of the power of the court to commit for contempt in any proper case, but this power should be most cautiously exercised. Where the bankrupt denies possession or control, the fact of such possession should be established by indisputable testimony; for it is only in cases where it is proved beyond a reasonable doubt that the bankrupt is willfully disobedient in refusing to obey its orders that the court should feel itself compelled to punish such disobedience. It follows that it is not sufficient to establish a probability, however strong, that the bankrupt is in the possession of the money, but there must be reasonable and moral certainty, and the circumstances tending to establish it must be such as to clearly exclude any reasonable supposition to the contrary. In a civil action to recover the money, it would suffice if there was a preponderance of the evidence that the bankrupt had it in his possession or under his control; and, though it might not be free from reasonable doubt, if it is more likely to be true than not there could be a judgment against him, and process issued for its recovery. There have been numerous cases under the present law wherein this question has been considered, and the legal principles which should govern have been set forth with sufficient clearness. In *re Purvine*, 37 C. C. A. 446, 96 Fed. 192; In

re Rosser (C. C. A.) 101 Fed. 562; Knitting Works v. Schreiber (D. C.) 101 Fed. 810; In re Mayer (D. C.) 2 Nat. Bankr. N. 257, 98 Fed. 839; In re Deuell (D. C.) 2 Nat. Bankr. N. 597, 100 Fed. 633. Each case must be determined according to its own facts.

The testimony shows that Anderson conducted a mercantile business at Timmons ville, in connection with his brother, during the year 1898, and that about the end of that year a fire occurred, as a result of which the business was broken up, and that he commenced business on his own account, with a part of the damaged stock, and with some money received as insurance. The amount of this capital is stated as \$3,700, but upon the argument before me it was contended that this was an overestimate. No books of account were kept, or at least no books from which the true condition of the business could be ascertained. Such as were kept are of such fragmentary character that it is impossible to ascertain from them any correct, or approximately correct, idea as to the business. It is not alleged that the failure to keep proper books was due to the fraudulent purpose of concealing his true condition, and the testimony tends to show that it was to be attributed, rather, to his inexperience and incapacity. He is a very young man, and had had very little knowledge of business. Upon the report of the referee, it seemed to me incredible that such a large deficit should honestly occur in a business of such small magnitude within such a comparatively brief space of time, and as the referee had evidently considered the case with care and deliberation, and is a lawyer of the highest character and intelligence, I was greatly inclined to accept his report as conclusive; for, having opportunity of seeing the witnesses, which the court had not, his conclusions were justly entitled to great weight. But, inasmuch as the enforcement of any order made by me would involve imprisonment for an indeterminate period, I felt it to be my duty to proceed with caution, and the bankrupt was brought before me. Upon that hearing it transpired that he had had dealings with the Bank of Timmons ville during the year 1899, and it did not appear that his account with that bank had been produced before the referee. Thereupon an order was made for an examination of this account, and I have before me the statement of the cashier, showing the transactions of the bankrupt. I have not the advantage of any comment upon this testimony by the counsel for the creditors, and therefore accept the exhibits as filed by the cashier as true. Exhibit A, which is entitled, "Mr. C. Anderson in Account with the Bank of Timmons ville," shows the debits and credits from January 17, 1899, to October 3, 1899, with one item of \$2.32, amount paid to Thompson, trustee, on December 12th. This account shows deposits of \$8,629.66, and payments to the same amount. It, therefore, would not affect the figures given or the results reached by the referee. It tends to show that the volume of business transacted during the year was considerably larger than might be inferred from the referee's report. Exhibit B, however, which is entitled, "Memorandum of Cash Received in Payment of Drafts Sent Me for Collection on C. Anderson," shows that the bank paid out during the period beginning February 4th and until September 19th, to the various mercantile establishments whose names are given, the sum of \$1,664.92. Exhibit C, which

is entitled, "Memorandum of Cash Received in Payment of Drafts Sent Me for Collection on Anderson Bros.," from January 20, 1899, to September 20, 1899, shows payments of \$984.30. I assume that C. Anderson paid out this money on account of the old debts of Anderson Bros., which were assumed by him. The aggregate of these payments is \$2,649.92, which, deducted from \$3,362.17, the balance found unaccounted for by the referee, would leave only a balance of \$712.25. These accounts show that, up to the day the attachment proceedings in the state court were commenced, Anderson was paying out moneys to his creditors as they seemed to fall due. There is testimony showing that certain statements made by the bankrupt to some of the creditors during the year are untrue, and they naturally produce an unfavorable impression; but, as the testimony is clear that the old business was very loosely conducted, it is entirely possible that the balance of \$712.25 unaccounted for upon the present showing may be attributed to that cause, and, in the absence of any direct testimony that the bankrupt has this sum or any sum in his possession, I do not feel that certainty that Anderson is now in the possession of the money which he withholds from the creditors which would justify me in committing him to jail for noncompliance with the order to turn it over to the trustee, and such order must for the present be refused. If hereafter the attorneys for the creditors should satisfy me that I am in error in allowing the credits which appear in the statements of the Bank of Timmons ville, or if any new facts have been brought to light since the last hearing which tend to show that the bankrupt is in possession of money, the application for such order may be renewed.

The next question to be considered relates to the claim of the homestead exemption. The trustee has set apart the wearing apparel of the bankrupt in his possession, of the value of \$50, and one bicycle, of the value of \$25, and allows him out of the cash in hands of trustee (being proceeds of the sales and stock of merchandise in the store in Timmons ville, and sold by the trustee under order of this court) the sum of \$425. He also sets apart the dwelling house and lot in the town of Timmons ville, of the value of \$1,000.

First, as to the personal exemption: The constitution of South Carolina exempts from attachment, levy, and sale personal property to the value of \$500, or so much thereof as the property is worth, if its value is less than \$500. So the exemption of the wearing apparel and bicycle, of value \$75, is allowed. The amount of \$425 of cash from the proceeds of the sales of stock of goods cannot be allowed. The proof shows clearly that these goods had not been paid for. Claims of creditors to the amount of about \$10,000 for goods sold have been proved against the bankrupt, and are unpaid. One of the provisos of section 32, art. 2, of the constitution, under which the homestead is claimed, is as follows:

"That no property shall be exempt from attachment, levy or sale for taxes or for payment of obligations contracted for the purchase of such homestead or personal property exemption or the erection or making of improvements or repairs thereon."

The money in the hands of the trustee, being derived from the sale of the merchandise for which the purchase money is still due, is not a proper subject of homestead exemption, and it would be unconscionable to allow it. To this extent the report of the referee confirming the allowance made by the trustee is set aside.

Second, as to the real estate: The constitution allows a homestead in lands to the value of \$1,000, with the same proviso above recited; and it is claimed by the creditors that the improvements upon the real estate assigned as homestead were made with money derived from the sales of the merchandise, and therefore it is in the nature of purchase money, and that such exemption should not be allowed. There is some force in this contention, and I have not been able to reach a conclusion with reference to it entirely satisfactory to my mind. This real estate was purchased by the bankrupt in July, and the title was taken in his wife's name. The house was erected subsequent to that date out of moneys received by the bankrupt at his store. Inasmuch as there is proof that the bankrupt at the time when he commenced business, in January, was in possession of funds to the amount of \$1,000, at least, and at the time when the lot was purchased, there is not sufficient evidence that he had such contemplation of bankruptcy as would lead to fraudulent diversion of moneys properly belonging to his creditors in the improvement of the homestead. I am inclined to allow this exemption, and do so order. Inasmuch, however, as the proof tends to show that the house and lot exceed \$1,000 in value, the case is recommitted to the referee, with directions to have appraisers appointed,—one to be selected by the bankrupt, one by the trustee, and one by himself,—who shall appraise the homestead. If it exceeds in value \$1,000, it will be assigned as homestead upon the payment to the trustee of any sum in excess of the amount of \$1,000.

The next question relates to the allowance of \$90 to W. F. Clayton, Esq., as attorney for the bankrupt, to which allowance the creditors have excepted. Section 64b of the bankrupt act, which provides for the payment of costs in the administration of the bankrupt estate, provides for "one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed." The amount that should be allowed to the attorneys for the bankrupt in involuntary cases should be limited to compensation for such services as are presumptively of benefit to the estate. The bankrupt in such cases is required to prepare schedules, which require the services of a lawyer; and, if he is compelled to attend references before the referee in matters involving the conduct of his business prior to the bankruptcy, he should be allowed services of counsel, to the extent of protecting his rights on the inquiries so made. This is in aid of the proper administration of the estate, and allowances out of the estate should be strictly limited to services so rendered. No allowance should be made for services rendered in defending the bankrupt from charges of fraudulent conduct or concealment of property. I am of opinion that the allowance of \$90, under the circumstances, is not excessive, and the report of the referee is therefore confirmed.

FISHER et al. v. CUSHMAN et al.

In re FISHER et al.

(Circuit Court of Appeals, First Circuit. June 15, 1900.)

Nos. 315, 317.

1. **BANKRUPTCY—PROCEDURE FOR REVIEW.**

The fact that an appeal is taken in bankruptcy proceedings, and a petition for revision also filed, both relating to the same subject-matter, does not defeat the right to have the matter determined on the merits in whichever proceeding is held to be appropriate.

2. **SAME.**

The proper proceedings to review an order of the court in bankruptcy requiring a bankrupt to indorse a license for sale is by petition to revise, and not by appeal.

3. **SAME—ASSETS OF ESTATE—LIQUOR LICENSE.**

A liquor license issued by the authorities of a city under the police laws of the state, transferable subject to the approval of such authorities, which is ordinarily granted, and which for that purpose has a recognized value of from \$4,000 to \$5,000, conditioned upon the acceptance of the transferee by the authorities, on the bankruptcy of the license is available as assets of his estate, under Bankr. Act, and he may be required by the court to execute the transfer necessary to enable the trustee to convert it into money for the benefit of the estate. While such a license is not in itself property, regarded merely as an evidence of authority to do business under a police regulation, under the circumstances stated it represents a substantial investment of the bankrupt's capital which would otherwise be subject to the claims of his creditors; and, so long as such capital is in such form that it can be converted into money at his option by merely executing an assignment, it constitutes property, within the meaning and intent of the statute, which he has no right to withhold from his creditors.

4. **SAME—INTERVENTION IN PROCEEDINGS.**

Where a liquor license owned by a bankrupt and converted into money by his trustee by order of the court had previously been pledged by the bankrupt, the pledgee is entitled to intervene in the bankruptcy proceedings for the purpose of asserting his claim to the payment of his debt from the proceeds.

5. **SAME—JURISDICTION OF COURT.**

Where there are several proceedings in bankruptcy against two persons who claim several interests in the same subject-matter, and the trustee of one bankrupt voluntarily submits himself to the jurisdiction of the court of bankruptcy in summary proceedings relating to the estate of the other for the purpose of disposing of the property claimed in common, the court has jurisdiction in such proceedings to dispose of his interest in such property.

6. **SAME—MATTERS REVIEWABLE—COMPLIANCE WITH ORDER.**

Where a liquor license was issued to two persons, named therein, and one of the licensees in summary proceedings in the matter of the other's bankruptcy was required by the order of the court in bankruptcy to indorse the license for sale, and did so indorse it, he has no remedy against the order by application to the circuit court of appeals, because whatever action that court might take would be futile. It seems that his remedy, if any, would have been by refusing to make the indorsement, and by taking proper measures for review in case he was proceeded against for contempt.

Appeal from, and Petition for Revision of Proceedings in, the District Court of the United States for the District of Massachusetts.

Edward F. McClennen (Brandeis, Dunbar & Nutter, on the brief), for appellants.

Addison C. Burnhan (Carver & Blodgett, on the brief), for appellees.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. One of these cases is an appeal from the district court for the Massachusetts district, sitting in bankruptcy, and the other is a petition to revise the proceedings of that court. 98 Fed. 89. Both relate to the same subject-matter. The appeal will not lie because the subject thereof is not within the three specifications of the matters of appeal found in section 25 of the bankrupt act, approved July 1, 1898 (chapter 541, 30 Stat. 553). Nevertheless, as was determined by us in *Re Worcester Co.*, in our opinion passed down on April 20, 1900 (102 Fed. 808), the fact that an appeal was taken and a petition also filed does not defeat the right of the party moving this court to have the merits of the controversy adjudicated by us. They do not neutralize each other, and the only result is that the appeal must be dismissed, while the court must proceed to the adjudication of the merits in *Ida C. Fisher et al.*, Petitioners, which petition, on the record before us, involves only a "matter of law," as required by section 24b of the bankrupt act.

The controversy in this case is whether, under the circumstances shown in the record, a license issued in accordance with the provisions of the Public Statutes of Massachusetts (chapter 100, § 5), and held by the bankrupt at the time the petition in bankruptcy was filed, can be availed of as assets for the benefit of the creditors in bankruptcy. That section is as follows:

"In a city which at its annual municipal election, or in a town which at its annual meeting, votes to authorize the granting of licenses for the sale of intoxicating liquors, as hereinafter provided, licenses of the first five classes mentioned in section ten, and in any city or town licenses of the sixth class mentioned in said section, may be granted annually by the mayor and aldermen of cities or the selectmen of towns to persons applying therefor. Every license shall be signed by the mayor or the chairman of the selectmen, and by the clerk of the city or town by which it is issued, and shall be recorded in the office of such clerk, who shall be paid by the licensee one dollar for recording the same. It shall name the person licensed, shall set forth the nature of the license and the building in which the business is to be carried on, and shall continue in force until the first day of the May next ensuing, unless sooner forfeited or rendered void."

Section 1 of the same chapter provides as follows:

"No person shall sell, or expose, or keep for sale, spirituous or intoxicating liquor, except as authorized in this chapter; but nothing herein contained shall apply to sales made by a person under a provision of law requiring him to sell personal property, or to sales of cider and native wines by the makers thereof, not to be drunk on their premises."

The power of issuing licenses was transferred to the police commissioners by section 1, c. 83, of the Acts of 1885, as follows:

"The police commissioners, instead of the mayor and city clerk of the city of Boston, shall exercise the powers and perform the duties given to and imposed upon said mayor and city clerk by section five of chapter one hundred of the Public Statutes relating to the signing of licenses for the sale of intoxi-

ating liquors; and said licenses, together with all licenses as hotel keepers or common victuallers shall be recorded in the office of the said commissioners instead of the office of said city clerk."

Obviously, the licenses thus authorized appertain to the police regulations of the state; and, except for the facts further appearing in the record, they would be in no manner subject to the control of a federal court sitting in bankruptcy, nor could they be availed of by such courts as assets.

The petition for the adjudication in bankruptcy of Ida C. Fisher was filed on October 19, 1898. The license in controversy issued on May 1, 1898. On its face, it purported to run to Ida C. Fisher and Rollin B. Fisher, as Fisher & Co. The record shows that Fisher & Co. was Ida C. Fisher solely, and that therefore Rollin B. Fisher, who is the husband of Ida, had only a nominal interest, and that his name appeared in the license, in accordance with a prevailing custom, to prevent a lapse thereof in the case of the death of Ida. For the purpose of considering the fundamental question in the case, we can assume that it is not complicated by the fact that the name of Rollin B. Fisher appeared in the license, and that Ida was the sole holder of it, both substantially and nominally. The record also shows as follows:

"Liquor licenses are issued by the city of Boston to a limited number only, and are much in demand. They are transferable only with the assent of the board of police commissioners and then only in the following manner: There is a usage and practice by which a license may be surrendered, and a new license issued to another in the place thereof, as follows: The man that desires to go into business files an application describing the locality, and who the persons are that propose to engage in business; and if they are satisfactory, and there is no legal objection to the place where they propose to engage in business, and there will be a vacancy caused in the list of licenses ordinarily granted, the board agrees to one license being surrendered for the purpose of being canceled, and in place of it another is issued to the new firm or persons applying for it. The surrender is ordinarily by a simple form of indorsement addressed to the board of police stating, 'The undersigned hereby surrenders his license for the purpose of having it canceled,' and signed by one or more of the licensees, binding the firm to that agreement.

"There is a recognized value of from \$4,000 to \$5,000 which attaches to a license for the purpose of such transfer, and such sum can be obtained in the liquor trade for the surrender of a license in favor of another, conditional upon the purchaser proving satisfactory to the board of police commissioners as a licensee."

It is also said in the record that evidence was submitted that the police commissioners have refused to consent to the transfer of any license until the one seeking to make the transfer has shown himself to be free of debt; but there is no finding to this effect, and the topic becomes unimportant, because, in fact, the license in controversy, with the consent of the commissioners, was surrendered by Ida C. Fisher and Rollin B. Fisher, by their indorsements thereon, made under the order of the district court, a new license substituted, and a valuable consideration received in connection with the transfer, in accordance with the practice shown by the citation which we have already made.

The trustee in bankruptcy of Ida C. Fisher seasonably claimed that the license should be realized for the benefit of the estate, and

petitioned the court for an order on her and Rollin B. Fisher to indorse the license, so that the proceeds thereof might be thus secured. An interlocutory order was entered, pursuant to which the license was indorsed as follows: "This license is hereby surrendered for cancellation. Ida C. Fisher. Rollin B. Fisher." The amount of \$4,250 was realized, which was deposited in the registry of the district court, to await its final determination in reference to the claims thereto. Subsequently a final decree was entered that the amount so deposited in the court, less an equitable charge thereon of \$1,000, should be paid to the trustee as assets. Ida C. Fisher and Rollin B. Fisher objected throughout to these proceedings, and their petition to revise them was seasonably filed in this court, and was answered by the trustee. An issue was thus duly raised on the matter of law whether or not the license or its proceeds were under the control of the district court for the purpose of the action which it took in reference thereto. The appropriate parts of the record in the district court were sent up on the appeal, and they are made parts of *Ida C. Fisher et al., Petitioners*, by references to them in the petition and answer, though it would have been more prudent to have incorporated them by an express agreement therefor filed in the case.

The only provision of the bankrupt act covering the fundamental question in this case is found in section 70 (30 Stat. 565, 566), where it is provided that among other things which shall vest in the trustee of an estate of a bankrupt is "property which prior to the petition he" (that is, the bankrupt) "could by any means have transferred or which might have been levied upon and sold under judicial process against him." No determination by any judicial tribunal of sufficient authority to conclude this court has been brought to our attention or found by us. It is, of course, well settled that governmental pensions and salaries of public officers are not affected by proceedings in bankruptcy; but neither of these can be presumed to represent any capital invested, and public policy forbids their transfer. *Hyde v. Woods*, 94 U. S. 523, 24 L. Ed. 264, and *Sparhawk v. Yerkes*, 142 U. S. 1, 12, 12 Sup. Ct. 104, 35 L. Ed. 915, which relate to seats in stock exchanges, in no way touch on matters of police regulation. Nevertheless they settle one question in this case, and that is that the fact that transferability depends on the consent of a stranger does not defeat the claim of creditors in bankruptcy to realize what can be obtained on a transfer if made. This, however, is a rule of law well settled and broadly applied.

In *Ex parte Butler*, 1 Atk. 210, the question came before Lord Chancellor Hardwicke whether or not the office of undermarshal of the city of London, which was a salable office, passed into the control of a commission in bankruptcy. It was held that it did, but the terms of the statute under which that case was decided include some expressions which render the decision inapplicable as an authority on the question at bar. Nevertheless the lord chancellor made an observation which leads up to a line of reasoning of importance with reference to this proceeding, as follows:

"This is a matter of very great consequence; for, when a man is likely to become bankrupt, he may sell all his stock in trade and effects, and invest

the produce in one of these salable offices, and in that manner cheat his creditors."

Following out this suggestion of Lord Chancellor Hardwicke, it cannot be denied that the license in controversy represented pecuniary interests of the bankrupt of substantial value. Not only, as shown by the extracts which we have made from the record, does a recognized value of from \$4,000 to \$5,000 attach to a license of this nature for the purposes of transfer, but in this particular case the license in fact realized \$4,250. Whether Ida C. Fisher, on her acquisition of the first license, of which the one in issue was the successor, paid for the transfer thereof from her assets an amount in excess of the governmental fee, which fee was, in the eyes of the law, a substantial sum, although the particular amount is not stated in the record, or whether that excess gradually accrued as an increment of the value of the successive licenses during the several years in which she was carrying on the business of Fisher & Co., the record does not show. Neither is it of consequence that it should, because the question underlying this case cannot be determined with reference to all the special circumstances of a particular license, but it must be disposed of in the light of the fact that every license, however obtained, has a recognized value, as already stated, in excess of the governmental fee, and of the further fact that the amount of that excess may represent actual cash of its holder paid for it on its transfer from some other licensee. Thus, it represents capital. To apply to these conditions the propositions of the petitioners would come to the same result, whether the amount involved was that at issue in this case, or much larger. In either case, if their propositions are sound, the creditors of a bankrupt may be left without the receipt of any percentage of their debts, and the bankrupt may remain in possession of what is practically under his own control, and of a pecuniary value sufficient to characterize him as a person of substance. To put their propositions in another form is to say that, although a bankrupt is otherwise unable to pay his creditors even a small percentage, yet he stands under no legal obligation to realize for their benefit a matter of large pecuniary value, but that, on the other hand, he may apply to his own uses what he can secure therefrom, although it has absorbed a large amount of assets which otherwise would have been within the reach of his creditors. Nothing but a clear purpose on the part of any bankrupt act to accomplish such a result, or an absolute defect in its provisions, would justify sustaining propositions which work such results.

It is impossible to give any categorical definition to the word "property," nor can we attach to it in certain relations the limitations which would be attached to it in others. This will be obvious on examining the article about property in the several editions of Bouvier's Law Dictionary. The same is equally obvious on an examination of the definitions given to the word in the standard dictionaries of the English language. All that can be said positively in reference to it is that, when found in a statute like the bankrupt act, it is not to be construed in any loose, popular sense, but with regard to the limitations which the law attaches to it. In this view, con-

sidering that the mere license represents a police regulation, so that, according to the determinations of the supreme court, even though given for a fixed period, it may be revoked without compensation by legislation touching the public interests, because it represents no vested right, it is not possible to regard it as property of itself. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 25 L. Ed. 989; *North Western Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Douglas v. Kentucky*, 168 U. S. 488, 18 Sup. Ct. 199, 42 L. Ed. 553; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 74, 18 Sup. Ct. 513, 42 L. Ed. 948. On the other hand, under the circumstances shown in the record, it so far represents invested capital that it cannot be disputed that a licensee's administrator, who after his death obtains on its transfer a valuable consideration, is required by law to account in his official capacity for the sum received. Neither can it be denied that the same rule applies to a co-partner settling the affairs of a co-partnership after the death of one of the co-partners, or, in the present case, to Rollin B. Fisher, in case he had survived his wife and no bankruptcy proceedings had interposed. Further, as we have already said, there is not here involved the rule of public policy which applies to governmental pensions and the salaries of public officers; but the case in that respect is more akin to instances where hotels, livery stables, and other establishments subject to police regulation, and requiring licenses from the public authorities, are disposed of, with all the privileges and advantages appertaining thereto. Having in view, therefore, the evident fact which we have already stated,—that nothing but a clear purpose on the part of the statute to accomplish a different result, or an absolute defect in its provisions, would lead to a different conclusion,—we see no difficulty in holding that the pecuniary interest or capital which this license represents, and which may customarily be made available, is property which the bankrupt is bound to assist in realizing for his creditors, so long as he can render practical aid thereto by merely giving his signature, and without that substantial assistance which it is well settled creditors in bankruptcy are not entitled to receive, for accomplishing anything which requires skill or substantial labor on the part of the bankrupt after the petition is filed by him or against him. We therefore agree on this point with the conclusions of the district court.

It may be claimed that the reasoning on which this result is based cannot be carried out to its logical conclusion. We have reference especially to the matter of inventions and literary manuscripts, and contracts which require for their completion the skill of the bankrupt. It is generally said that none of these pass to the creditors. *Williams, Bankr.* (7th Ed.) 196; *Cop. Copyr.* (3d Ed.) 176; and *Low, Bankr.* 233. However, these facts make no difficulty with the result which we have reached, because, with reference to inventions and manuscripts, and contracts partly completed which involve the personal skill of the bankrupt, there is no doubt that all such things are property, as all the authorities make clear; and they are capable of being assigned as such, and of devolution by succession. *Cop. Copyr.* (3d Ed.) 177, and elsewhere. So, also, it is ordinarily said that an

action for breach of a contract to marry, or breach of a contract to cure, and other actions of tort which do not concern injuries to property, do not pass to the bankrupt's creditors, and yet all these are property. The most that can be said about these exceptional rights is that they illustrate what we have already pointed out,—that it is impossible to give any categorical definition to the word "property," or to give such specific limitation to it as would always determine its relations to any particular statute. All these things are property, and absolutely at the disposal of the owner of them; and yet they lack one usual element of property, in that they are not within the reach of creditors. But our point is that these exceptional illustrations relate clearly to what is property, and therefore they cannot obstruct us in determining whether or not the matter in controversy is property, within the meaning of the bankrupt act.

The rule with reference to nonpatented inventions has never been laid down, except in the most general terms; and it may well be doubted whether, under peculiar circumstances, a court in bankruptcy might not compel an inventor to do what the district court in this case compelled the owner of this license to do. Assuming, as an extreme case, that an inventor has completed his invention, has put it in practical form, and has depleted his estate in experimenting in the course thereof, and that all that remains for him to do in order to procure his patent is the nominal act of giving his signature to the application therefor, we would have a case somewhat parallel to the case at bar; and we cannot concede that there are any authorities of so precise a character as would prevent a court in bankruptcy from realizing capital thus locked up.

We have proceeded in this matter without any special reference to the language which we have cited from the statute. This, in terms, covers "property which prior to the filing of the petition he" (the bankrupt) "could by any means have transferred or which might have been levied upon and sold under judicial process against him." It seems to us safer to put the case on broad ground, rather than on any peculiar phraseology of the statute, the precise scope of which is not plain. Very likely some of these words were used for the purpose of meeting difficulties arising under previous statutes in bankruptcy, by reason of the fact that sometimes a large amount of property was held under unrecorded deeds, which had given the debtor a credit to which he was not entitled, and which might have been attached under the local practice in various states, or might have been conveyed by the debtor to an innocent purchaser, but which, however, did not pass to assignees in bankruptcy. Nevertheless the language may well be held to be so broad as to sweep in cases of the precise character of that at bar. However, we pass this by, observing only that the alternative in this quotation shows a statutory declaration of what we have already found to be the fact,—that there may be property which cannot be sold under judicial process, and that there may be property of that character which passes for the benefit of creditors.

In behalf of the trustee in bankruptcy, reference is made to the paragraph of section 70 of the bankrupt act which provides that the

trustee shall be vested with certain "powers"; and it is claimed that this applies at bar, because the bankrupt had the power to realize from the license. However, we prefer not to attempt to rest the case on this expression, because we doubt whether so popular a signification can be given to the word, and whether, on a careful examination of the English statutes from which this was drawn, and of the decisions of the English courts in regard thereto, we might not be required to determine that it is to be construed technically, as known to the common law.

Questions as to the jurisdiction of the district court with reference to this license have been raised, in view of the fact that it issued to Rollin B. Fisher as well as to his wife; and a question is also made with regard to the intervention of one Chapin, who claimed an equitable interest in the fund derived from its transfer, and paid into the registry of that court. We do not understand that the objection as to Chapin is now insisted upon, but, even if it were, it would be fruitless, because the rule is settled beyond all doubt that any person claiming an equitable or legal interest in a fund in the registry of a court is entitled to intervene in that behalf.

So far as Ida C. Fisher is concerned, there can be no question of jurisdiction, inasmuch as the proceedings have taken place in the case in which she was adjudged bankrupt, and the court therefore clearly had the power to proceed summarily for the purpose of merely compelling her to give her signature on the transfer of the license. So far as Rollin B. Fisher is concerned, the objection as to want of jurisdiction is subdivided; that is to say, it is, on one hand, maintained that he was entitled to appropriate the license, or an interest in it, to his personal use, and that therefore the court could not, in the case of Ida C. Fisher in bankruptcy, proceed summarily against him with reference thereto. This objection is met, however, by the fact that Rollin B. Fisher is himself in bankruptcy, and his assignee submitted himself to the proceedings in the district court, which disposes of all substantial questions so far as Rollin B. Fisher is concerned. On the other hand, the more technical objection is made that the district court, in this proceeding relating to Ida C. Fisher, had no summary power to compel Rollin B. Fisher to perform any act,—especially that of indorsing the license in the manner which we have described. This, however, does not touch the merits of the case, and is purely a moot question, so far as we are concerned. Rollin B. Fisher has indorsed the license, and it has passed to a purchaser for value. Any decree that we might make could not rescind that, and would be futile. If, on the other hand, he had refused to make the indorsement, and the district court, in the case of Ida C. Fisher in bankruptcy, had proceeded against him for contempt by reason of that refusal, and had fined him or imprisoned him, and the fine had remained unpaid, or the imprisonment was not fully accomplished, a practical issue might have arisen in some way for our determination. *Ex parte Baez*, 177 U. S. 378, 20 Sup. Ct. 673, Adv. S. U. S. 673, 44 L. Ed. —.

In No. 315 (*Fisher v. Cushman*) the appeal is dismissed, without costs, except that, in accordance with the agreement of the parties,

the expense of printing will be paid out of the fund in the registry of the district court, the net proceeds of the transfer of the license.

In No. 317 (Ida C. Fisher et al., Petitioners) there will be a decree affirming the proceedings of the district court, without costs, except that, in accordance with the agreement of the parties, the expense of printing will be paid out of the fund in the registry of the district court, the net proceeds of the transfer of the license.

RICKARD et al. v. DU BON.

(Circuit Court of Appeals, Second Circuit. July 25, 1900.)

No. 165.

PATENTS—UTILITY—SPOTTING TOBACCO LEAVES.

The Rickard patent, No. 604,338, for an improvement in the art of treating tobacco leaves, which consists in sprinkling the leaves of the growing plant with chemicals—preferably, a solution of potash, but including any alkali—which produce spots, and are claimed to improve the quality of the leaves for use as cigar wrappers, is void, because not useful; the only effect of the treatment, if not the only object, being to spot the tobacco, and counterfeit the leaf spotted by natural causes.

Appeal from the Circuit Court of the United States for the District of Connecticut.

F. T. Chambers, for appellants.

W. E. Simonds, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an action for the infringement of letters patent No. 604,338, granted May 17, 1898, to the complainants, for "improvement in the art of treating tobacco leaves." The invention "relates to the art of treating tobacco leaves which are employed as wrappers for cigars," and purports to have for its object "a process for treating the leaves of a growing plant in such a manner and by such means as to provide for producing a wrapper of superior quality." The treatment described in the specification consists in applying to the leaf, while the plant is still growing, preferably by means of atomizers, about the time the leaves have reached their maturity, "chemicals belonging to the alkaline group, such as potash, and at the same time such chemicals as have a considerable affinity for water, so that the leaf will only be partially deadened at the spots of application, whereby sufficient vitality will be left in such spots to allow for absorption and assimilation of the chemical throughout the leaf, and to prevent the spots from becoming brittle." The specification states that "the best mixture found available for the purpose is a combination of potash and glycerin,—the potash having the important property of promoting or increasing the burning quality of the leaf, while the glycerin maintains the spot soft and pliable, so as to maintain the usefulness of the leaf as a wrapper,"—and recommends solutions of caustic potash, known commercially as "Babbitt's Caustic Lye," varying from 16 ounces to 32 ounces per gallon of water,

with or without the addition of glycerin in the proportion of about 1 pint of glycerin to 10 gallons of the solution. It also contains this statement:

"Other agents may be such chemicals as absolute alcohol, with or without glycerin, lime, or the like; but it will, of course, be understood that any means may be employed for securing the two results emphasized, namely, the increasing of the burning quality of the leaf, and causing the spots to remain soft and pliable."

The claims are:

"(1) An improvement in the art of treating tobacco leaves, which consists in applying a combustion-promoting agent to the leaves of a growing plant, substantially as described.

"(2) An improvement in the art of treating tobacco leaves, which consists in applying an alkali to the leaves of a growing plant in spots, substantially as described.

"(3) An improvement in the art of treating tobacco leaves, which consists in applying a mixture of potash and glycerin to the leaves of a growing plant in spots, substantially as described."

The defendant treated a crop of tobacco by spraying the leaves, when they were about ripe and ready for cutting, with a solution of about one pound of caustic soda (commercially known as "Banner Lye") to a gallon of water, with a small admixture of molasses, sugar, and glycerin.

The court below was of the opinion that the patent was void for want of utility, "except to deceive," unless it could be sustained as one for a process of treatment by ingredients which would promote the burning quality of the leaf; and, without deciding that it was not void for want of utility, held that the treatment by the defendant was not an infringement of the claims, as neither caustic soda, nor any other ingredient of the mixture, was a combustion promoting agent. The court accordingly dismissed the bill. 97 Fed. 96.

We are of the opinion that neither the treatment applied by the defendant, nor that described or advised in the patent, has any tendency to promote the burning quality of the leaf, or to improve its quality in any respect, and that the only effect, if not the only object, of such treatment, is to spot the tobacco, and counterfeit the leaf spotted by natural causes.

The notion has long prevailed with a numerous class of smokers that cigars having spotted wrappers are superior to those without them. This notion is a pure delusion. It originated and has been propagated by the coincidence that much choice tobacco is spotted, being raised in localities where this characteristic is imparted by natural causes, although without improving or impairing the quality of the leaf. The origin of the spots has been referred to various causes by different authorities; the most rational explanation being that in some localities they are produced by the stings of insects, and in others by the action of the dew. So extensively has this erroneous notion obtained in this country and in Europe among consumers, that for many years spotted wrappers have commanded a considerably higher market price than unspotted; and dealers in tobacco, to meet the demand and obtain the higher price, have been accustomed to spot their leaves artificially, by spraying them with acids or chemical mor-

dants. As is stated in Tobacco Trade Review, in an article published in 1885:

"Of course, it was impossible to supply the demand for cigars having this natural characteristic; but, fortunately for manufacturers, science stepped in, and a common vinegar cruet, filled with muriatic acid, secured the desired result."

Until shortly before the patent in suit was applied for, cigar manufacturers and dealers in tobacco seem to have monopolized the counterfeiting of spotted tobacco; but in course of time the tobacco growers, seeking to share the illicit profit, began to spot their crops. So far as appears, they had not done so extensively before the date of the application for the patent in suit; but prior to that date Connecticut growers were sprinkling their crops, before the tobacco was cured, with solutions of acids. The patentees began their experiments in Ohio in 1893. They commenced by spotting leaves that had been cut and cured, treating some with a solution of peroxide of hydrogen, and others with a solution of carbonate of ammonia. In 1894 they spotted a few growing plants, first using a lye, and then Babbitt's potash. They observed, so Mr. Rickard testifies, that "after four or five hours the plant would seem to recover from its wilted condition, and apparently had absorbed or assimilated the material thoroughly within that time." In the summer of 1895 they applied their process upon a commercial scale, spotting growing crops for others. In October, 1895, they made their application for the patent in suit.

In their original application they made these statements:

"This invention relates to the art of treating tobacco leaves which are employed as wrappers for cigars, and it has for its object to provide a process for discoloring the leaves in spots, so that the same will accurately and truly simulate the well-known Sumatra wrapper or tobacco leaves. * * * The quality of a Sumatra tobacco leaf is commonly believed to be somewhat superior to the American leaf, and this fact, taken together with the duty levied thereon, gives the same a high marketable value. * * * This invention therefore contemplates providing means for discoloring a tobacco leaf in spots so that its identity cannot be distinguished from the ordinary Sumatra leaf, and, to accomplish this result, is designed to employ such chemical or other means as will partially deaden the life of the leaf in isolated spots, so that such spots will become discolored and partially or completely bleached, while at the same time remaining sufficiently soft and pliable so as not to destroy the usefulness of the leaf as a wrapper for cigars. * * * It has already been observed that the chemical or other agent is generally applied to the leaf while the plant is growing, so that, after such agent has produced a partial decomposition of the leaf at the point of application, the sun and rain will bleach out the spots, while the life still remaining in the leaf will maintain the partially decomposed spots soft and pliable. * * * In this connection an incidental feature of the invention is that since the discoloring agent is applied to the leaf while the plant is growing, and since the discolored leaf is only partially deadened, the chemicals will be absorbed and assimilated throughout the leaf. This becomes very important when the chemical employed is such a chemical as potash, that would greatly increase the burning quality of the leaf when used as a wrapper; and it has been found that the chemical is more thoroughly distributed throughout the body of the leaf by applying the same to the leaf in spots, and allowing the growing leaf to absorb and assimilate the chemical."

The patent office rejected the application upon the ground that the described treatment was not useful, and the only object of the alleged invention was the deception of the public. Thereafter the applicants amended their application by striking out the parts indicative of their

purpose to simulate the naturally spotted leaf, and inserting statements emphasizing the utility of their treatment in improving the quality of the leaf. The board of examiners again rejected the application, stating as their opinion that "it is clear that the process has no substantial purpose, and can have no result, other than the fraudulent imitation of a known product for the purpose of deceiving the public." The applicants then appealed to the commissioner of patents, and before him fortified their application by the affidavits of two cigar manufacturers, and the unverified communication of another, stating in substance that the leaves treated by the process were thereby improved in quality. The commissioner of patents, influenced by this evidence to believe that the process was useful for some purpose, overruled the decision of the board of examiners, and granted the application.

Although the patent, in its description and claims, covers broadly the application of the chemicals at any stage of the growth of the plant, it is to be observed that the patentees insist that it is useful and efficient if applied after the plant has matured. Mr. Rickard testifies to an instance where a crop of tobacco was cut within five hours—some of it within four—of the time of the application, and found to be in a very satisfactory condition. The proposition that the burning quality of tobacco can be improved by sprinkling the leaf with a solution of lye or potash sufficiently strong to discolor and partly eat out the leaf where it is touched by the drops, and that the leaf will advantageously absorb and assimilate such chemicals, even when applied within a few hours of the time of cutting, is one which staggers credulity. This is so repugnant to common sense and ordinary intelligence that it can hardly be accepted as true without adequate corroborative proof. We have carefully examined the record before us, to ascertain whether such proof is supplied. A number of cigar manufacturers, tobacco dealers, and tobacco growers have testified for the complainants to the general effect that tobacco spotted by the patented process is of improved quality; but an analysis of their testimony shows their opinions to be of little value, beyond establishing the fact that the spotted tobacco brings a higher market price than the unspotted. The quality of tobacco differs with different soils, with different seasons, with different conditions of growth, cutting, and curing; and the testimony fails to demonstrate that under identical conditions the leaves spotted by the process of the patent are of better quality in any respect than unspotted leaves. Their opinions are no more persuasive than those of the large body of smokers who have been so long convinced that spuriously spotted tobacco is superior to the unspotted, and whose fallacious judgment has created the demand supplied by the spurious article. A recapitulation of the testimony, or of the opposing testimony, would not be profitable. It suffices to say that the proofs fail to overcome the presumptions created by the conduct and avowals of the patentees.

It is plain that the patent originated in experiments which were intended only for the purpose of counterfeiting the spotted tobacco of commerce. The first experiments of the patentees, made upon cured tobacco, and with chemicals useful only for their corrosive or bleaching action, prove this. It may be that their lye and potash experi-

ments were suggested, as Mr. Rickard testifies, by his belief that the spots on Sumatra tobacco were caused by the ashes blown by the wind upon the plants. It may be that they conjectured that potash, when sprinkled upon the growing leaves, would be absorbed and assimilated by the plant, and would improve the burning quality. But the result they had in view was not to improve, it was to simulate. When they introduced their treatment commercially, in the summer of 1895, they had sprinkled only a few leaves, and must have known, unless their judgment was overmastered by their cupidity, that their experiments were, as to this theory, of no probative value. Their dominant object being to make a profit by enabling others to commit a fraud, it is not unlikely that they proposed to appeal to some tobacco growers by an argument having a color of honest merit; and this may explain the incidental suggestion in their original application for the patent, that the potash treatment would improve the burning quality of the leaf. That they placed no reliance upon this theory when they made that application is indicated by the indirect and inferential terms in which it was advanced. If they had been convinced that their treatment was an improvement in the art, by which the quality of tobacco was improved, they would have said so plainly and prominently in the application, and made this the meritorious basis for at least one of their claims. Instead of doing so, they avowed the object and stated the advantage of their invention to be the simulation of spotted tobacco. The application was carefully drawn to enable them to secure the monopoly of spotting tobacco, either while growing, or at any other stage, by the application of any chemical which would serve as a "discoloring agent." They asked for claims covering "an improvement in the art of treating tobacco leaves, which consists in partially deadening and discoloring the leaf in spots," and "an improvement in the art of treating tobacco leaves, which consists in discoloring the leaves of a growing plant in spots," and also "an improvement in the art of treating tobacco leaves, which consists in applying a mixture of potash and glycerin to the leaf in spots"; but, among their seven claims, they asked for none restricted to the application of potash, or of potash and glycerin, to the leaf of the growing plant. When they found that they could not succeed upon such a presentation, they made a complete change of front, suppressed their original representations, put forward elaborately the theory of improving the quality of the tobacco by their treatment, limited the claims sought to the application of combustion-promoting agents to the leaves of growing plants, and bolstered up their case before the commissioner by ex parte statements of witnesses. It is noticeable that, of these witnesses, only one has been produced by the complainants, and his testimony is worthless. They are now insisting that the patent is infringed by applying their process not only after the plant has practically matured, when it is manifest that the alkali or potash could not be absorbed or assimilated appreciably, but that it is infringed by applying a solution which, according to the weight of testimony, has no effect upon the burning quality of the leaf.

The patent shows upon its face that it is intended to secure a monopoly in the art of spotting growing tobacco, without reference to improving its quality. The only fact that lends color to the theory

that the treatment of the leaves by the patented process will improve the quality is that tobacco rich in organic salts of potash absorbed from the soil has a porous carbon, and is therefore of superior burning quality. But tobacco in which lime replaces the potash has to that extent a compact carbon, and will extinguish rapidly. According to the specification, lime can be substituted for potash in applying the process of the patent. And the claims of the patent cover a treatment by any alkali.

In authorizing patents to the authors of new and useful discoveries and inventions, congress did not intend to extend protection to those which confer no other benefit upon the public than the opportunity of profiting by deception and fraud. To warrant a patent, the invention must be useful; that is, capable of some beneficial use as distinguished from a pernicious use.

The decree of the court below is affirmed, with costs.

ROWE V. BLODGETT & CLAPP CO.

(Circuit Court, D. Connecticut. August 14, 1900.)

No. 936.

1. PATENTS—DESIGNS—LIMITATION AS TO SUBJECT OF PATENT.

Design patents refer to appearance, and not to mechanical utility, and are intended to apply only to matters of ornament, in which the utility depends upon the pleasing effect imparted to the eye, and not to any new function. A calk for a horseshoe is not a proper subject for such a patent.

2. SAME—HORSESHOE CALK.

The Rowe design patent, No. 26,587, for a design for a horseshoe calk, is void because the article is not an appropriate subject for a design patent.

In Equity. Suit for infringement of a patent. On final hearing.

William E. Simonds, for complainant.

L. P. W. Marvin, for defendant.

TOWNSEND, District Judge. Bill in equity for infringement of patent No. 26,587, granted to Allen H. Rowe, February 2, 1897, for a design for a horseshoe calk. These calks, which are made separate from the shoes, are formed from square bars of steel on hand screw machines. The end of the calk which comes in contact with the earth is in the form of a truncated cone. On the other end are screw threads for attaching it to the shoe. Between the two ends a part of the bar is left untouched, forming a square base or shoulder. Calks of this character were very old. What complainant claims as new, and embodied in his patent, are two features,—a groove, cut by a distinct operation at the base of the threaded end of the calk, and a central "downward projecting curved part" on the surfaces of the base or shoulder extending upon the surface of the truncated cone. None of the defendant's calks has the groove. Complainant, however, claims that said groove is a negligible feature. The curved surfaces, irregularly and indefinitely formed, are found in most of defendant's calks. Defendant shows that the groove thus applied to horseshoes is old. Calks with such grooves were made in 1871. Patent No. 470,702, granted March 15, 1892, to W. Pierce Marsh, shows such a groove.

Furthermore, it is merely an adaptation of the old and well-known method of making set screws, and is used here to serve the same purpose. The downward projecting curved lines on the sides of the base or shoulder are only such changes from the prior art as would be made by the ordinary mechanic without the exercise of any inventive faculty, or are the result of mere accident or carelessness in forming the calks. The forming tool which is used in turning out these calks operates on the same principle as a hollow auger, or the ordinary pencil sharpener. It appears that, if the tool were run down sufficiently far upon the bar of metal, the base of the conical end of the calk described a circle, leaving the under side of the base or shoulder straight across on all four sides; but, if there chanced to be any variation in the size of the metal, or carelessness in manipulating the tool, a flat surface might be left on one or more of the sides of the base or shoulder, causing a curved line, like that claimed by complainant in his patent. In short, the configuration claimed by complainant as the essential feature of his alleged novel shape is such as one makes in sharpening a square pencil with the circular pencil sharpener. This contention was proved by showing the machine by which these calks are formed. The defendant further shows, by comparison of a calk made for complainant more than six years prior to the patent in suit with a calk made for him under the patent in suit and a calk sold by defendant, that the only difference between the three is in the degree of flat surface on the base or shoulder of the calk and the set-screw groove, and that, therefore, the three are identical in law. I decide this case, however, upon the broader ground that patents for designs are intended to apply to matters of ornament in which the utility depends upon the pleasing effect imparted to the eye, and not upon any new function. The advantage claimed by complainant for the increased flat surface afforded by the curved line, which is the essential feature of his patent, is to enhance the mechanical utility of the calk by thus making a stouter shoulder, which would not so readily become bruised out of shape, and which, therefore, could be more easily removed with a wrench, when worn, from the shoe. It is significant, in this connection, that the patentee first applied for this essential feature of downward projecting curved lines on the sides of the base as a mechanical invention, which application was rejected, and that he then attempted to cover the same feature by a design patent. Design patents refer to appearance, not utility. Their object is to encourage works of art and decoration which appeal to the eye, to the esthetic emotions, to the beautiful. A horseshoe calk is a mere bit of iron or steel, not intended for display, but for an obscure use, and adapted to be applied to the shoe of a horse for use in snow, ice, and mud. "The questions an examiner asks himself while investigating a device for a design patent are, not 'What will it do?' but 'How does it look?' 'What new effect does it produce upon the eye?' The term 'useful' in relation to designs means adaptation to producing pleasant emotions." There must be "originality and beauty; mere mechanical skill is not sufficient." *Northrup v. Adams*, 12 O. G. 430, Fed. Cas. No. 10,328, approved in *Smith v. Saddle Co.*, 148 U. S. 679, 13 Sup. Ct. 768, 37 L. Ed. 606; *Ex parte Parkinson* (1871) Com. Dec. 251. A decree may be entered dismissing the bill.

SMITH v. RIDGELY.

(Circuit Court of Appeals, Sixth Circuit. July 14, 1900.)

No. 804.

1. PATENTS—INFRINGEMENT—RIGHT OF LICENSEE TO SUE PATENTEE.

A licensee may sue the patentee, who granted the license, for infringement of the patent within the bounds of the license, in the same manner and with like effect as though the patentee were a stranger.

2. SAME—SUIT AGAINST PATENTEE FOR INFRINGEMENT—ESTOPPEL.

A patentee, who has assigned his patent or granted an exclusive license thereunder, when sued for its infringement, cannot deny its validity; but, subject to such limitation, he may invoke the prior art to limit its scope in defense to the charge of infringement to the same extent that a stranger might.

3. SAME—INFRINGEMENT—WALL-PAPER TRIMMERS.

The Ridgely patent, No. 408,193, for an improvement in wall-paper cutters and trimmers, construed, and *held* limited in its scope by the prior art to the particular location and construction of the spiral spring shown in the specification, the purpose of which was to give a yielding movement to the blade, and, as so limited, not infringed by machines made in accordance with patents Nos. 533,374 and 533,375, subsequently issued to the same inventor.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This is a bill in equity filed by the appellant, Mark A. Smith, for the purpose of obtaining an injunction against an infringement of certain patents by the appellee, Charles T. Ridgely, and to recover for profits and damages. The parties to the suit were originally joint owners of the patents. They were issued to Ridgely for himself, and as assignor of a one-half interest therein to Smith. These patents were issued, the first on the 25th day of September, 1888, and was numbered 389,901; the second was issued on the 30th day of July, 1889, and was numbered 408,193; and both were for improvements in tools used for trimming wall paper and other like purposes. Prior to July 23, 1894, the said parties were engaged in the manufacture and sale of implements constructed upon the patents above mentioned, under the firm name of Ridgely & Smith, and had built up something of a business. On the day last mentioned, Ridgely made a proposition to Smith to buy or sell all the rights of the other in the partnership, including the stock on hand, the good will, and the exclusive right to manufacture and sell the patented inventions at a price therein named. Smith accepted the offer, buying Ridgely out at the price stated in the latter's proposition, and thereupon the parties entered into the following contract in writing:

"This agreement, made this 23rd day of July, 1894, between Charles T. Ridgely, of Springfield, in the county of Clark and state of Ohio, party of the first part, and Mark A. Smith, of the same city, county, and state, party of the second part, witnesseth that whereas, letters patent of the United States Nos. 389,901 and 408,193, for an improvement in wall-paper cutters and trimmers, were granted on September 25, 1888, and July 30, 1889, respectively, to the first party, who was the assignor of one-half of each to said second party; and whereas, letters patent of the United States No. 480,516 for an improvement in straight edge, were granted to said parties jointly on the 9th day of August, 1892; and whereas, said parties still own said letters patent; and whereas, the party of the second part is desirous of owning the exclusive right of making, using, and vending paper cutters and trimmers and straight edges containing said patented improvements: Now, therefore, the parties have agreed as follows: The party of the first part, for the consideration hereinafter stated, hereby grants to the party of the second part and assigns the exclusive right to make, use, and vend within the United States, subject to the conditions hereinafter named, to the end of the term for which said letters patent were granted, and for such additional time as said patents, and each of them, may be extended, paper cutters and trimmers and straight edges

containing the patented improvements covered by the letters patent above mentioned. In consideration whereof, the party of the second part agrees to pay to the said first party one hundred (\$100) dollars for each and every thousand paper cutters or trimmers containing any of the improvements covered by said letters patent made and sold by said second party or assigns, and further agrees on the first days of January and July of each year to make to said first party full and true returns, under oath, of all the paper cutters or trimmers containing said patented improvements sold by him and his assigns during the preceding six months, and to settle in full for the same. It is further agreed that said second party and assigns shall have the right at any time to purchase the entire interest of said first party in the improvements covered by said letters patent for the sum of one thousand (\$1,000) dollars, upon tender of which amount said first party agrees to deliver to said second party an assignment or assignments, in writing, conveying to said second party and assigns the entire interest of said first party in and to said improvements covered by said letters patent, and in and to said letters patent therefor aforesaid. In witness whereof the said parties have hereunto set their hands the day and year first above written.

Charles T. Ridgely.
"Mark A. Smith."

On the 29th day of January, 1895, Ridgely took out two other patents for improvements in paper-cutting tools,—one being No. 533,374, upon an application filed December 14, 1894; the other, No. 533,375, upon an application filed August 16, 1894,—and thereupon commenced to manufacture and sell paper cutters and trimmers under his new patents, wherein is the infringement complained of. The defendant, Ridgely, denied infringement, proofs were taken, and the case was brought on for hearing. The circuit court found that, in view of the prior art, the inventions covered by the first two patents above mentioned stood within such narrow limits that the instruments manufactured in accordance with the two later Ridgely patents did not infringe. Accordingly a decree was passed dismissing the bill, and the plaintiff has appealed.

Paul A. Staley, for appellant.

H. A. Toulmin, for appellee.

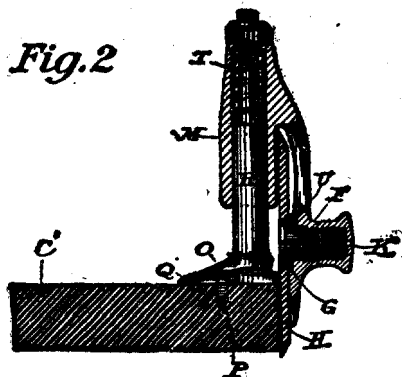
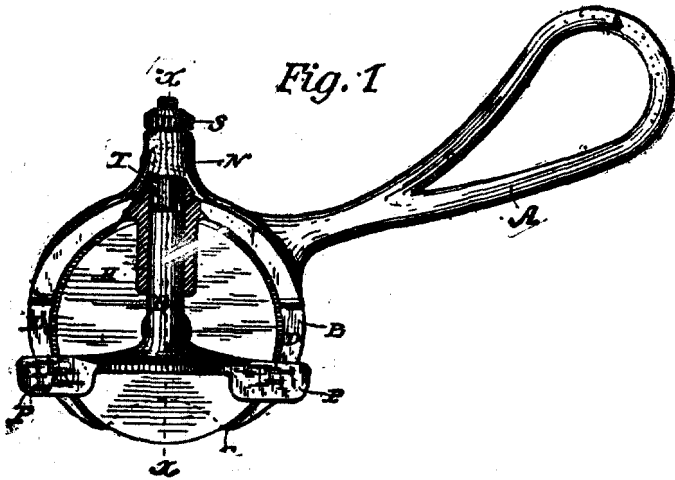
Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

By his bill in this case, the plaintiff complained of the infringement of both of the patents first mentioned in the preceding statement as having been originally owned by both parties, and of which he holds the license to use the defendant's one-half interest. But the plaintiff has since then apparently ignored the first patent, and now seeks for the establishment of the rights claimed by him under the second patent, No. 408,193. We shall, therefore, in dealing with the case, proceed upon a comparison of the invention embodied in the second of the patents to Ridgely and Smith, with the inventions covered by the two later Ridgely patents. There can be no doubt that a licensee may sue the patentee, who has granted the license, for infringing the patent within the field covered by the license, in the same manner and with like effect as though the patentee were a stranger. *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577; *Adriance, Platt & Co. v. McCormick Harvesting Mach. Co.* (C. C.) 55 Fed. 288; *Walk Pat.* § 400. The plaintiff contends that the defendant, having granted the license to him for a valuable consideration, is estopped from denying that the patent is valid, and we are of opinion that he is right in this. In a case recently decided by this court, it was held that the patentee, after having transferred his interest in the patent, was precluded from denying the validity thereof to the

same extent, and to the same extent only, that a third person would be, subject to the limitation, however, that he could not allege the total invalidity of the patent; the result being that he is still left at liberty to show that, assuming the patent to be valid, it is nevertheless subject to the limitations imposed thereon by the prior art. Subject, therefore, to the limitation just mentioned, its scope is to be tested by the principles which are generally applicable. *Noonan v. Athletic Club Co.*, 39 C. C. A. 426, 99 Fed. 90, and see *Manufacturing Co. v. Scharling* (C. C.) 100 Fed. 87. Adopting these premises, we will proceed to ascertain what are the limitations of the patent alleged to be infringed, and, having ascertained these, will then proceed to the inquiry whether the defendant's manufactures infringe the patent, the scope of which shall have been ascertained.

The plaintiff's patent, No. 408,193, was for improvements in tools for cutting paper, trimming shades, etc.; and the complete tool contemplated consisted of the combination of a head, B, having a receding face in circular form on one side thereof, in which a disk-formed blade, H, was located, the surfaces of the head, one of which is lettered "C," Fig. 1, projecting slightly beyond the blade and on



each side thereof to act against the side of the guide-strip, C', shown in Fig. 2. The blade was mounted upon an arbor fixed in the center of the recess of the head, and there was a gauge, O, extending across the head, and having a vertical shank, R, a channel in the head in which the shank was slidingly mounted, and a spring fitted around the shank, resting upon a shoulder thereof on its upper portion so as to press the gauge downward normally, with a stop to prevent the spring from forcing the shank out of the channel. Figs. 1 and 2 of the drawings are exhibited, which, with the foregoing description, sufficiently explain the basis of the patent. Claim 1 is for the whole combination of elements above enumerated. Claim 2 is for those parts of the tool connected with the head, which consist of the gauge, with a shouldered shank, moving in a channel of the head, —the shank being threaded at the upper end, and having a nut thereon,—and the spiral spring. The third claim involves the combination of the head, the blade, the gauge provided with dependent lips, and a flange extending laterally beyond the lips. Claim 4 combines the head, the disk blade, the arbor, and a jam-nut on the end of the arbor. The fifth is similar to the fourth, but includes, also, a recess in the head around the arbor, in which is located a washer, projecting somewhat beyond the adjacent surface of the head. The defendant introduced evidence to show the prior art, consisting of several patents for paper-trimming tools, and proof of the prior use of another of such tools. A patent to Van Horn for a wall-paper cutter, issued in 1885, shows a head, with an oblong block carrying a disk-blade in an opening or slot in the lower end of the block journaled upon a shaft or bolt extending through the same. From the upper end of the block extended a screw-threaded stem, which projected through the head, and had a nut for adjusting the blade up or down. It had a straight edge or guide, with a channel or slot therein parallel to its sides; and there were flanges extending from the head and running in the slot, and lips or flanges descending from the head to bear against the edge of the guide-strip. This patent contained nearly all the elements, though some of them were in cruder form, possessed by the plaintiff's patent. It had a head, a disk-blade journaled therein, a channel for the vertical oblong block, and the stem in prolongation thereof, the vertical shaft consisting of the oblong block and stem, a guide-strip, flanges running therein, and flanges running on the edge of the guide-strip. It did not contain a spring to give a yielding movement to the vertical shaft carrying the disk-blade, nor did it have the recess in the side of the head for the blade. Recurring for a moment to the fact that the member moving vertically through the head in the Van Horn patent is called a "block," and the stem integral with it is called a "stem," they are the mechanical equivalent of the corresponding member in the complainant's patent,—crude in form it is true, and suggesting the well-known rule that a mere change of form or proportions, or the perfecting thereof, by mechanical skill, does not create a patentable difference. Another earlier patent for improvements in paper cutters was that to Clarke, of August 14, 1888, upon an application filed in February, 1887. This patent

shows a head with a vertically projecting part of semicircular form, in the face of which is a circular depression to receive a disk-blade which is journaled upon a bolt running through an arm let down from the upper part of the upright projection, and into the upright portion of the head. A flange is formed upon the lower edge of the head, to work against the face of the guide-strip; and another flange is constructed upon a lateral projection of the head, to work against the other side of the guide-strip, thus insuring a direct movement of the cutter. Adjustment is made by means of set screws running down through the head and resting at the lower end,—two of them on a strip or gauge moving upon the upper surface of the guide piece, and another upon a roller also moving on the guide piece. There is a handle to operate the cutter attached to the head. In this patent, it will be observed, there is no vertically moving member, as in the Van Horn patent, and no spring to affect the operations of the cutter. Some improvements were made upon this cutter in a patent to Clarke & Robinson, of date March 18, 1890, upon an application filed June 13, 1888, relating mainly to the means for adjustment vertically of the knife or blade. This was effected by pivoting one end of the frame in which the blade is fixed to a vertical standard attached to the bed or gauge, securing the other end to a like standard affixed to the other end of the bed of the machine; this last standard having a clamping screw projecting at one side, on which moved a perpendicular slot formed on that end of the knife-carrying frame. By moving the slotted end up and down on the shank of the screw, and tightening the latter at the proper position, the knife is then held vertically at the place desired. Another paper trimmer, called the "Union Paper Trimmer," one of which was produced in evidence, is shown to have been manufactured at Meriden, Conn., and to have gone somewhat into public use as early as 1886. This trimmer was a simple affair, but it had a head with a disk-blade journaled therein; the head being supported by elliptical springs having rollers at either end, thus affording means for depressing the blade as desired by bearing down upon the frame carrying it. Washers were put upon each side of the blade shaft, to prevent friction between the head and the blade. Rude handles were cast upon the frame for the purpose of manipulating the tool. The cutter was used in connection with a guide-strip. Objection was made to the evidence relating to the Union trimmer at the time it was taken, for the reason that no sufficient ground was laid for it in the answer, and notice was given that a motion would be made to strike out the deposition, and a motion to that effect was subsequently filed. But the motion does not appear to have ever been brought to the attention of the court, and we therefore infer it was abandoned.

From what has been stated, it appears that when Ridgely applied for the patent, No. 408,193, he must be presumed to have known that paper trimmers had already been made in which there had been employed a head or frame, having a recessed face at one side thereof to receive the blade, whereby surfaces were left at each side of the blade to act against the edge of the guide-strip; a disk-blade journaled in

the recess of the head; a gauge extending across the head; a knife frame having a vertical shank slidingly mounted in a channel made for the purpose; a spring to support the knife-carrying frame, whereby a varying pressure could be put upon the knife; washers upon the knife shaft between the knife and the frame to ease the friction; and a handle wherewith to manage the cutter. We have in a preceding part of this opinion stated what Ridgely claimed for his invention, and, by comparing it with the foregoing statement of the condition of the art at that time, it is quite apparent that there was nothing new in his invention, except the introduction of the spiral spring into the channel of the cutter head, whereby the objections to the rigid construction of former cutters were overcome, and a yielding movement given to the blade,—a property thought desirable in the art. But this, too, had in a certain way already been accomplished,—apparently, however, by rather clumsy and inadequate means. The means provided by him operated in a somewhat different way, and produced better results. To the extent of this improvement his patent was valid, but it obviously limits its scope to the particular means invented by him. The following considerations will demonstrate the correctness of this conclusion: It is a settled rule of law that the mere combination of several parts, chosen from old machines in the same art, to perform in a new machine the same functions which they performed in the old machines, where the adaptations are such as require only the skill of a mechanic trained in the art, is not patentable as an invention. In the Union Trimmer the spring supports the head, and through it the blade which is fixed within it. The spring rests upon rollers which move upon the upper face of the guide. If for these rollers we should substitute the pressing strip found in the Clarke patent, we should have substantially all the elements involved in that part of the Ridgely patent, No. 408,193, associated in the operation of his spring device. And the other elements of his combination were all old, or at most were but mere mechanical improvements of old forms, not affecting their mode of operation. Do the trimmers made under the new Ridgely patents infringe his former patent, as limited to the specific means employed in the latter for giving effect to the advantages secured by the introduction of the spring between the blade carrier and the gauge, or "pressing strip," as it is called in the Clarke patents? In the first of the new patents the head in which the blade is fixed is pivoted upon the gauge at one end thereof, and a coiled spring is turned around the pivot, and connected at one end thereof with the gauge, and at the other with the head, and so adjusted that normally it tends to throw the gauge and head apart. This tendency is overcome by pressure upon the other end of the head, which causes the blade to descend to the desired position. An incidental advantage is the leverage upon the blade which is obtained by this construction. There is no vertical shank upon the gauge or channel in the head in which the shank is slidingly mounted, as in the older Ridgely patent. In the second of the two new patents the gauge and head are pivoted at the end, as in the first; but the spring is transferred to the other end, and coiled around a pin attached to that end of the head, descending into a hole or channel in the gauge. The pin does not move vertically, but

in the arc of a circle; the movement being controlled by the fixed pinion on which the other end of the head or frame revolves. If the patent alleged to be infringed had been of a primary character, or one embodying a distinct and substantial advance in the art to which it relates, we should probably be able to find in the new Ridgely patents, and particularly in the last one, the equivalents of the elements combined in the patent now held by Smith, as was done by this court in reference to the important and very novel inventions in the cases of McCormick Harvesting Mach. Co. v. C. Aultman & Co., 37 U. S. App. 299, 16 C. C. A. 259, 69 Fed. 371, and Bundy Mfg. Co. v. Detroit Time-Register Co., 36 C. C. A. 375, 94 Fed. 524; but as the plaintiff's patent is sustained merely for the peculiar location of the spring in the trimmer, effecting the specific mode of operation resulting therefrom, we think the defendant's patents do not show an infringement thereof. To hold otherwise would be to admit that the plaintiff's spring device covered a spring located anywhere in the trimmer for the purpose of modifying the effect of pressure upon the head and blade. This we cannot do, in view of the similar device in the Union paper trimmer.

The claims in the plaintiff's patent, other than claim 1, stand on equally narrow ground. The second relates only to the spring device, and the special means set forth therein for operating it, among which is a shouldered shank on the gauge "screw threaded at its upper end, and provided with a nut." Nothing of the kind is found in the defendant's structure. The third is for a gauge extending across the head and "mounted in the head," referring to the vertical shank thereof sliding vertically in the channel of the head. The defendant does not employ a gauge having such characteristics. The fourth includes "a disk-blade having a central bore constructed with a seat"; that is, countersunk on the inner side to receive the correspondingly formed head of the arbor on which the blade turns. The bore of the defendant's blade is uniform through its thickness, and is not constructed with a seat. The side of the disk-blade is flat at that place, and so is the inside of the head of the arbor. It may be that this peculiar construction of the plaintiff's blade and arbor is not, as matter of fact, material; but it is claimed in that specific form in the patent, and in the specifications the description of the blade and the arbor is not general, but of this form only. It cannot, therefore, be claimed that it is immaterial,—certainly not where the patent stands on such limited grounds.

As to the fifth, it is not contended that the defendant's patents infringe it. But counsel for the plaintiff refer to certain evidence in the record from which it appears that the defendant, prior to the commencement of the suit, caused to be made 380 trimmers according to his new patents, and they contained, also, a washer resting in a recess in the head bored out around the arbor hole; and upon this proof it is claimed that the plaintiff is entitled to an injunction to restrain the defendant from infringing the fifth claim of his patent. In the Union paper trimmer was a washer at the same place for the purpose of holding the blade away from the head and preventing friction between them. The modification of this in the plaintiff's patent consist-

ed in boring a seat for the washer in the head, so that only a part of the thickness of the washer should project into the space between the blade and the head. There was nothing new in mechanics in forming this recess for the washer. Besides, this claim calls for the disk-blade and the arbor of the specifications, none other being therein suggested than those particularly described as parcel of the substance of the invention; and these, as we have already said, are not such as are used by the defendant. Upon the whole, we are of opinion that the decree of the circuit court should be affirmed. It is so ordered.

THE GEORGE FARWELL, et al. (five cases).

(Circuit Court of Appeals, Second Circuit. July 25, 1900.)

Nos. 109-113.

1. MARITIME LIENS—REPAIRS AND SUPPLIES—REPRESENTATION OF OWNERSHIP BY CHARTERER.

A steamship company having its place of business in New York City through its officers, procured repairs to be made and supplies furnished to a vessel in that port, representing that it was the owner of such vessel, although the vessel was in fact owned in Cleveland, and the company was in possession under a charter which required it to make all repairs and furnish all supplies at its own expense, and to keep the vessel free from liens. *Held*, that persons making repairs or furnishing supplies on such representations were not bound to make further inquiries as to ownership, but were justified in relying on such representation, and, where there was an express agreement for a lien, the vessel was bound thereby; but that, in the absence of such agreement, or where no inquiry or statement was made as to ownership, there would be no lien, although the repairs or supplies were charged to the vessel, the presumption being that credit was given to the supposed owner.

2. SAME.

A libellant who made repairs on such vessel under an agreement with the port captain, who had charge of the work, with the approval of an officer of the company, on a statement by the port captain that the vessel was owned by the company, and was "good for the bill," but who made no inquiries of the company, and no agreement with it for a lien, was not entitled to a lien therefor.

Shipman, Circuit Judge, dissenting as to the second point.

Appeals from the District Court of the United States for the Southern District of New York.

These cases come before this court on appeal by Nicholas J. Boylan and Syndenham Scott, the claimants, as owners of the steamship George Farwell, from decrees of the district court, Southern district of New York, sustaining libels filed against said steamship for repairs and supplies.

James Byrne, for appellants.

James K. Summers, for appellees Philip and others.

Edward G. Benedict, for appellee Pollock.

James F. Foley, for appellee Hoffmire.

Le Roy S. Gore, for appellees Tregarthen.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The owners of the steamship were residents of Cleveland, and on her stern, at the several times mentioned, appeared the words "George Farwell, Cleveland, Ohio." On November 17, 1898, she was chartered to the Manhattan Steamship Company, a corporation organized under the laws of the state of New Jersey, but doing business in New York City. The charter was for 24 months at \$1,000 per month, with an option to purchase at a stipulated price. The Farwell was built for a freighter on the Lakes, and it was the intention of the charterer to overhaul her so that she would be fit to run with other steamers on a coastwise line which it expected to establish from New York to Southern ports. The charterer was to bear all expenses, including alterations, repairs, and addition, and agreed to keep her free and clear of all liens, incumbrances, and debts. The vessel was delivered to the charterer at Buffalo, was brought through the canals and St. Lawrence river, and reached the foot of Twenty-Fifth street, South Brooklyn, considerably damaged by sea perils encountered on the voyage. Upon her arrival at South Brooklyn parts of her engines and other machinery were taken down and removed from the vessel, and she went out of commission. Her supply of coal was taken out, in order that changes might be made in her bunkers, and that new bulkheads might be put in. In this condition she was towed from South Brooklyn to East Fourth, borough of Manhattan, and while at the foot of East Fourth street she was further dismantled. Her system of iron piping was removed, to be replaced with copper. While she was in this condition, and while this work was going on, the claims of the libelants accrued. All of the work claimed for and all of the supplies and materials were furnished (except the supplies furnished by Nieman) while the steamship was lying at the foot of East Fourth street.

The following propositions seem to be established by authority:

(1) The charterer of a vessel becomes the owner *pro hac vice* to such an extent that he may bind the ship for repairs and supplies, when there is nothing in the charter restricting him in that particular.

(2) "Neither reason nor public policy forbids the owner and the charterer from making" an agreement that the charterer shall supply such things, and keep the ship free of liens therefor. *The Kate*, 164 U. S. 465, 17 Sup. Ct. 138, 41 L. Ed. 516.

(3) If the person furnishing the labor or supplies knows the terms of such a charter, he cannot have a maritime lien upon a foreign vessel when he furnishes such labor and supplies upon the order of the charterer or the charterer's servants, even though he charges them to the vessel. *The Kate*, *supra*.

(4) The same rule will apply even if the person so furnishing labor and supplies has no knowledge of the contents of the charter party, "If the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim." *The Valencia v. Ziegler*, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710.

(5) Where supplies and repairs are ordered in a foreign port, not by the master, but by the owner, there must be some affirmative evidence

to show that the credit of the ship was pledged as security for payment.

These propositions dispose of all the questions raised on these appeals.

The Philip Claim.

The superintendent of the Manhattan Steamship Company, the charterer, went to libelant's shop, and said there was some work to be done on the steamer George Farwell. Libelant asked him for whom the work was to be done. He said the Manhattan Steamship Company owned the boats. The libelant, having had some previous trouble in collecting bills, replied that he did not wish to do anything for the Manhattan Steamship Company, whereupon the superintendent said, "Do it on the credit of the vessel." Here we have no question of the libelant being put on inquiry. He did, in fact, inquire, and was informed by a person who ought to have known, and who was one of the charterer's agents, that there was no charter restriction. We find no authority which would seem even to imply that the libelant, under such circumstances, was bound to make any further inquiry, or to search the documentary title to the ship. If the result is a hardship for the owners, they, rather than the libelant, should suffer, because they turned over the possession of their ship to a charterer who allowed its agents to misrepresent the situation. We are further of the opinion that libelant was entitled to rely on Schley's direction to give credit to the ship. He was not a mere subordinate employé, but the chief engineer and superintendent of the particular department concerned with work of the sort furnished. The claim of this libelant is, therefore, sustained.

The Hoffmire Claim.

In this case the weight of evidence is to the effect that Newcomb, the general manager of the steamship company, told libelant that "he" (meaning the company) had bought the ship, and that the work was done upon an express understanding with him that "the ship was good for it." The claim of this libelant is therefore sustained.

The Pollock Claim

The supplies in this case were furnished upon the order of the purchasing agent of the Manhattan Steamship Company, who stated that the steamship company owned the George Farwell. Nothing was said between the libelant and the purchasing agent, or any person representing the steamship company, in respect to a pledge of the vessel, and there are no circumstances in the case from which an understanding that the vessel was to be pledged for the supplies can be implied. The case is exactly as though the supplies had been ordered by the owner in person, and the presumption is that they were furnished upon the owner's credit, and not upon the credit of the vessel. They were charged to the steamer and owners. The libelant never saw the steamer, and did not know whether she was a domestic or foreign vessel. The case is merely one where the libelant, as was its usual custom, charged the supplies to the steamer and her owner. The decree in this case must be reversed.

The Tregarthen Claim.

The repairs were made pursuant to an agreement with Newcomb, the manager of the Manhattan Steamship Company, or with the port captain. The libelants did not concern themselves to find out whether the vessel was foreign or domestic, did not know whether the Manhattan Steamship Company was a foreign or domestic corporation, and supposed that New York was the home port of the vessel, and that she was owned either by a New York corporation, or by an individual resident of New York. They knew that she was being generally overhauled. The supplies were charged to the steamer. This case, like the Pollock case, is one where the supplies were furnished without any agreement for a lien, express or implied, and upon the supposition that they were ordered by the owner in person at the home port of the vessel. The decree should be reversed.

The Nieman Claim.

The libelant sold meats and groceries to the vessel on the order of the steward. He knew the home port of the vessel was Cleveland. He made no inquiries as to whether she was chartered, or on what terms. There is no other evidence as to this claim, which is not established by proof.

The decrees of the district court in the Pollock, Tregarthen and Nieman claims are reversed, and causes remitted to that court, with instructions to decree in accordance with this opinion. Costs to appellants. The decree in the Philip and Hoffmire claims are affirmed, with interest and costs.

SHIPMAN, Circuit Judge. I agree with the conclusions expressed by Judge LACOMBE in all the cases except in the Tregarthen claim, in regard to which I think that the facts require an affirmance of the decree of the district court. Tregarthen is a member of a firm of shipwrights, and was told, through Hoffmire, another libelant, and whose lien upon the steamship has been established, that the owners of the ship wanted work done upon her. Tregarthen's testimony is thereafter as follows:

"I then went to the steamer, and saw the captain, and said I heard the owners wished some work done on the ship. He said, 'Yes, wanted some new guards on,' and so forth, and sent me to the port captain. I saw him, and he said that the new guards were wanted around the ship. I asked about the owner. He said, 'Manhattan Steamship Company.' He said, 'Why, the ship is good enough for your bill.' That was Captain Holton, port captain, who said that. I gave an estimate, and the next day he agreed to it, and we started work. Newcomb, superintendent, or something, said we should get pay as soon as the work was done; said, 'We have brought a few other vessels here.' Contract price was \$250."

Holton, the port captain, had charge of the repairs on the deck of the vessel, and to him the captain was subordinate. The captain said that the owners wanted deck repairs; sent Tregarthen to Holton for information, who said that the Manhattan Steamship Company was the owner, and "the ship is good enough for your bill"; agreed to Tregarthen's estimate; and, after an interview with Newcomb, the superintendent, who made promises in regard to the time of payment,

the work was started. It is true that Tregarthen thought that the vessel was owned by a New York corporation, of whose pecuniary character or responsibility he was ignorant, and it is evident to me from his conversation with Holton, who was in immediate charge of the repairs, and to whom he was sent by the captain for information, that the work was done upon the credit of the vessel, and that the libelants supposed that they had a lien upon her under the New York statute. Tregarthen made all the necessary inquiries in regard to the ownership of the vessel, and was not bound to make further search for documentary title; and, in my opinion, did the work with as much reliance upon the credit of the vessel, and as adequate a right to rely upon her, as did either Philip or Hoffmire, although he did not obtain from the general manager a confirmation of Holton's declaration that the vessel was liable.

THE MARGARET B. ROPER.

(District Court, D. South Carolina. August 2, 1900.)

1. COLLISION—SUIT FOR DAMAGES—TESTIMONY OF SEAMEN.

The testimony of seamen on a ship sunk in collision, as to the manner of such collision, is not to be discredited because of their personal interest in the suit on account of their claims for loss of effects, such fact being no more likely to affect their testimony than the bias most seamen have in favor of their own ship.

2. SAME—PRESUMPTION OF FAULT.

The fact that one of two vessels sailing on crossing courses was struck by the other and sunk raises no presumption that the survivor was the one in fault for the collision.

3. SAME—SAILING VESSELS CROSSING—EVIDENCE CONSIDERED.

Evidence relating to a collision at sea in the night between two schooners considered, and held not to sustain the contention of the libelant, whose vessel was sunk, that the two vessels met on parallel courses, and that the collision was caused by a change of course on the part of the libeled vessel, but to support the claim of the latter that she was sailing closehauled on the starboard tack on a course crossing that of libelant, and that she held her course, which, as the privileged vessel under navigation rule 14, she was required to do, and was not, therefore, in fault for the collision.

In Admiralty. Suit for collision.

Nathans & Sinkler, for libelant.

Bryan & Bryan, for respondent.

BRAWLEY, District Judge. The case for the libelant is that, sailing closehauled on a course to the north, with the wind northwest by west, she was sunk by the claimant, heading south, and sailing free. The case for the claimant is that she was sailing closehauled on the starboard tack, on a course southwest by south, with the wind west by north. Whatever may be the truth, there was such "risk of collision" as brought into operation the sailing rules embodied in article 14 of the international regulations, which are as follows:

"Art. 14. When two sailing vessels are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other as follows, namely: (a) A ship which is running free shall keep out of the way of a ship which is close hauled. (b) A ship which is close hauled on the port tack shall keep out of the way of a ship which is close hauled on the

starboard tack. (c) When both are running free, with the wind on different sides, the ship which has the wind on the port side shall keep out of the way of the other. (d) When both are running free, with the wind on the same side, the ship which is to windward shall keep out of the way of the ship which is to leeward."

The Fannie Brown, a schooner of 430 net registered tonnage, was heavily laden with phosphate rock, bound from Charleston to Baltimore, making four or five knots an hour. The Margaret B. Roper, a schooner of 393 net registered tonnage, partly laden with 100 tons of sulphur, bound from New York to Charleston, was making about seven knots an hour. There was a wholesale breeze of about 14 miles an hour, and the collision occurred about 8 o'clock on the night of December 26th, at a point about 25 miles northeast of Cape Hatteras, the night being starlight. The Brown, with everything on board, sunk shortly after the collision, all hands getting aboard the Roper, which swung alongside. The mere fact that one vessel is sunk, and that the other survives a collision claimed to have occurred on crossing courses, is not of itself a circumstance which aids in the determination of the fault, for the vessel that arrives first at the point of intersection is generally the sufferer, and that is a matter of chance and of a few seconds. The burden of proof, therefore, rests upon the libellant here, but I do not give much weight to the contention of the claimant that the testimony of his witnesses is to be discredited because of their interest, each of them claiming some compensation for loss of personal goods. It would be a hard case if the same blow that caused the injury should at the same moment strike down the only testimony competent to prove it. An unvarying experience shows that the testimony of all seafaring men is affected by the supposed interest of the ship they sail on, and the truth as to any happening at sea is to be ascertained, if at all, not by weighing the number and bias of witnesses on one side against the number and bias of witnesses on the other side, or by attempting to reconcile testimony generally irreconcilable, but by taking certain conceded or well-proved facts, or facts established by disinterested witnesses, and from them deducing such conclusion as seems to accord best with the probabilities of the case. The fact not disputed in this case is that the Roper struck the Brown on the starboard side in her forerigging, cut her through, and knocked off the after-part of the forward house, the jib, fore staysail, and headgear forward of the foremast, and all the staysails remaining in good condition and uninjured after the collision. The forward house was about 12 feet long, the foremast passing through it about 2 feet from the forward end, and was about 6 or 7 feet from the rail. The fore staysail had a boom about 22 or 23 feet long, which swung within 5 feet of the rail. The master of the Brown being asked, "Did she strike you a glancing blow?" answered, "She struck a pretty solid blow." The mate, being asked a like question, answered that he did not think it was a glancing blow. Cannon, the steward of the Brown, standing on the fore hatchway, on the starboard side, about 12 feet aft the foremast, and about a foot and a half away from the after-end of the forward house, says that a very few seconds before the collision he saw both "lights of the Roper, and

judged that she would come between the cat and the forerigging." This witness has drawn a diagram, which is in evidence, marked "Exhibit F," indicating what, in his view, was the line upon which the Roper approached the Brown. The angle of incidence therein is about 50 degrees. The lookout on the Brown says she was struck "in the forerigging." After the collision the vessels swung round and lay alongside, bow and bow. The Roper was examined by the court during the hearing, and the testimony, confirmed by such personal inspection, shows that her stem was considerably bruised, and that there were bruises on the starboard side above the main deck, and indentations of probably a half inch from a point about 5 feet aft to about 12 feet aft the stem. There were some bruises on the port side, and a hole where the wood showed some decay, and the testimony is that the lumber ports on both starboard and port sides had been broken in. As the Brown was heavily laden, she was probably about 5 feet lower than the Roper. It is therefore clearly established that the Roper struck the Brown at an angle more or less considerable. Cranmer, the master of the Roper, estimated it at about five points, which is about the angle given in Cannon's diagram. Neither the master nor mate of the Brown testifies on this point. In the collision all the head sails of the Roper, her jib boom, and martingale went, and the testimony is that among the wreckage picked up was this martingale and a sheer pole claimed to be that of the Brown. This martingale and sheer pole were offered in evidence. The sheer pole was of iron of about an inch thickness, wrapped with tarred twine, and is of three links, each about $3\frac{1}{2}$ feet in length. One of the links of the sheer pole produced is bent in the form of a loop, and this loop fits over the lower end of the martingale. In the crown of the loop the twine is broken and abraded, and the contention is that these abrasions were caused by the jumper chains which run from the lower end of the martingale to the jib boom, which chains, the testimony shows, were broken. Inasmuch as the sheer pole on the Brown, as on all vessels, runs fore and aft, this loop bears silent but pregnant testimony to the fact that it must have been caused by some hard body of about the diameter of this martingale pressing against it at such an angle of incidence as to bend rather than glide from it. The genuineness of this sheer pole is questioned because some of the libellant's witnesses, who were in a position to see, did not see it; but the man who fished it up with the other wreckage testifies positively to its being taken from the water; and Capt. Lamson, who saw it produced in court, and who had opportunity to do so, has not denied that it belonged to the Brown. The practical difficulty in the way of the fabrication of such a piece of testimony, the chances of exposure, and the serious consequences that would be likely to follow such attempts, with the intrinsic signs of genuineness in the thing itself, all compel the acceptance of this evidence. My conclusion upon this branch of the case, in which there is little or no conflict of testimony, is that the Roper must have struck the Brown at an angle of from 35 to 50 degrees.

Next will be considered the account of the collision as detailed by the chief witnesses for the libellant. Lamson, the master, standing on the lee quarter of the Brown, testifies to seeing the red and white

lights of the Roper ahead, between his forerigging and jib boom, the Brown on a course north, the Roper coming straight on a course south until within a length, when the Roper ported her wheel and luffed, striking the Brown just forward of the fore-rigging, cut her through, shoved her around, and came alongside. Drisko, the mate, testifies to seeing the lights of the Roper about a mile or a mile and a half ahead, a little on his starboard bow,—it might be one-half a point, not more,—until within about two lengths, when she luffed, striking the Brown as already detailed. Webster, the lookout on the Brown, says that he saw both lights of the Roper directly ahead until she came within a length, when she commenced to luff, and showed her red light. Lieut. Johnston, called by the libelants as an expert on other points, in reply to a question by the court, says that in the conditions above described, if the Roper had luffed at one or two lengths away, the Brown would have struck her upon the port side. That seems so obvious even to the nonnautical mind that counsel for libelant contends, and correctly, that estimates of distances at sea in the nighttime are not to be absolutely relied on. It follows, then, that the alleged luffing detailed as the cause of the collision must have been at less than one length, in which case it seems impossible that the Roper should have struck the Brown at the angle, and in the way that it is substantially established that she did strike her, or that she would have approached her on the line which Cannon, an intelligent witness for libelant, standing nearest to the point of collision, has described; for, if the Roper kept her course, there would have been an end-on collision. If she luffed, as described, and showed her red light one length away, the Brown would have run into her on her port side. If she luffed within less than one length, she could not have described a semicircle so as to strike the Brown, as proved. Drisko, the mate of the Brown, upon being recalled, drew a diagram representing the positions of the vessels just before the collision. In this diagram (Exhibit R) the Roper is placed about $2\frac{1}{2}$ points off the starboard bow of the Brown. This is inconsistent with his testimony in chief, wherein he says that she was half a point, not more, on his starboard bow. Making due allowance for the fact that he is not an expert draughtsman, this changing of position is a circumstance tending to confirm the conclusion that, however this collision occurred, and to whosoever fault it was due, it could not have occurred in the way it did if the two vessels were moving upon the courses described by the chief witnesses for the libelant.

An examination of the testimony in detail is now necessary. Accepting as true the statement of the libel that the Brown was heading northward, and going at the rate of four or five miles an hour, and being satisfied that each vessel kept its course, the question for decision is which had the right of way, and the solution of it depends upon the direction of the wind and the course of the Roper. I have said that each vessel kept its course. As to the Brown there is no dispute. As to the Roper there is a conflict. Witnesses for the libelant testify to a change of course a few moments before the collision, while witnesses for the Roper say that an order was given to port the helm too late to be executed, and that it was not executed.

If such movement was made, it was an error in extremis, and the fault, if fault there be, lies further back. It lay in keeping a course which she had no right to keep, and in not getting out of the way sooner, if it was her duty to keep out of the way. The testimony of witnesses on one moving vessel as to deflections in the course of another moving vessel is apt to be illusory from the natural disposition to regard your own vessel as stationary, the only moving object which the eye takes in being the other vessel. The man at the wheel on the Roper testifies positively that it was not turned so as to cause any deflection in her course; and all the witnesses on the Roper concurring in that, and inasmuch as such movement, under the circumstances, would have been an error, and not a fault, I am of opinion that the collision was caused by each vessel keeping its course, as each claimed the right to do; and the pivotal question remains, which had the right of way? If the Brown had the right of way, as she claimed, then the Roper is at fault, whether she luffed or not. What was the direction of the wind? Two witnesses only on board of the Brown—Lamson, the master, and Drisko, the mate—testify on that point. They say the Brown was heading north, and that the wind was northwest by west at the time of the collision; that at 12 o'clock, when they were 44 miles north and east of Diamond Shoal, the wind was about northwest, at 4 o'clock it was about northwest by west, and that after the collision it was a little northwest. The testimony of the witnesses of the Roper is that before noon on the day of the collision, the wind was from the northwest, it was canting down towards the west in the afternoon, and at the time of the collision the wind was west by north. That is the testimony of Cranmer, master, Stiles, mate, of Johansen, the lookout between 6 and 8, just before the collision, who says the wind was in his face, and that the Roper was sailing closehauled. Such, also, is the testimony of Johnson, and of Lunt and Bulkley. Johansen and Johnson are Swedes. Bulkley and Lunt have been from 25 to 30 years at sea. Mount, the master of the Horace B. Sheres, which had been sailing in company with the Roper all that day, and passed the two vessels just after the collision, within about 700 or 800 feet, testifies that the wind was northwest before noon, and that it canted more westerly in the afternoon, and that he had to trim his sheets to head his course, and that at half past 7 the wind was west-northwest when he took the wheel and trimmed his sheets, and that at 8:25 p. m., when he came to, to trim his vessel for the course round Hatteras, the wind was west one-half north, and that when he passed the vessels they were headed to the westward. Macon, captain of a vessel that was 30 miles southwest by west from Diamond Shoal lightship that night, testifies that the wind at that point at 8 p. m. was west-northwest, and that from his experience of about 25 years on the North Atlantic coast, when the wind is west-northwest south of Hatteras, it generally draws about a point and a half to about two points more north of Hatteras. Capt. Low, who testified to an experience of 15 or 18 years in sailing around Hatteras, says that with a northwest wind at Hatteras the wind has a tendency to draw to the north north of Hatteras and to the west south of Hatteras. The weather

report from Cape Hatteras, the weather bureau nearest the point of collision, gives the wind direction at 8 p. m. as west, and the velocity 14 miles per hour; velocity at noon being given at 16 miles, and no great variation from that time to the time of the collision. The extract from the daily journal of the observer at that point for December 26, 1899, is as follows: "Clear day, lower temperature, brisk westerly winds, heavy frost in the early morning." The report from Wilmington, N. C., the point south of Hatteras, gives the wind direction at 8 p. m. as northwest, and the wind velocity five miles per hour. The report from Cape Henry, Va., gives the wind direction at 8 p. m. as southwest, wind velocity eight miles per hour. The report from Norfolk gives the maximum velocity and direction of the wind from 8 a. m. to 12 o'clock noon at a velocity of 17 miles, direction northwest; from 12 noon to 4 p. m., maximum velocity 16, direction west; from 8 p. m. to 9 p. m., direction southwest. The report from Kitty Hawk, which is the station next north of the point of collision, a little further off from the collision point than the station at Cape Hatteras, is that there were fresh northeast winds all day, giving the maximum velocity from 12 noon to 4 p. m. at 19 miles per hour, direction unknown. A detailed report of the wind directions at Kitty Hawk is not furnished. Letters from the chief of the weather bureau say that the observer at Kitty Hawk station does not make an observation of the wind at any particular moment, but notes from time to time the direction during the day, and records it in his journal, and that he does not make an observation of the wind at 8 p. m. It appears that this observation is confined to the daylight hours. Kitty Hawk is about 45 miles from the place of collision, Hatteras about 25. The records of Hatteras, Cape Henry, and Norfolk show a wind movement from the northwest in the morning, backing down to a west wind at 8 p. m. With this general concurrence as to the direction of the wind, I think that the report from Kitty Hawk, unsubstantiated by detailed observations, is not entitled to credence. It is contradicted in part by the testimony of Capt. Lamson and his mate, who testified that they were up in that direction at one time during the day on one of their tacks, and that the wind was from the northwest. The direction of the wind, therefore, as testified to by Lamson and Drisko, the only two witnesses for the Brown, is contradicted by six witnesses upon the Roper; by Mount, an independent witness, who gives in detail the circumstances which led him to note the direction of the wind; and in a general way is contradicted by the weather reports. It seems to me, therefore, that the libellant has failed to establish this essential part of his case by a preponderance of the testimony. The testimony of Mount, master of the *Sheres*, is conclusive against him, if it is to be accepted as true. Libellant seeks to break the force of his testimony on this and on another important branch of the case by suggesting and charging that Mount is not a disinterested witness; that he has such a bias in favor of the master of the *Roper* that he has perverted facts, and joined Cranmer in an effort to concoct with him a story which would save him from liability. There is no evidence that Mount has any interest in this case, or that he has any such relations with Cran-

mer as would lead him to testify falsely in his behalf. He himself has said that his acquaintance with Cranmer was slight, and that he had more friendly relations with Lamson than with Cranmer. There was nothing in his demeanor while upon the stand to awaken in my mind any suspicion that he was not telling the truth. His testimony is impeached because it is said that his conduct in passing these two vessels while they were in collision without stopping to offer assistance shows him to be lacking in humanity, and that one who, under such circumstances, exhibited such heartless indifference, ought not, therefore, to be believed. I think that Mount, under the circumstances, should have stopped to see if assistance was needed. He says that some hours afterwards he was conscious of his failure to do the right thing, and regretted it; and it should be said in fairness that no signals of distress were given him. However reprehensible may have been his indifference, I cannot say that such conduct in itself stamps him as unworthy of belief, nor do I regard certain discrepancies in parts of his testimony, which have been pointed out, sufficient ground to discredit him upon the main point upon which he has testified with such positiveness and with such details as seem to me to make his testimony credible. His failure to answer a letter written by Mr. Cohen, the agent of the Brown, asking for information, is also commented upon. I cannot say that such a refusal justifies a reflection upon his veracity. It may be that he did not wish to be troubled with the affairs of others. His conduct on the night of the collision shows that he is a man more regardful of his own convenience and interest than of the possible needs of others. His appearance and manner, intelligence and experience, all seem to me to give weight to his testimony. The testimony of Macon and of Low that when the wind below Hatteras is from the northwest the general direction north of Hatteras is likely to bend to the northward does not seem to have much application, if the testimony of all of the Roper's witnesses and of the weather bureaus that the wind was westerly, instead of from the northwest, is to be believed, as I think upon the whole that it is. If it be true that the wind was west by north, then it would follow that the Brown, sailing due north, would have the wind two points free, sailing, as the testimony shows she could, within five points of the wind. The claim of the Roper is that she was sailing closehauled on the starboard tack at the time of the collision, the wind being west by north. The testimony is that when light she sails within $5\frac{1}{2}$ to 6 points of the wind. All of the witnesses testify that down to about 10 minutes to 4 she was on a south-southwest course; that at that time they came to, the captain took the wheel, and they trimmed the vessel down closehauled, because they say that at that time the wind came more out to the westward (specific details as to what was done at 4 o'clock are given in the testimony); that they put down the center board, and jiggered up the peak; and that from that time to the time of the collision she was sailing closehauled on the starboard tack southwest by south. The testimony of Mount is that he passed Body Island light, whose visibility is $18\frac{1}{2}$ miles, about 16 miles to the eastward; that just before dark he saw the Roper 5 or 6 miles east-southeast of him. Mount

testifies that he kept on a course south-southwest for about an hour, until Body Island light bore northwest; then changed his course to south, and, sailing there about an hour and a half, he saw the vessels in collision. All of the witnesses of the Roper testify to seeing the Sheres just before dark, and that she was five or six miles away. If this testimony is true, then the Roper, in order to reach the point of collision, and where the Sheres passed her at 8 o'clock, must have been at a point so far to the eastward of Body Island light that her course to the point of collision must have been about south-southwest. That is so certain that the libelant insists that that testimony as to the position of the Roper at dark cannot be accepted as true. His contention upon this point is that the Roper made Body Island light; and Lieut. Johnston the navigator, called as an expert, to whom was submitted Capt. Cranmer's testimony as to his courses from the time he left New York, shows that following such course he would have passed 14 miles east of Body Island light. In marking this course Lieut. Johnston allows "half a point variation which is west and half a point leeway which is west." If the wind was from the northwest or west, it is clear the leeway would be to the east, as that generally varies with the direction and duration of the wind. Drisko, mate of the Brown, testifies that at the time of the collision there was a half-mile current to the westward. Cranmer undoubtedly calculated to make Body Island light, and took a course for that purpose. When one considers the varying elements which affect a sailing vessel at sea, there is nothing in itself improbable or incredible in the story told by Cranmer that he was several miles to the eastward of where he expected to be. As has been well observed, a course at sea is not a railroad track. So many variable elements enter into it, it is so much affected by winds and currents, sometimes by the idiosyncrasies of the men at the helm, that a variation of five or six miles in the position of two vessels of like character sailing upon the same general course is not an improbability. It is true that Johnson, the man at the wheel on the Roper, in answer to libelant's question, "What time did you see Body Island light?" answers, "About 6 o'clock." It does not appear that he had ever been on that coast but once before; said he did not know how far off he was, and manifested a general ignorance of the locality which does not entitle his testimony to credence, contradicted as it is by all of the other witnesses on the Roper. Bulkley, who thought he saw a brightness in the direction where he was looking for a light, testifies that he went up into the rigging, but could not see a light; and Cranmer and other witnesses all testify that they saw no light,—Cranmer going to the masthead to look for it; and if Mount is to be believed, and he was about 16 miles from the light, and the Roper 5 or 6 miles to the eastward, it would be impossible for the Roper to have made Body Island light. The preponderance of the testimony that the Roper did not make Body Island light is so great that it compels me to accept as probably true the testimony of Mount and all the witnesses on the Roper that the Roper, about dark, was 5 or 6 miles from the Sheres, which was about 16 miles from Body Island light.

The case, then, stands thus: The libelant claims that the Roper was sailing on a south course, both lights being visible directly ahead for the distance of a mile and a half or two miles; that she came on that course head to head, or at most half a point off the starboard bow of the Brown, until within one or two lengths, when she luffed, and ran into her. The libelant's own expert witness testifies that upon that state of facts the collision could not have happened. It is impossible that the Roper should have struck the Brown at the point where all the testimony shows that she was struck. If she was dead ahead until within one or two lengths, and the luffing occurred one or two lengths off, her bow must have gone to the windward, and the Brown would have struck her on the port side; if the luffing occurred at any time before the bowsprits lapped, the point of collision would have necessarily been different from that established by the proof; if the luffing occurred after the bowsprits of the opposing vessels had passed each other, the Roper would have struck a glancing blow. It does not seem to me possible that the collision could have happened in the way it did happen if the Roper was on the course testified to by the libelant's witnesses. It follows, therefore, that she must have been on another course. If she was on a course southwest by south, and kept her course, and the Brown was on a north course, and kept her course, then the collision would have happened about as it did happen. The angle of collision, which is the only fact concerning which there is no material conflict in the testimony, becomes, therefore, confirmatory proof of the truth of the claimant's testimony. If the testimony is to be believed, which fixes the position of the Roper, just after sunset, at a point six miles to the eastward of the Sheres, she would have to sail a course southwest by south to reach the point of collision at the time she did reach it. To reject that testimony would be to assume that all the witnesses on the Roper have testified falsely, and that Mount has joined them in a conspiracy against the libelant. Such perjury and such conspiracy is not impossible, but there is nothing in this case which leads me to believe that it is probable. Here and there throughout the testimony there does appear some discrepancies to which I would be disposed to attach more weight if the story on the main point appeared intrinsically improbable, but there is nothing in the case which seems to make it improbable or impossible that the Roper should have been at the point stated, except the testimony offered by the libelant that she was seen a mile and a half north of the Brown, sailing on a course due south; and, as I have already stated, it is impossible to believe that testimony. If, then, it be assumed as proved that the Roper at sunset was at the point testified to, she would have been so far to the eastward that a course southwest by south would be the proper course for her in order to make Hatteras light. The testimony is that, sailing upon that course, the lookout, Johansen, reported a white light about seven or eight minutes before the collision. The master and mate and the seamen Lunt and Bulkley all testify to the hearing of this report, and to watching this light until three or four minutes before the collision, when the green light appeared. There is some testimony that the steward of the Brown

had a lantern on deck about that time, and that he went with it to the lazaret to get some fish for breakfast the next morning, and it is claimed that this lantern was placed upon the poop, and that it was in a position to absorb the green light, so that the green light was not visible until the Roper approached nearer. Some testimony has been offered tending to show that it is impossible that this white light should have had the effect claimed. That a white light has greater intensity than a green, and that the effect of it in proximity to a green light will be to render the green light invisible at a certain distance, is a fact in optics about which there can be no dispute. But I attach little consequence to this point, as it has no bearing upon the question of responsibility for this collision. It is contended by the claimants that there is not sufficient proof that the red and green lights of the Brown were burning. All the circumstances tend to satisfy me that they were, and the collision was in no wise due to the absence of lights, or to the mingling of the green and white lights, if there was such mingling. The green light was visible, according to the claimant's witnesses, at least three or four minutes before the collision, and this gave notice to the Roper as to where the Brown was. The testimony of the Roper is that she kept her course up to the very moment of the shock, the mate testifying that immediately before the collision he gave the order "Hard down," and jumped to the wheel, and made three turns, but that nine turns were needed to make it go round, and before the order was executed the Roper struck the Brown. If this maneuver in extremis had been actually accomplished, and the Roper was without fault up to that time, under all the authorities that would have been an error, and not a fault; but under all the circumstances I am satisfied that the course of the Roper was not changed. The preponderance of testimony is that the Roper was on a southwest by south course, which would be the proper course for her to make Hatteras light from the position where she was at dark, if the wind was in the quarter claimed; and it seems to me that the great preponderance of testimony is that the wind was west by north, or west one-half north. Not only is this proved to be so by the greater number of witnesses,—for which I care little,—but such would be a fair deduction from the aggregate of the weather reports. The master and mate of the Brown are the only two witnesses testifying positively to the contrary, they fixing the direction of the wind, they say, by the compass, as they had no vane on the ship. There is some discrepancy in their testimony as to their exact location. They were sailing in the dark, and it is easier to believe that they were mistaken in the direction of the wind than that all of the other witnesses, including Mount, a disinterested witness, should be mistaken, confirmed as they are in the main by the weather reports; and it may be proper to say that the crew of the Roper, including two Swedes, who from their youth are accustomed to the sea, and likely to be observant and generally truthful, impressed me as being unusually intelligent for that kind of vessel.

Some testimony has been offered as to the conduct of the crew of the Brown, and of statements made by them, from which I am

asked to draw inferences unfavorable to them. There is also some testimony that the master and mate of the Brown were in the cabin examining charts, and that the crew were at the pumps at the time of the collision. My conclusion is reached without regard to testimony of this kind; nor is it shaken by the argument on behalf of libellant that the collision was due to a supposed race between the Roper and the Sheres, which so distracted the attention of the master and crew of the Roper that they ran into the Brown without seeing her until too late to avert it. Such theory has little support in the proofs or in the probabilities. To accept it requires me to believe that there was a deliberate conspiracy between Cranmer and Mount, supported by perjury, in which all of the crew of the Roper joined. It is passing strange that two vessels, with the broad Atlantic to move in, should, on a bright starlight night, with plenty of wind, but under no stress of wind, so conduct themselves as to bring about a collision; but the law which directs the movements of sailing vessels at sea is, like every other law, intended to be obeyed, and it ordains that the vessel having the right of way shall keep her course, at the peril of condemnation if she departs from it, and the certainty of acquittal if free from fault, although she may inflict mortal injury upon the opposing vessel. The fact of injury raises no presumption as to the fault one way or another. That is a matter of merest chance. If the Roper had arrived at the point of intersection a few seconds earlier, she would have been the sufferer. That she gave the blow instead of receiving it was pure accident; but the collision itself was not due to accident, but to fault, and the law demands that one who seeks compensation for injuries inflicted by another should prove the fault. My inclination, moved by a natural sympathy for the unfortunate, has been to find some ground upon which the loss might at least be divided, but I am constrained to hold that there is no testimony that would justify such conclusion. If the vessels were on a north and south course, with the wind from the quarter proved, both ships would have been running free, and the Brown, having the wind on the port side, should have kept out of the way. But the preponderance of testimony satisfies me that the Roper was closehauled on the starboard tack; and, if the Brown was closehauled on the port tack, the Roper had the right of way. The libel must, therefore, be dismissed.

EUREKA & K. R. R. CO. v. CALIFORNIA & N. RY. CO.

(Circuit Court, N. D. California. August 20, 1900.)

No. 12,919.

1. FEDERAL COURTS—INJUNCTION STAYING PROCEEDINGS IN STATE COURT—JURISDICTION ON REMOVAL.

Rev. St. § 720, prohibiting a federal court from granting an injunction to stay proceedings in a state court, except in relation to bankruptcy matters, does not prevent the removal upon the usual grounds of a suit from a state court in which such an injunction has been granted; and in case of such removal, under section 4 of Act March 3, 1875, the injunction previously granted remains in force until dissolved or modified by the federal court.¹

2. INJUNCTION—GROUNDS—PROCEEDINGS UNDER POWER OF EMINENT DOMAIN.

Where two railroad companies have each instituted proceedings for the condemnation of the same land for right of way under the California statute, which expressly authorizes the court in such proceedings to determine the respective rights of different parties seeking condemnation of the same property, a court of equity will not interfere by injunction in behalf of the party whose proceedings were first commenced, so long as the other conducts its proceedings in accordance with the statute, but will leave the rights of the parties to be determined by the special tribunal designated by law.

In Equity. Suit to restrain prosecution of actions in the state courts.

S. M. Buck and C. M. Wheeler, for plaintiff.

J. C. Campbell, for defendant.

MORROW, Circuit Judge. This action was brought in the superior court of the state of California for the county of Humboldt by the plaintiff, a California corporation, to enjoin the defendant, a corporation of the state of Nevada, from prosecuting certain condemnation suits in the state court. A temporary restraining order was granted as prayed for. The defendant demurred to the complaint, and at the same time filed a petition for removal of the cause to the federal court on the ground that the controversy was wholly between citizens of different states, and that the matter in dispute exceeded in value the jurisdictional sum. The petition was granted, and the case now comes before this court upon the order to show cause why an injunction should not issue as prayed for in the state court.

The plaintiff alleges that it was incorporated for the purpose of constructing and operating a line of railroad in the county of Humboldt, state of California, among other places, from the town of Arcata, around the east shore of Humboldt Bay, to the city of Eureka; that it has commenced the construction of said line of railroad, and has expended therein about \$100,000, and will put said branch line in full operation within a year, unless prevented from so doing. It is alleged that a terminal site has been secured by the plaintiff in the city of Eureka at an expense of \$60,000; that it is necessary, for the purpose of constructing its railroad to its said depot grounds upon its estab-

¹ Enjoining proceedings in state courts, see notes to *Gardner v. Bank*, 16 C. C. A. 90, and *Trust Co. v. Grantham*, 27 C. C. A. 575.

lished lines, to have a right of way over a certain parcel of land lying in the city of Eureka, and for the purpose of obtaining said right the plaintiff on June 30, 1899, commenced an action in the superior court of the state for the county of Humboldt to condemn the property required for said right of way. It is further alleged that during the pendency of said action the defendant, a corporation created for the purpose of constructing and operating a line of railroad from the city of Eureka to Crescent City, in Del Norte county, Cal., brought suits in the same court to condemn certain lands, including the identical parcel of land sought to be condemned by the plaintiff. Plaintiff charges that this action is fictitious and not prosecuted in good faith; that the defendant has not commenced the construction of its proposed line of railroad, and in the proceedings for condemnation has conspired with certain parties who are the owners of the land, for the purpose of hindering, delaying, obstructing, and preventing the plaintiff from completing its branch railroad; and irreparable damage to the plaintiff and loss of its franchise are alleged.

It is contended by the defendant that this court has no power or jurisdiction to enjoin the prosecution of actions commenced in the state court, under the inhibition contained in section 720 of the Revised Statutes. This section reads as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunctions may be authorized by any law relating to proceedings in bankruptcy."

This prohibition is more particularly directed to cases where suit is instituted in the United States courts for the specific purpose of enjoining an action in the state court. But injunction proceedings commenced in the state court, and removed in the customary manner to the United States court by reason of some inherent right, are governed by the act of March 3, 1875, determining the jurisdiction of United States circuit courts over causes removed from state courts. Section 4 provides:

"That when any suit shall be removed from a state court to a circuit court of the United States, * * * all injunctions, orders, and other proceedings had in such suit prior to its removal, shall remain in full force and effect until dissolved or modified by the court to which such suit shall be so removed."

The relation of these two statutes to the interference by a United States court with proceedings in a state court is distinctly shown in the case of *Bondurant v. Watson*, 103 U. S. 281, 287, 26 L. Ed. 447. An injunction was issued by the state court, and the case was thereafter removed to the United States court by the defendant, and the injunction there made perpetual. The decree was appealed from, and claim was made that the case was not removable, because its purpose was to obtain the writ of injunction to stay proceedings in a state court, which a court of the United States is forbidden to grant, by section 720 of the Revised Statutes. The supreme court, speaking upon this contention, said:

"It is to be observed that the injunction had already been granted by the state court before the application for removal was made. The interest and

purpose of [the defendant], who asked for the removal, was to get the injunction dissolved. If [the plaintiff] had filed his petition for injunction in the state court, and, before it was allowed, had petitioned for a removal of the cause to the circuit court, with the design of applying to that court for his injunction, the objection to the right of removal would have force. That would have been an evasion of the statute. But that is not this case. The act of March 3, 1875, provides that all injunctions had in the suit before its removal shall remain in full force and effect until dissolved or modified by the court to which the suit shall be removed. It provides for removals, without making any exception, of cases in which an injunction has already been allowed to stay proceedings in a state court. It would not be according to the well-settled rules of statutory construction to import an exception into this statute from a prior one on a different subject."

A stricter interpretation of section 720 would defeat the purpose of the removal act in many instances, and deprive a party of a remedy in either court. *Smith v. Schwed* (C. C.) 6 Fed. 458; *Perry v. Sharpe* (C. C.) 8 Fed. 24.

This court, then, having power to consider the injunctive proceedings, the question arises, upon general principles of equity jurisprudence, should the injunction have been granted originally, and ought it now to be maintained? In this connection it is urged by counsel for defendant that it is not a case for equitable interference, for the reason that the plaintiff has a complete and adequate remedy at law. The plaintiff seeks to enjoin the defendant from prosecuting condemnation suits affecting the same parcel of land that the plaintiff is attempting to condemn, and the irreparable injury which the plaintiff claims it will suffer if denied a preventive remedy is the infringement upon and loss of its franchise in said city of Eureka, and consequent loss of the value of work and labor already performed in the construction of railroad along its proposed line. But will this result necessarily follow if the defendant is not restrained from the prosecution of its condemnation suits? The outcome of such suits feared by the plaintiff is that the defendant will obtain a decree adjudging that said parcel of land is necessary for a public use, and that defendant may hold and enjoy it for that purpose, to the exclusion of the plaintiff. The questions here presented are whether the plaintiff shall have the exclusive right to the land, or whether the defendant shall use it exclusively, or whether both parties may enjoy it as a public use. Such questions the state court is specifically empowered to determine in an action at law under the right of eminent domain. Section 1247 of the Code of Civil Procedure of the State of California provides that in condemnation proceedings the superior court shall have power:

"(1) To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in the fifth subdivision of section 1240. (2) To hear and determine all adverse or conflicting claims to the property sought to be condemned, and tax the damages therefor. (3) To determine the respective rights of different parties seeking condemnation of the same property."

Section 1240 of the same Code, referred to in subdivision 1, just quoted, in specifying the various kinds of property which may be taken for a public use under the right of eminent domain, includes:

"(5) All rights of way for any and all the purposes mentioned in section 1238, and any and all structures and improvements thereon, and the lands

held or used in connection therewith, shall be subject to be connected with, crossed, or intersected by any other right of way or improvements, or structures thereon. They shall also be subjected to a limited use, in common with the owner thereof, when necessary. But such uses, crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury."

In the case of *Western N. C. R. Co. v. Georgia & N. C. R. Co.*, 88 N. C. 79, the plaintiff was in a similar position to that of the plaintiff herein. It had surveyed and located a route through a certain locality, and claimed an inchoate prior right to construct a railroad thereon, the right to become perfect upon payment of damages to be assessed for appropriation of the land. The defendant had taken possession of a portion of the land traversed by the line of plaintiff's projected road, and claimed a right to locate its road thereon under a deed or license from the proprietor of the land. The plaintiff obtained a restraining order enjoining the defendant from interfering with the disputed territory until a hearing could be had, and later, numerous affidavits and evidence having been filed, the court directed an intermediate injunction to issue. From this ruling the defendant appealed. The supreme court of the state reversed the order issuing the injunction, and stated the following reasons:

"If the purpose of asking for the intermediate injunction is to obtain the opinion of the court upon the question of priority of right to lay the track upon and over the gap of the contesting companies, we should refrain from giving it, since the motion is heard upon *ex parte* evidence, without those safeguards which the law has provided, in requiring in most cases the personal presence of the witness, and affording in all opportunities for cross-examination,—conditions so important to the development of truth and determination of falsehood in trials before a jury, and under the rules that govern them. * * * The facts of the present application do not bring it within the principle upon which a court of equity acts in affording such relief, nor do they warrant our intervention in the controversy at this stage of its progress; and we leave it—where it should be left—to the determination of a jury."

In the case of *East St. Louis Connecting Ry. Co. v. East St. Louis Union Ry. Co.*, 108 Ill. 265, 274, where franchises had been granted to two railway companies, of lines crossing each other, and somewhat interfering with the convenient operation of the plaintiff's road, it was held that legal damages, assessed as provided by law, would afford an adequate remedy, and that there was no ground for an injunction. And in *East & W. R. Co. v. East Tennessee, V. & G. R. Co.*, 75 Ala. 275, 283, in a controversy between two railroad companies over a right of way, on appeal from a decree of injunction the court declared that it would not intervene to quiet titles, or to decide controversies as to the title; that other and more appropriate remedies and tribunals were provided for the determination of all such controversies. In *Chicago & N. W. Ry. Co. v. City of Chicago*, 151 Ill. 348, 37 N. E. 842, a railroad company had purchased a certain parcel of land in the city of Chicago, and used it for many years as a railroad yard, for the storing and switching of cars, the making up of trains, as well as for the transit of regular trains. The city proposed to open a street across this yard, and commenced condemnation proceedings for that purpose. The railroad company sought to enjoin this action

on the ground that the effect would be to deprive it of the special use to which it had put the land, and of its right and title therein. The title of the railroad company to the land was not in controversy, or the value of its use disputed. Yet the court denied the injunction, upon the ground that, even conceding that damages would accrue to the railroad company by the threatened action of the city, it would constitute no proper ground for the interposition of a court of equity; that if damages accrued because of the taking of the right, or the value of the property be decreased in consequence, adequate compensation could be made in the proceeding at law provided in such cases.

The procedure approved by the supreme court of this state is indicated in the case of *Water Co. v. Cowles*, 31 Cal. 215. Actions by different water companies were pending in the county court for the condemnation of the same lands. The court refused to proceed with one because of the pendency of the other. Application was made to the supreme court for a mandamus. In granting the application the court said:

"The condemnation of lands is but a purchase of them *In invitum*, and the title acquired is but a quitclaim. If a corporation starts proceedings under the statute, to get a title of that quality, after like proceedings for acquiring a like title have been commenced by another company, and there should be a condemnation and payment in both proceedings, both corporations would have good title as against the original owner or owners; but as between the companies the lands would belong to the one over whose proceedings the court first acquired jurisdiction,—a question to be litigated between the companies. It may be that either company might make the other a party defendant in its suit to condemn, or, failing that, that either of the companies might intervene in the proceedings of the other, so that the question of priority might be determined in advance of a purchase by either; but should the junior applicant, knowing all the facts, or having the means of knowing them, push its suit to a quitclaim, and voluntarily pay the purchase money, the responsibility would not be with the law."

The duty of courts of equity in issuing injunctions is clearly stated in the early case of *Bonaparte v. Railroad Co.*, Fed. Cas. No. 1,617:

"The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction. * * * When there is a reasonable doubt whether the law set up as a justification authorizes the acts done, it [injunction] will not be granted (*Field v. Jackson*, 2 Dickens, 600; *Agar v. Canal Co.*, Coop. 77); or if a discretionary power is given, which is not abused or misapplied, but exercised in good faith, sound discretion, and according to the best judgment of those to whom its execution is confided, the party complaining will be left to his remedy at law."

And further it is there declared that the conditions upon which the lawful exercise of the right of eminent domain depends are plainly defined, and the party seeking to use this privilege will not be interfered with by a court of equity so long as he keeps within the limits of those powers, and pursues the precise course laid down by the law.

In the case at bar the parties are seeking to condemn the same land for a right of way, and each seems to have taken the steps provided by law in such proceedings. The plaintiff's rights are not as yet established, other than by priority of action; and it is not shown by the bill of complaint that the defendant is going outside of the lines prescribed by law, or that the action threatened is without the limits of its powers under the right of eminent domain. From the authorities

cited, the conclusion to be drawn is that where proceedings to condemn private property for a public use are being conducted in accordance with the requirements of the statute conferring the authority, and there is no abuse or misapplication of such authority, a court of equity will leave the complaining party to the special tribunal designated by the law to decide all questions arising in its execution. In the light of this doctrine, it does not appear that the bill presents a state of facts warranting the interference of a court of equity. The temporary injunction will therefore be dissolved, and the bill dismissed for want of equity.

BOARD OF TRADE OF CITY OF CHICAGO v. C. B. THOMSON COMMISSION CO. et al.

(Circuit Court, E. D. Wisconsin. October 1, 1900.)

1. EXCHANGES—PROPERTY RIGHT IN MARKET QUOTATIONS.

A board of trade has a property right in the quotations made upon the transactions of its exchange, as prepared by its officers and agents, until their publication.

2. INJUNCTION—USE OF MARKET QUOTATIONS.

A preliminary injunction will not be granted on the application of a board of trade restraining the use of its market quotations by others, where the question whether there has been such prior publication of such quotations as to make them public property is in dispute, both as to the facts and their effect, and can only be properly determined on a full hearing.

In Equity. On application for preliminary injunction to restrain the use of market quotations as made on complainant's exchange.

H. S. Robbins and Miller, Noyes & Miller, for complainant.

Wm. Kaumheimer, J. W. Bass, Quarles, Spence & Quarles, and Timlin & Glicksman, for defendants.

SEAMAN, District Judge. The bill, answers, and affidavits filed in this cause present serious questions involving both private rights and interests of the public. The bill rests on the theory that the complainant has a property right in the quotations made upon the transactions of its exchange, and may restrict their use to such parties as conform to its regulations in respect thereto. At common law the right of property of the complainant in its quotations as prepared by its officers and agents until publication is well established, and it is thereby entitled either to withhold entirely from publication, or to make the first publication. Against subsequent publications the common law affords no protection, and it can be obtained only through the statutory copyright. *Wheaton v. Peters*, 8 Pet. 591, 657, 8 L. Ed. 1055, and 3 Notes on U. S. Reports, 482; *Publishing Co. v. Monroe*, 38 U. S. App. 410, 415, 19 C. C. A. 429, 73 Fed. 196. That such general rule is applicable to quotations of the class involved in this controversy appears to be clearly upheld in *Telegraph Co. v. Gregory* [1896] 1 Q. B. 147, and other cases cited; and to the extent as well that giving out the quotations to a limited number of persons for

individual use is not such publication as will defeat the property right. In reference to the quotations of this complainant, however, the supreme court of Illinois held in *New York & C. Grain & Stock Exch. v. Board of Trade of City of Chicago*, 127 Ill. 153, 19 N. E. 855, 2 L. R. A. 411, that the right of the complainant was qualified by the interests of the public to such extent that, so long as it continued to give out its quotations "either directly or indirectly, it must do so without unjust discrimination as to persons, and must furnish market quotations to all who may desire to obtain them for lawful purposes, and upon the same terms." Subsequently, in the case of *Christie-Street Commission Co. against the Board of Trade and Western Union Telegraph Co.*, on hearing before Judge Tuley, an important decision was rendered on June 19, 1900, whereby the complainant commission company was found to be engaged in the unlawful business of a "bucket shop," and therefore without standing in a court of equity to demand continuance of the market quotations of the board; hence relief in its favor was denied. Furthermore, on a cross bill filed by the board of trade, an injunction was issued depriving the complainant of such reports upon the ground that they were so used as to affect injuriously the business of the board and the value of its property right in the reports, although at the same time holding that such relief could not be granted upon the fact alone that the commission company was engaged in illegal or immoral acts. Whether the relief would have been granted on an original bill filed for the purpose, independent of the jurisdiction acquired by the filing of the complainant's bill, is not there determined. The answers of the defendants, among other matters, set up in substance the right of the public to these market reports "as part of the general news and information of the day,"—a contention which is not tenable, if the rule prevails as held in the authorities cited. Other matters are put in issue, however, by the answer and affidavits on behalf of the defendants which call for the hearing of proofs before the drastic remedy of an injunction can be invoked. The allegations of the bill, both as to the nature of the business carried on by the several defendants and as to their representations respecting the market reports received by them, are expressly denied. The source from which their market reports are derived is not disclosed, except in the instance of the defendants represented by Mr. Rogers; and in that instance the Central Stock and Grain Exchange is named as furnishing the reports, with an affidavit and allegations which tend to show an unrestricted publication of such market reports, aside from its effect by way of particular defense for that defendant. As such allegations are introduced as well on behalf of the other defendants for the purposes of this motion, both the issue of fact and its effect upon the property right asserted by the complainant must be left for determination when the proofs are submitted. Moreover, the other defendants expressly deny that their reports are obtained surreptitiously, and aver that they are transmitted to them after their public posting in the various places in Chicago upon blackboards and otherwise, to the extent of making them public property. As the right of property asserted on behalf of the complainant subsists only until publication,—and from the nature of the trans-

actions this period is necessarily one of minutes, rather than of hours, —I am of opinion that an issue is raised in that regard which can be determined only when the proofs are taken, and cannot be prejudged on this motion for preliminary injunction. Equity will search out the true intent of transactions involved within its cognizance; will brush aside subterfuges, and administer relief as the right of the parties shall appear, after fair hearing; but its strong arm of injunction will be employed only when the proof is indubitable both of the right and of the need for its exercise. The motion is therefore denied.

Upon the hearing a question of jurisdiction was suggested, and briefs submitted thereupon. My impressions are that the bill states sufficient grounds for jurisdiction, under the authorities, and the objection is overruled at this stage, subject to reconsideration if it shall arise later.

DOBSON et al. v. PECK BROS. & CO. et al.

(Circuit Court, D. Connecticut. September 20, 1900.)

No. 1,036.

EQUITY—PLEADING—PLEA.

Where the object of a bill is to overturn an alleged successful fraud and conspiracy accomplished by decrees of a court collusively obtained, and the answer denies all averments of fraud and collusion, it is impracticable to determine the validity of a plea setting up in bar the proceedings and decrees attacked until the issues of fact joined by the bill and answer have been found.

In Equity. On argument of plea.

Wm. Hoag, for plaintiffs.

White & Daggett, for defendants.

SHIPMAN, Circuit Judge. The complainants, citizens of the state of Massachusetts, allege in their bill in equity substantially as follows: That they leased on November 20, 1895, to Peck Bros. & Co., a corporation formerly of the state of Connecticut, and established in New Haven, in this state, hereafter called "Corporation No. 1," a parcel of real estate in Boston for the term of 10 years from January 1, 1896, for the sum of \$5,000 per year for the first half, and of \$5,500 per year for the second half, of said term. That on or about March 14, 1896, the stockholders of Corporation No. 1, finding that it was embarrassed with large outstanding obligations, so that their profits would be greatly cut down if the obligations of the said company were not in some way avoided, conceived a scheme to organize a new corporation and transfer to it the good will and property of Corporation No. 1, paying such claims of creditors as their interests might require, and fraudulently avoiding the claims of others, and the claim of the plaintiffs in particular. That, in pursuance of this scheme, Henry F. Peck and others, stockholders of Corporation No. 1, on the 14th day of March, 1896, entered a petition in the superior court of the state of Connecticut for the county of New Haven, representing that the said Peck Bros. & Co. was insolvent, and asking for the appointment of a receiver. Thereupon

the said corporation appeared and assented to the petition, and receivers were appointed. That an order of court was procured, barring all claims against the corporation which should not be presented within four months, of which order the complainants had no notice, and did not attempt to prove a claim. On May 4, 1898, all the assets of Corporation No. 1 were sold for the sum of \$265,000, in pursuance of an order of the superior court,—for a sum sufficient to pay in full, with interest, all the claims which had been proved against said corporation,—to a committee representing its stockholders. That the said stockholders and the committee acting for them, in pursuance of the scheme which they had devised to avoid the obligations of Corporation No. 1, and in particular the obligations to the complainants, organized a new corporation, called The Peck Bros. & Co. (hereafter styled "Corporation No. 2"), for the benefit of all the stockholders of Corporation No. 1; and on or about May 6, 1898, the receiver conveyed and transferred all the property of Corporation No. 1 to Corporation No. 2, and on May 10, 1898, procured an order of the said court dissolving Corporation No. 1, and declaring all claims barred except those which had been proved against it before said court, and on or about June 3, 1898, procured an order of court to pay over to Corporation No. 2 the sum of money remaining in his hands as such receiver, and on June 16, 1898, pursuant to such order, did so pay over to Corporation No. 2 the sum of money so remaining in his hands, amounting to \$28,925.96, which was a gift made because the two corporations are the same in interest, the name only being changed. That Corporation No. 2 occupied the leased premises from May 10, 1898, to October 1, 1899, and paid the rent, the complainants supposing that the money came from Corporation No. 1, and has paid no rent since the latter date. That the complainants had no legal notice of the decrees of the superior court, were not parties to the petition, and never submitted themselves to the jurisdiction of the court. That the sale and conveyance of the said property were fraudulent as against the rights of the plaintiffs, creditors of Corporation No. 1, and that Corporation No. 2 had notice of the fraud, and is not a bona fide purchaser of said property. The bill contains divers prayers, one of which is that Corporation No. 2 may be declared to hold the sum of \$28,925.96, which it received from the receiver of Corporation No. 1, upon trust, first for the benefit of the creditors of said corporation, and especially for the benefit of the complainants and other such creditors as shall enter into and become parties to this suit, and afterwards for the benefit of the stockholders of said Corporation No. 1. To this bill the defendant, Corporation No. 2, has pleaded, in bar of the suit and of all claim of the complainants, the proceedings, orders, and decrees of the superior court in the matter of the receivership and dissolution of corporation No. 1, and has also filed, under equity rule 32, in support of the plea, an answer which denies all the complainants' averments of fraud or conspiracy. The complainants have set down the plea for argument.

The bill in equity anticipates the defense, and is founded in great part upon the averments that all the proceedings, orders, and decrees of the superior court upon the petition for a receivership were a scheme of fraud and conspiracy upon the part of the stockholders of

both corporations, and upon the position that the complainants, being nonresidents, and neither made nor having become parties to the proceedings, and therefore strangers to them, may show that they were collusive or fraudulent. The object of the bill is to overturn an alleged successful fraud and conspiracy carried out by decrees of a court collusively obtained. All these averments are denied in the answer. The validity of the plea as a bar may depend upon the inability of the complainants to sustain their averments, and it is not practicable to declare in advance that the plea is or is not a bar, until the finding of the court upon the questions of conspiracy and fraud. The proper course is that the plea should stand for an answer, because it contains matter which may be a defense, and it is so ordered.

OSKAMP v. LEWIS, Auditor, et al.

(Circuit Court, S. D. Ohio, W. D. August 31, 1900.)

1. TAXATION—OHIO STATUTE—ASSESSMENTS BY COUNTY AUDITOR.

Under Rev. St. Ohio, §§ 2781, 2782, which make it the duty of a county auditor to list and value property which the owner has failed to return for taxation, or as to which he has made a false return, the functions of the auditor are not judicial, but ministerial, being merely those of an assessing officer, whose determination is not conclusive, but is subject to review in the courts in a suit authorized to be brought for that purpose by section 5848; and it is no objection to the validity of such provisions that the auditor is allowed by law a percentage on the taxes collected.

2. SAME—CONSTRUCTION OF STATUTE.

The provisions of Rev. St. Ohio, § 2782, relating to the procedure by a county auditor for the assessment of property omitted to be returned or falsely returned by the owner, are applicable to proceedings under either that or the preceding section, including the requirement of notice to the taxpayer.

3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—ASSESSMENTS FOR TAXATION.

The assessment of property for taxation, although without notice to the owner, is not in violation of the provision of the fourteenth amendment to the constitution against depriving any person of his property without due process of law, where, as by Rev. St. Ohio, § 5848, the owner is expressly given the right to test the validity of the assessment by a suit to enjoin the collection of the tax, the amount of which and of the assessment are matters of public record at all times after the assessment is made.

In Equity. Suit to enjoin collection of tax. On demurrer to bill.

Chas. W. Baker and Keam & Keam, for complainant.

Rendigs, Foraker & Dinsmore and Edward Barton, for respondents.

THOMPSON, District Judge. This is a bill to enjoin the collection of a tax levied upon property of the complainant in Hamilton county, state of Ohio, upon the ground that the statutes of Ohio under which the property was listed and valued for taxation, and the tax levied, is in contravention to that clause of the fourteenth amendment to the constitution of the United States which forbids any state from depriving any person of property without due process of law. The defend-

ants demur to the petition upon the ground that it does not state facts sufficient to entitle the complainant to the relief prayed for. The constitutional objections are (1) that sections 2781 and 2782 of the Revised Statutes of Ohio, under which the complainant's property was listed and valued for taxation, do not provide for notice to the taxpayer of the proceedings thereunder; (2) that the county auditor, who lists and values property for taxation under those sections, acts in a judicial capacity, and, under the provisions of section 1071 of the Revised Statutes of Ohio, relating to taxation, receives as compensation for his services in so listing and valuing property 4 per cent. of the tax levied and collected thereon.

These sections read as follows:

"Sec. 2781. If any person whose duty it is to list property or make a return thereof for taxation, either to the assessor or county auditor, shall in any year or years make a false return or statement, or shall evade making a return or statement, the county auditor shall for each year, ascertain as near as practicable, the true amount of personal property, moneys, credits and investments that such persons ought to have returned or listed for not exceeding the five years next prior to the year in which the inquiries and corrections provided for in this and the next section are made; and to the amount so ascertained as omitted, for each year he shall add fifty per centum, multiply the omitted sum or sums, and (as) increased by said penalty by the rate of taxation belonging to said year or years, and accordingly enter the same on the tax lists in his office, giving a certificate therefor to the county treasurer who shall collect the same as other taxes."

"Sec. 2782. The county auditor, if he shall have reason to believe, or be informed that any person has given to the assessor a false statement of the personal property, moneys, or credits, investments in bonds, stocks, joint stock companies or otherwise, or that the assessor has not returned the full amount required to be listed in his ward or township, or has omitted or made an erroneous return of any property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, which are by law subject to taxation, shall proceed at any time before the final settlement with the county treasurer to correct the return of the assessor, and to charge such persons on the duplicate with the proper amount of taxes; to enable him to do which, he is hereby authorized and empowered to issue compulsory process, and require the attendance of any person or persons whom he may suppose to have a knowledge of the articles, or value of the personal property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, and examine such person or persons, on oath, in relation to such statement or return; and it shall be the duty of the auditor, in all such cases, to notify every such person before making the entry on the tax-list and duplicate, that he may have an opportunity of showing that his statement or return of the assessor was correct; and the county auditor shall, in all such cases, file in his office a statement of the facts or evidence upon which he made such correction; but he shall, in no case, reduce the amount returned by the assessor, without the written assent of the auditor of state, given on a statement of facts submitted by the county auditor. In all cases in which any person shall make a false statement of the amount of property for taxation, to evade the payment of taxes, in whole or in part, the person making such false statement shall be liable for, and pay all costs and expenses that may be incurred under the provisions of this section, and the same fees and costs shall be allowed and paid as are now or may be allowed by law, for similar services, and if not paid, may be collected before any justice of the peace of the proper county, by suit in the name of the county commissioners, but in all cases under this section, where the statement shall be found correct, and no intention to evade the payment of taxes, the costs and expenses incurred under this section shall be paid out of the county treasury of the proper county, on the order of the county auditor."

1. The functions of the county auditor under these sections are ministerial, not judicial. He is a mere assessing officer, whose duty it is to truly list and value property which the owner has falsely returned for taxation, or the return of which he has evaded altogether. The return he makes may be founded upon the evidence he is authorized to take, or upon his own personal knowledge, and simply furnishes a basis for the levy of taxes, as do the returns of other assessing officers. The assessment or listing and valuation of property for taxation should be made by the taxpayer himself. If he fails to do it, it may then be made by the township assessor or the county auditor or the boards of equalization. The assessment is not a judicial determination of the value or ownership of the property. It is not conclusive against the taxpayer. It simply makes a *prima facie* showing, which the taxpayer may test by a suit, under section 5848 of the Revised Statutes of Ohio, to enjoin the levy or the collection of the tax. The county auditor is not a judge, but an assessing officer, whose zeal in bringing upon the tax duplicate property wrongfully withheld by the owner may properly be stimulated by giving him a percentage of the taxes collected thereon. *Musser v. Adair*, 55 Ohio St. 466, 45 N. E. 903.

2. Section 2782 expressly provides for notice to the taxpayer, and, by fair construction, notice is also required by section 2781. The auditor is required by section 2781 to "ascertain, as near as practicable, the true amount of personal property, moneys, credits, and investments that such persons ought to have returned or listed for not exceeding the five years next prior to the year in which the inquiries and corrections provided for in this and the next section are made." The procedure provided for in the "next section" is applicable in proceedings under either section.

But, if it be conceded that notice is not required by section 2781, nevertheless "due process" is provided by the laws of Ohio for the collection of taxes. Section 5848 of the Revised Statutes of Ohio provides that "courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected." In *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335, the supreme court say:

"It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present or had an opportunity to be present in some tribunal when he was assessed. But this is not and never has been considered necessary to the validity of a tax."

And in *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 537, 16 Sup. Ct. 87, 40 L. Ed. 251, the supreme court say:

"That rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the fourteenth amendment to the constitution which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it, either before that amount is determined, or in subsequent proceedings for its collection."

Here ample means are provided by the tax laws of Ohio for a judicial determination of every question touching the validity or legality of the listing or valuation of property, and the levying of taxes thereon, before the taxes are collected. *State Railroad Tax Cases*, 92 U. S. 575-609, 23 L. Ed. 669; *Pearson v. Yewdall*, 95 U. S. 294, 24 L. Ed. 436; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Corry v. Campbell*, 154 U. S. 629, 14 Sup. Ct. 1183; *Grether v. Cornell's Ex'rs*, 43 U. S. App. 770, 23 C. C. A. 498, 75 Fed. 742. The records of the auditor and the treasurer show the tax valuations and levies against each taxpayer, and the law prescribes the time when the taxes become due and payable, and the modes of collection are by distress or suit, so that each taxpayer has the means of knowing the amount of the taxes levied against him, and upon what property and upon what valuations thereon, and has ample opportunity, before the collection of the tax, to avail himself of the ultimate remedy afforded him by the provisions of section 5848 of the Revised Statutes of Ohio. The tax laws of Ohio afford the taxpayer many opportunities to be heard for the correction of mistakes, errors, irregularities, and wrongs in the assessment and levying of taxes before boards of equalization, the county auditor, and the state board of remission, with the ultimate right of resort to the courts to enjoin the collection of any tax not legally assessed or levied.

The constitutional objections urged against sections 2781 and 2782 of the Revised Statutes of Ohio are without foundation; and the demurrer to the petition will be sustained, and the bill dismissed.

DAVIS v. BROWN.

(Circuit Court, S. D. Ohio, W. D. May, 1900.)

POSTMASTERS—NONMAILABLE MATTER—SUIT TO COMPEL ACCEPTANCE.

Act Sept. 26, 1888 (25 Stat. 496) § 1, declaring certain matter to be nonmailable, and vesting the postmaster general with power to exclude it from the mails, by reasonable implication also vests him with authority to determine what matter is nonmailable thereunder; and the courts cannot review his action in that regard unless he acts maliciously or fraudulently or exceeds his authority. Hence, in a suit to compel a postmaster to accept for transmission through the mails matter inclosed in certain envelopes, an answer setting up as a defense an order from the postmaster general directing the defendant to decline to accept such envelopes, on the ground that they contained matter printed thereon which rendered them nonmailable under the statute, is not evasive, but is responsive to the bill; it being the defendant's duty to obey such order.

In Equity. Suit to compel defendant, as postmaster, to accept for mailing matter inclosed in certain envelopes. On exceptions to answer.

J. Hartwell Cabell, for plaintiff.

Wm. E. Bundy, U. S. Dist. Atty., for defendant.

THOMPSON, District Judge. The bill in this case sets forth, in substance, that the complainant is engaged in business in Cincinnati,

Ohio, under the name and style, "The National Collecting Company"; that said business consists in collecting accounts and claims, reducing the same to judgment, and furnishing reports of mercantile responsibility in answer to requests from his clients and customers; that in the course of his said business he sends by mail large numbers of letters to clients, attorneys, and other persons to all parts of the United States, and that many of said letters contain valuable papers and checks; that the defendant is postmaster at Cincinnati, and as such arbitrarily and wrongfully refuses to place in the mails for transmission certain sealed letters addressed by the complainant to his various clients and correspondents, upon the pretended ground that the envelopes in which said letters are sealed have an unlawful card printed thereon. Samples of the envelopes are attached to the petition as exhibits. The card is in the following words: "National Collecting Company, 11 East Fourth street, St. Paul Building, Cincinnati, Ohio." The words "National Collecting Company" are printed in letters about one-fifth of an inch in length, the other words being in much smaller type. Upon some of the envelopes the card is printed in red ink, and on others in black ink. A demurrer was interposed to the bill upon the ground that it "does not state facts sufficient to constitute a cause of action, or to warrant granting the relief asked for." The demurrer was heard at the April term, 1899, and it was claimed in support of the demurrer that the cards or printed matter upon the envelopes are of a character obviously intended to reflect injuriously upon the character or conduct of others; but the court, being unable to say, upon examination of the exhibits, that the printed matter thereon was of the character alleged, overruled the demurrer. Afterwards the defendant answered. The answer contains two defenses. In the first defense the defendant justifies his action under an order of the first assistant postmaster general, of which the following is a copy:

"CDA 12,924.

"Postoffice Department.

"First Assistant Postmaster General, Division of Correspondence, Washington. J. R. A.

"October 25, 1898.

"Postmaster, Cincinnati, Ohio—Sir: Inclosed herewith you will find an envelope mailed at your office by the National Collecting Company. The card upon the envelope is unmailable, under the act of congress approved September 26, 1888, as construed by the department, and you are directed to decline to accept for mailing envelopes bearing such cards. Please return the inclosure to this office for its files.

"Very respectfully,

Perry S. Heath,

"First Assistant Postmaster General."

The second defense, in substance, repeats the assignments of the demurrer.

The complainant excepts to the first defense of the answer, as evasive and insufficient. The cause is now submitted to the court on this exception to the answer. The defense excepted to denies the jurisdiction of the court to review the action of the postoffice department. The complainant is not deprived of the use of the mails. The postoffice department does not seek to deprive him of the use of the

mails, but only to regulate the use consistently with the department's construction of section 1 of the act of congress of September 26, 1888 (25 Stat. 496). That act provides:

"That all matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which * * * any delineations, * * * calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another may be * * * printed * * * are hereby declared non-mailable matter, and shall not be conveyed in the mails nor delivered from any postoffice, nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the postmaster-general shall prescribe."

This law vests the postmaster general with power to exclude non-mailable matter from the mails, and, by reasonable implication, with authority to determine what matter is nonmailable; and the courts cannot review his action unless he acts maliciously or fraudulently or exceeds his authority. It was the duty of the defendant to obey the order of the department, and in doing so he did not act arbitrarily or wrongfully. The first defense of the answer is not evasive and it is sufficiently responsive to the allegations of the bill, and the exceptions, therefore, will be overruled. *Association v. Zumstein*, 15 C. C. A. 153, 67 Fed. 1000; *Hoover v. McChesney* (C. C.) 81 Fed. 472; *Dauphin v. Key, MacArthur & M.* 203.

HARPER v. ENDERT et al.

(Circuit Court, N. D. California. August 20, 1900.)

No. 12,852.

POST OFFICE—OBSTRUCTING CARRIAGE OF MAILS—EXACTING TOLL FROM MAIL CARRIER.

To constitute a knowing and willful obstruction of the passage of the mails, or of a vehicle, horse, or carrier carrying the same, which is prohibited by Rev. St. § 3995, the act must be in itself unlawful. The refusal of persons operating a toll road, under a franchise which does not exempt mail carriers from payment of toll thereon, to permit a mail carrier to pass their gates without payment of toll, is not unlawful, or within such section, so as to sustain the jurisdiction of a federal court over a suit by the mail contractor for an injunction and damages, on the ground that it involves a federal question.

Action in equity to enjoin defendants from collecting tolls from complainant while conveying the United States mail over a certain toll road.

Frank McGowan and L. H. Cooper, for complainant.

L. Buck, for defendants.

MORROW, Circuit Judge. This is an action in equity. The bill alleges that complainant is a citizen and resident of the state of Oregon, and the defendants citizens and residents of this district; that the defendants are executors of the will of one Horace Gasquet, deceased, whose sole devisee and legatee is one Elie Gasquet, a citizen of France; that complainant has had a subcontract since July 1, 1898, for carrying the United States mail from Grant's Pass, in Oregon, to Crescent

City, Cal., and back, seven times each week, upon a schedule satisfactory to the postmaster general, for the sum of \$4,800 per year, for the violation of which contract certain penalties are imposed. The bill also alleges that in 1881 the supervisors of Del Norte county, Cal., gave Horace Gasquet a franchise to collect tolls over a certain road, named "Gasquet's Road"; that this is the only route which complainant can use in carrying out the subcontract; that there are two toll gates on said road, operated by defendants as a part of the road, and defendants securely fasten these gates to prevent complainant from going through, and have employes and servants watching the gates for that purpose, one of whom is John Endert, postmaster at Gasquet, Cal., and threaten to use violence to complainant to prevent him carrying the mail through these gates without payment of the toll that they claim he is bound to pay under the terms of the ordinance of the board of supervisors of Del Norte county, Cal., conferring the franchise upon Horace Gasquet; that since January 18, 1899, defendants have refused to permit complainant to carry the United States mail through said gates, and have delayed the transmission of the mail, and aver that they will continue so to prevent and delay complainant unless he pay the defendants \$60 per month as toll; that complainant has been compelled to pay large sums of money to prevent defendants from carrying into effect their threats to stop the United States mail; that during his lifetime Horace Gasquet, while claiming to act under the ordinance aforesaid, waived the right to collect toll from all persons carrying United States mail; that the toll is illegally demanded and exacted by defendants; that since February 25, 1899, complainant has paid defendants \$1,076 for traveling over said road while carrying the United States mail; that complainant has large sums of money invested in material necessary to carry out said subcontract, and that he is prevented from carrying out his contract by reason of the acts of defendants, and if he shall forfeit it he will sustain great loss and damage; that complainant has no plain, speedy, and adequate remedy at law; that this suit will prevent a multiplicity of suits; that defendants have exacted various sums of money from complainant, the amount of which he is unable to state, and he therefore asks for an accounting thereof. The bill further alleges conspiracy on the part of the defendants, with parties unknown, to injure and damage complainant in the matter of conveying the United States mail, and prays for an injunction requiring defendants to desist from collecting tolls from complainant while carrying United States mail over said road, and to give an account of all moneys received by them as such tolls, and, when that sum has been determined, that complainant have judgment therefor, and for further relief. The defendants have demurred to the bill on the grounds (1) that this court has no jurisdiction to grant the relief prayed for, or any relief; (2) that it appears from the bill that complainant is not entitled to the relief prayed for; (3) that the facts set out in the bill are not sufficient to entitle the complainant to relief; (4) that the bill shows that complainant has an adequate remedy at law.

The bill alleges the diverse citizenship of the parties, but fails to disclose that the jurisdictional amount of \$2,000, exclusive of interest

and costs, is involved in the controversy. There is an allegation that since February 23, 1899, complainant has paid out \$1,076 for tolls in traveling over the road in question while carrying the United States mail in pursuance of the subcontract alleged; and the payment of sums unknown in amount before that date is alleged, for which complainant asks that defendants give an accounting. The prayer of the bill is for the full sum, after the determination of these amounts, but it does not appear from the bill that the amount in controversy exceeds the sum of \$2,000, exclusive of interest and costs. Complainant, however, claims a right of action against the defendants by virtue of the fact that he carries the United States mails, and is obstructed in so doing by the defendants, who will not allow the vehicles containing the mails to pass unless a toll is paid, and cites section 3995 of the Revised Statutes, as follows:

"Any person who shall knowingly and willfully obstruct or retard the passage of the mails or any carriage, horse, driver, or carrier carrying the same, shall for every such offense be punished by a fine of not more than one hundred dollars."

This section has been construed in the case of *U. S. v. Kirby*, 7 Wall. 483, 19 L. Ed. 278, where Justice Field said:

"The statute of congress, by its terms, applies only to persons who knowingly and willfully obstruct and retard the passage of the mail, or of its carrier; that is, those who know that the acts performed will have that effect, and performed them with the intention that such shall be their operation. * * * The statute has no reference to acts lawful in themselves, for the execution of which a temporary delay to the mails unavoidably follows."

In *U. S. v. Kane* (D. C.) 19 Fed. 43, it was said:

"In all such cases the question to be decided is whether the act causing the obstruction is in itself lawful. If it is, the obstruction necessarily caused thereby is not a crime. It can hardly be pretended upon the facts stated that these men who stopped this train had any legal right to travel thereon without payment of their fare or the consent of the conductor. No contract, understanding, or usage is alleged or shown, under or by virtue of which they could claim such a privilege with a shadow of right."

It appears from the bill herein that defendants are operating the road by virtue of a franchise granted in 1881 to Horace Gasquet by the board of supervisors of Del Norte county, empowering him to collect toll over the road in question. Section 2814 of the Political Code of California enumerates those exempt from the payment of tolls upon roads so operated, but among these the carriers of United States mail, as such, are not specifically mentioned, and consequently cannot claim any exemption upon the ground that they carry the mail. The question of the exemption of mail carriers from tolls arose at an early date in our history, in days when toll roads and turnpikes played a more important part in the relations of men than they now do. From the decisions upon the question of such exemption may be cited the case of *Turnpike Co. v. Newland*, 15 N. C. 463. The court there said:

"We find no act of congress excepting persons or carriages engaged in the business of the post office from the payment of tolls for passing ferries, bridges, or roads. As such tolls are granted as the price of construction and repairing those public accommodations, and are necessary for those purposes, and to no establishment are such facilities more indispensable than to the

post office itself, it is probable that no such act has been or ever will be passed. Without a statute, no exemption can be inferred or allowed."

Again, in *Dickey v. Turnpike-Road Co.*, 7 Dana, 113, it was said:

"Having been constructed by an association of individuals incorporated into a private body politic by an act of the Kentucky legislature which gave the corporation the right to charge toll according to a prescribed scale, in consideration of the appropriation of its own funds to the construction of the road for the public benefit, the turnpike road from Maysville to Lexington should be deemed private property, so far as the value of the franchise and the right to preserve it, as conferred by the charter in the nature of a contract, may be concerned; and therefore the public, whether it be Kentucky or the United States, can have no constitutional right to use the road without contributing to its reparation and preservation either a just compensation for the use, or the rate of tollage prescribed by the corporation under the sanction of its charter. By authorizing the company to exact a fixed compensation for the use of the road, the charter interfered with or impaired the power to carry the mail, wherever congress should elect to carry it, no more nor otherwise than it obstructed or impaired the right of every freeman to travel on any public way he might choose thus to use."

To the same effect is *Proctor v. Crozier*, 6 B. Mon. 268.

The acts of defendants were not unlawful in themselves. They acted by virtue of an ordinance expressly authorizing the charge of toll upon the road in question. Such obstruction as has occurred to the United States mail has done so incidentally, and the temporary delay caused to the mail has arisen naturally from the action of defendants in the exercise of their rights under said franchise. According to the allegations of the bill, there does not appear to be any cause of action under the section of the Revised Statutes cited by the complainant. Defendants' demurrer will therefore be sustained, and the bill dismissed.

DURGAN v. REDDING.

(Circuit Court, N. D. California. August 23, 1900.)

No. 12,728.

1. PUBLIC LANDS—SUIT TO DETERMINE ADVERSE CLAIM—PLEADING.

A complaint in a suit under Rev. St. § 2326, in aid of an adverse claim filed to public lands, which alleges that the land is valuable mineral ground, constituting a part of a claim taken by plaintiff under the mining laws, and which has ever since been, and is still, occupied and held by him thereunder, and that defendant is seeking to obtain title thereto as a mill site, states a cause of action under the statute, the purpose of which is to provide for a suit to determine the right of possession as between the adverse claimants in aid of the land department.

2. SAME.

Such a complaint, although filed in a state court, and framed to conform to the requirements of Code Civ. Proc. Cal. § 307, which provides for but one form of action, alleges, in effect, that plaintiff is in possession of the land in controversy, and contains all the essentials of a bill in equity to quiet title, which renders it sufficient on a removal of the cause into a federal court.

Action to determine the right of possession involved in an adverse claim to certain mining ground, pursuant to section 2326 of the Revised Statutes of the United States. On demurrer to complaint.

F. P. Otis, for plaintiff.

Myrick & Deering and J. F. Rooney, for defendant.

MORROW, Circuit Judge. This is an action brought by the plaintiff, a resident and citizen of the state of California, pursuant to the requirements of section 2326 of the Revised Statutes of the United States, to determine his right of possession to certain mining ground situated in Tuolumne county, Cal., upon an adverse claim filed by the plaintiff as against the claim of the defendant, and pending in the United States land office at Stockton, Cal. The action was commenced in the superior court of the state of California for the county of Tuolumne, and was removed to this court upon the petition of the defendant showing that he was a resident and citizen of the state of New York, and that the matter in dispute exceeded, exclusive of interest and costs, the sum or value of \$2,000. The complaint alleges that on May 21, 1897, plaintiff entered upon and located a quartz mining claim in Tuolumne county, Cal., known as the "Gold Brick Quartz Claim," being 1,221 feet in length along the vein by 300 feet in width on each side of the center thereof; that he duly posted notice of his location, and on May 24, 1897, duly recorded a copy of this notice in the mining records of Tuolumne county; that since May 21, 1897, plaintiff has continued to hold, occupy, and work said claim according to law, and has done the required amount of assessment work upon it; that defendant has, by the attempted location of an alleged mill site, known as the "Alabama Mill Site," entered upon and now claims a certain portion of the said Gold Brick quartz mine; that the Gold Brick quartz mine is valuable mineral land, and the Alabama mill site is all mineral land containing a quartz vein with gold in paying quantities; that on or about April 16, 1898, defendant caused to be filed in the United States land office at Stockton, Cal., his application for a patent for said Alabama mill site, and for the Alabama Consolidated quartz mine, and in his application for patent included the said portion of the Gold Brick quartz claim; that defendant's application was received and filed by the officers of the land office, who thereupon issued notice of defendant's application for a patent for the mill site and the Alabama Consolidated quartz mine, and duly published the same in a Tuolumne county newspaper; that thereafter plaintiff filed his adverse claim in the land office, duly verified, and that the register, on August 1, 1898, made an order suspending all proceedings in the matter of the application for said patent, and directing plaintiff, as adverse claimant, to commence proceedings within 30 days, in a court of competent jurisdiction, to obtain the determination of the question of the right of possession to said mining claim. Plaintiff further alleges that the claim of defendant to that portion of the Alabama mill site in conflict with the Gold Brick quartz claim is without right, and that defendant has no right, title, or interest in or to the same, or any part thereof. Plaintiff prays judgment that he be entitled to the possession of all that portion of the Gold Brick quartz claim embraced within the Alabama mill site; that defendant be debarred from asserting any claim to the said lands and premises adverse to plaintiff; and for further relief. When the de-

fendant filed his petition in the state court for the removal of the cause to this court, he also filed a demurrer to the complaint on the ground that the court had no jurisdiction of the subject-matter of the action, for the reason that it appeared from the complaint that the subject-matter of the action is a piece or parcel of land embracing about five acres, the title of which is in the United States; that the plaintiff claims the land as mineral land, and the defendant claims the same as a mill site; that the only question involved is as to whether the land in controversy is mineral or nonmineral, and whether it is more valuable for mineral than it is for the purpose of a mill site. It is alleged in the demurrer that this controversy is a subject over which the land department of the United States has sole and exclusive jurisdiction. A further ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action against the defendant.

The allegations of the complaint show that the plaintiff entered upon the mineral ground described in the complaint, and located the same as a mineral claim upon a vein or lode of quartz; that the claim is valuable mineral land, and contains a well-defined quartz claim valuable for the gold contained therein; that ever since the entry and location of this land by the plaintiff he has continued to hold, occupy, and work said claim according to law, and has done the required assessment work thereon; that a portion of this claim has been entered upon and claimed by the defendant as a mill site; that the portion of the claim in conflict and claimed by the defendant as a mill site is mineral land containing gold in paying quantities. For the purposes of this demurrer the allegations of the complaint that the plaintiff's claim is for valuable mineral land must be taken as true. The mineral character of the land being, therefore, conceded, and the fact that the plaintiff has entered upon the ground and located it as mineral land under the laws of the United States, and has continued to hold, occupy, and work it as a quartz mining claim, disposes of any question as to the mineral character of the claim, so far as this demurrer is concerned. The question to be determined is, therefore, the right of possession to the surface of the ground in controversy, and this is the precise question required by section 2826 of the Revised Statutes to be decided by a court of competent jurisdiction. The section provides:

"Where an adverse claim is filed during the period of publication, it shall be upon the oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

In *Perego v. Dodge*, 163 U. S. 160, 165, 16 Sup. Ct. 973, 41 L. Ed. 117, the chief justice of the supreme court, in commenting upon the requirements of this and the preceding section, said:

"Thus the determination of the right of possession as between the parties is referred to a court of competent jurisdiction in aid of the land office, but the form of action is not provided for by the statute; and, apparently, an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances,—an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession."

The contention of the defendant that this court has no jurisdiction of the cause of action set forth in the complaint must, therefore, be overruled.

The only remaining question is as to the form of the action, which, although not discussed by counsel with reference to the distinction observed in courts of the United States between cases at law and in equity, may nevertheless be considered under the objection that the complaint does not state facts sufficient to constitute a cause of action. In *Perego v. Dodge*, supra, the court points out that the form of the action is not provided for by the statute, and may be either an action at law or a suit in equity, as the circumstances of the case may require. The complaint in this case appears to be in the nature of a bill in equity, but it was prepared for a state court, and was evidently designed to state a cause of action under the Code of Civil Procedure of this state, which provides in section 307 but one form of civil action "for the enforcement or protection of private rights and the redress or prevention of private wrongs"; and in section 738 it is further provided that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim." The question arises whether the complaint is sufficient as a bill in equity in a court of the United States, where a distinction between the legal and equitable rules governing procedure and remedies under the two systems is still maintained. Is it sufficient, in a controversy of this character, under section 2326 of the Revised Statutes, that the plaintiff alleges in effect that he is in possession of the land in controversy? This was one of the questions before the court of appeals of this circuit in the case of *Mining Co. v. Rutter*, 31 C. C. A. 223, 87 Fed. 801, 59 U. S. App. 538. It was there held:

"Whatever may be said of the nature and character of these proceedings (authorized by said section 2326 of the Revised Statutes) when tried in the state courts, where the statutes have, as to the forms of action, abolished the distinction which exists in the national courts between law and equity, it must be conceded that such proceedings are of an equitable nature, and, when brought in the national courts, are to be tried as equity cases. The mere fact that in certain cases an action at law has been deemed sufficient does not change the equitable character of the suit. The suit is brought for special relief, and the judgment required to be entered is such as a court exercising jurisdiction in equity alone could render."

It is clear that under these authorities the complaint is sufficient as a bill in equity to quiet the title of plaintiff, and the demurrer should be overruled, and it is so ordered.

McKNIGHT v. DUDLEY.

(Circuit Court, S. D. Ohio, W. D. May 5, 1900.)

1. PLEADING—MOTION TO STRIKE OUT—OHIO PRACTICE.

The objection that a defense pleaded in an answer is immaterial cannot be made by a motion to strike out, under the Ohio practice, but should be taken by demurrer.

2. SAME—SUFFICIENCY OF ANSWER.

Where the petition of a county treasurer, in conformity to the state practice, alleges that a certain amount stands charged upon the tax books of the county against the defendant as personal taxes and penalties, which is due and unpaid, and asks judgment therefor, without specifying on what property such taxes were levied, a denial in the answer that defendant had any of a particular kind of property subject to taxation does not state a defense, either in whole or in part.

At Law. On motion of plaintiff to strike out parts of answer.

R. B. Miller, for complainant.

Evan B. Williams and Jones & James, for defendant.

THOMPSON, District Judge. This cause is submitted on the motion of the plaintiff filed April 21, 1900. The first and third assignments of the motion seek to strike out certain defenses of the answer as immaterial. A motion for such purpose cannot be entertained. A demurrer should be interposed, not a motion. The defenses of the answer are sufficiently definite and certain, so that the second and fourth assignments of the motion are not well taken, and the motion, therefore, will be overruled. The second and third defenses of the answer, however, against which the motion is directed, do not state facts sufficient to constitute a defense to the action, and a demurrer, if interposed, will be sustained. The petition alleges that there "stands charged upon the tax duplicate of Lawrence county, Ohio, against the said Mary A. Dudley, personal taxes and penalties in the sum of \$5,471.50, and that the same is due and unpaid, and that the said defendant, Mary A. Dudley, is indebted to the plaintiff in said sum of \$5,471.50, with interest from this date." This form of pleading is authorized by section 2859 of the Revised Statutes of Ohio. The second defense of the answer simply denies that the defendant has any credits which are the subject of taxation, and does not, therefore, meet the allegations of the petition. The allegations of the petition are broad enough to cover taxation upon all forms of personal property. For aught that appears, the taxes claimed may have been levied upon goods and chattels, so that the denial that she had credits subject to taxation will not constitute even a partial defense.

Under sections 2734 and 2735 of the Revised Statutes of Ohio, a resident of this state, who is the agent of a nonresident, is required to list for taxation all moneys in his possession, all moneys invested, loaned, or otherwise controlled by him as such agent; and is required to list it separately from his own, specifying in each case the name of the person, estate, company, or corporation to whom it belongs. The property is listed by the agent, but stands charged on

the duplicate against the owner, and, for aught that appears in the fourth defense of the answer, the taxes claimed may have been listed under the provisions of these sections. The Jack Cases (Jack v. Walker, 96 Fed. 578; Walker v. Jack, 40 C. C. A. 689, 100 Fed. 1006) are not in point. In those cases the court held that the property assessed did not come within the provisions of sections 2734 and 2735, referred to.

STEARNS et al. v. FLICK.

(District Court, S. D. Ohio, W. D. September 24, 1900.)

No. 2,786.

1. BANKRUPTCY—PREFERRED CLAIMS AGAINST ESTATE—EXPENSES OF GENERAL ASSIGNMENT.

Claims of an assignee for the benefit of creditors for his compensation and expenditures in administering the estate prior to the filing of a petition in bankruptcy against the assignor are not preferred claims entitled to priority of payment out of the money in the hands of the trustee in bankruptcy, under Bankr. Act, § 64b, which limits such claims to "the actual and necessary cost of preserving the estate subsequent to filing the petition"; nor, in the absence of such express limitation, could the claim be allowed where the assignment was made after the enactment of the bankruptcy law, such assignment being not only an act of bankruptcy thereunder, but in contravention of the policy of the law, which is to draw to the bankruptcy courts the administration of the estates of all insolvents.

2. SAME—PROVABLE DEBTS—EXPENSES INCURRED BY ASSIGNEE FOR BENEFIT OF CREDITORS.

Such claims are not provable debts of the bankrupt, not having been incurred by him, but by the assignee himself in an attempt to prevent the administration of the estate in the bankruptcy courts; and it is immaterial that he acted in good faith, and in conformity to the insolvency laws of the state.

In Bankruptcy. On application of the assignee of the bankrupt under the state insolvency laws for allowance of compensation and expenses.

William E. Bundy and Sherman T. McPherson, for Claude W. & Chas. W. Flick.

Kiefer & Kiefer, Stafford & Arthur, and Oscar T. Martin, for trustee.

THOMPSON, District Judge. On December 11, 1899, Claude W. Flick made an assignment to his brother, Charles W. Flick, for the benefit of his creditors. The assignee qualified in the state court, took possession of the property assigned, and entered upon the administration of the trust. On the 22d day of December, 1899, Edgar G. Stearns, doing business as E. G. Stearns & Co., and others, commenced this proceeding in this court to have said Claude W. Flick declared a bankrupt; and on the 20th day of January, 1900, the said Claude W. Flick was duly adjudged a bankrupt. Afterwards a trustee was appointed by the creditors of the bankrupt, to whom, under the order of this court, Charles W. Flick, the assignee in the state court, turned over all the property in his hands belonging to the bankrupt,

except \$1,472.21, on deposit in the Mad River National Bank, which was to remain there until the further order of the court. An application is now presented by Charles W. Flick to be allowed and paid out of the moneys in bank the expenses incurred by him, and compensation for services performed by him, as assignee in the state court. The total amount of the moneys of the bankrupt received by Charles W. Flick was \$1,736.11. Of these moneys he paid out for expenses of administration in the state court \$165.12, and turned over to the United States marshal \$98.78, leaving the balance of \$1,472.21 now in bank. He now asks to be allowed and paid out of the moneys in bank, for additional expenses in the administration of the assignment in the state court, including \$250 as compensation for his services as assignee, the sum of \$584.25. The questions presented are: First, whether the expenses paid and incurred by the assignee in the attempted administration of the assignment in the state court, and compensation for his services as assignee, are preferred claims, payable out of the moneys in the hands of the trustee in bankruptcy; second, and, if they are not, whether they are provable claims against the estate of the bankrupt.

1. Section 64 of the bankrupt act prescribes what debts and claims against the bankrupt shall have priority, and whether the claim now made by Charles W. Flick shall have priority must be determined from an examination of the provisions of that section. That section provides as follows:

"Sec. 64. Debts Which Have Priority.—(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court.

"(b) The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States and one reasonable attorney's fee for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases as the court may allow; (4) wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the states or the United States is entitled to priority.

"(c) In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication."

The claim does not fall within any of the provisions of this section. It cannot be allowed as a part of the actual and necessary cost of preserving the estate, because the expenses were incurred and the services of the assignee were rendered prior to the filing of the petition in

bankruptcy, and this section limits priority to the "cost of preserving the estate subsequent to filing the petition." But, if the claim was not excluded from priority by the express terms of the bankrupt law, nevertheless its recognition would be opposed to the policy of that law. The assignment was an act of bankruptcy, and the acceptance of it and the attempt to administer it was wrongful in the sense that it tended to defeat the operation of the bankrupt law. The jurisdiction of the courts of bankruptcy is exclusive and the institution of proceedings in bankruptcy suspends the operation of the state insolvency laws. When acts of bankruptcy have been committed by an insolvent debtor, the administration of his estate, for the benefit of his creditors, is within the exclusive jurisdiction, when invoked, of the courts of bankruptcy. In *Re Binger*, 7 Blatchf. 262, Fed. Cas. No. 1,420, Judge Woodruff says:

"Whether some other administration, either through a receiver or a voluntary assignee, is wiser and better or not, whether the end will be the same if those modes are carried into honest and faithful execution or not, the operation of the bankrupt act is equally defeated. * * * The design and purpose of the bankrupt law is that the property of insolvents shall be secured to their creditors in the very mode pointed out thereby, with all the facilities for its appropriation, all the security for its administration, all the safeguards against fraud, all the protection against devices to establish false claims, fictitious debts, and illegal or inequitable preferences which that act provides, and in the summary manner in which the proceedings may be conducted. It is not, therefore, for the debtors, or for the debtors and some of the creditors, to say, 'We can devise a better or safer or more economical mode of reaching the same final result.' If it were true, it would be only saying, 'We will resort to an expedient to defeat the bankrupt law, and our reason therefor is that we think our plan is wiser and better than that which congress has seen fit to prescribe.'"

And see *In re Smith*, 2 Am. Bankr. R. 9, 92 Fed. 135; *In re Wright* (D. C.) 95 Fed. 807; Rev. St. U. S. § 711, cl. 6; *Id.* § 720; Const. U. S. art. 1, § 8, cl. 4.

No equity can arise, therefore, in favor of the assignee, which would entitle him to compensation for services rendered, or to reimbursement for expenses incurred, in an attempt to defeat the operation of the bankrupt law. The assignee, during the 11 days which elapsed from the time of his appointment until the filing of the petition in bankruptcy, expended of the moneys of the bankrupt which came into his hands \$165.12, and it is a serious question whether or not he should be required to refund that amount to the estate of the bankrupt. He was bound to know that the assignment was an act of bankruptcy, and that its attempted administration tended to defeat the operation of the bankrupt law, and his expenditure of the moneys of the bankrupt for that purpose was wrongful. At the time the petition in bankruptcy was filed, the moneys were not on hand, and the title thereto could not vest in the trustee in bankruptcy; but it is a question whether a right of action did not vest in the trustee against the assignee for the wrongful conversion of these moneys. However, notwithstanding the knowledge of the effect and operation of the bankrupt law imputable to the assignee, it is no doubt true, as a matter of fact, that he acted in good faith, believing that it was his duty to proceed with the administration of the assignment in the state court, and

upon that ground no order will be made requiring him to pay these moneys to the trustee.

2. The claims of the assignee are not provable debts of the bankrupt. They were not debts incurred by him. When he made the assignment the property passed out of his possession, and the debts were incurred by the assignee in an attempt to prevent the administration of the estate in the bankrupt courts. The assignee professed to act under the authority of the insolvency laws of the state of Ohio; but, if he could be regarded as the agent of the bankrupt in incurring these debts, yet, the purpose for which they were incurred being in opposition to the policy of the bankrupt law, they cannot be recognized as provable debts of the bankrupt, as against his bona fide creditors. The claims, therefore, of the assignee, will be disallowed, and he will be ordered to pay over to the trustee the \$1,472.21 now on deposit in the Mad River National Bank.

In re GARDNER.

(District Court, E. D. Virginia. June 16, 1900.)

BANKRUPTCY—COMMISSIONS OF REFEREE.

The setting aside of a homestead exemption to a bankrupt from the proceeds of property sold by the trustee is not the making of a dividend, such as the referee is entitled to a commission for.

In Bankruptcy.

The following is the report of Referee GEORGE S. BERNARD:

To Hon. EDMUND WADDILL, Jr., Judge of Said Court:

The undersigned referee respectfully reports to your honor's court that from the transcript of the record of the proceedings had before him in this cause from the date of the reference up to the 13th day of November, 1899, filed with the report of the undersigned made on the 14th day of November, 1899, from the transcript of the record of the subsequent proceedings so had from said 13th day of November, 1899, to the 31st day of March, 1900, herewith filed, and from the other papers in the cause on file in the clerk's office of the court, the following, among other facts not necessary to be mentioned, will appear upon inspection thereof: The bankrupt, in Schedule B 2, filed with his petition, mentions as a part of his property certain household and kitchen furniture "in the dwelling house No. 21 Brainard street, Watertown, N. Y., lately occupied by the petitioner and now occupied by his wife, estimated at \$250" in value, and "a stock of goods in storehouse No. 136 Sycamore street, Petersburg," at which last-mentioned place the bankrupt, at the date of the filing of his petition, was conducting his business, which stock of goods he estimated as of the value of \$1,500. In Schedule B 5, filed with his petition, the bankrupt claims as exempt from liability for his debts under section 3630 of the Code of Virginia this stock of goods, and under section 3650 said household and kitchen furniture; the former section exempting from such liability property of the value of not exceeding \$2,000, and providing the exemption commonly known as the "homestead exemption," and the latter section providing what is commonly known as the "poor debtor's exemption." In making this claim in Schedule B 5, the bankrupt (to use the language of the schedule) "requests that said property may be set aside to him to be held by him as his homestead and poor debtor's exemptions as allowed by said statutes, or that the same may be sold and the exemptions allowed him out of the proceeds, as allowed by the statute of the United States and as to the court may seem best." A receiver appointed by and under the direction of your honor's court took charge of this stock of goods, carried on the business of the bankrupt,

sold a part of the goods, and upon the appointment of a trustee turned the residue of the stock over to him, who in due course duly sold the same, and deposited in the depository of the court, the Planters' National Bank of the city of Richmond, to the credit of your honor's court in this cause, the net proceeds of the sale, as did the receiver the net cash in his hands. Of the net money which so came into the hands of the receiver and trustee, and was so deposited by them, after deducting the proper costs of carrying on said business and making said sale, and after further deducting the debts of \$66.80 and \$105.25 due the secured creditors, A. Rosenstock and James C. Robinson, for rent, and the debt of \$33.12 due the city of Petersburg for taxes, all of which were liens on said stock of goods, which, together with said costs, were allowed and duly paid under the order of your honor's court, there remains in said depository of the court a net balance of \$1,462.86. Of the other debts proved none have been paid, except one of the three proved by the Jefferson County National Bank, of Watertown, N. Y.,—that of \$70.79 due by John Mahan, for which the bankrupt was liable as surety. The other, proved by this bank and the creditors Carrie and William H. Gardner, aggregating the sum of \$1,818.66, will not be entitled to any dividends, if the bankrupt's claim for a homestead is allowed. All of the other unpaid debts proved, aggregating the sum of \$298.91, being demands for the purchase price of goods constituting part of the stock of goods aforesaid, are, however, debts against which the claim of homestead would not be valid, and under the rulings of your honor's court would be entitled to dividends out of any money which would be payable to the bankrupt as a homestead exemption.

The question now before the referee is, what is the disposition of said fund of \$1,462.86 proper to be made? The solution of this involves that of several other questions. Subdivision "a" of section 40 of the bankruptcy act, fixing the compensation of referees, which for argument's sake we will assume to be a valid provision of law, gives them "from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one-half of one per centum on the amount to be paid on the confirmation of a composition." Subdivision "a" of section 48 of the act, fixing the compensation of trustees, gives them "from the estates which they have administered such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars." What are dividends within the meaning of these sections? Sums of money payable to creditors alone? Or all sums payable by the trustee, including payments of debts having priority, the several classes of which are set out in detail in section 64 of the act? Under the rule of construction embodied in the maxim, "*Expressio unius est exclusio alterius*," the words of these sections giving to referees and trustees commissions "upon dividends and commissions," commissions being an item of the costs of administration, it seems clear that commissions are not allowable upon any other item of such costs. But does the word "commission," as used in section 40a after the word "and," embrace trustees' as well as referees' commissions, and does the same word, as used in section 48a next after the word "and," embrace referees' as well as trustees' commissions? In view of the very small commissions allowed to either trustee or referee, this question might almost be classed as one "*de minimis*." Yet it confronts us as one not to be thus disposed of, and should be passed upon. It is to the interest of the referee to decide that the word "commissions," as used in sections 40a and 48a next after the word "and," embraces the commissions of both referee and trustee. The claim of Mr. Richard B. Davis for \$100 as an attorney's fee is for an item of the costs of administration, and is allowable under the clause of section 64b which provides that "the costs of administration" shall include "one reasonable attorney's fee, for services actually rendered * * * to the bankrupt in voluntary cases, as the court may allow." If the referee were to pass upon this claim, and disallow or reduce it, his action would increase the net sum distributable as dividends. It would accordingly be to his interest to disallow or reduce the claim.

Assume, for argument's sake, that the word "dividends" embraces only payments made to creditors from the fund under the control of the court in a

case like this. Does the word embrace the payment of a debt of a secured creditor, who, like the secured creditors, Rosenstock and Robinson, proved their claims in this cause and received payment under the proceedings had therein? In *re Sabine*, 1 Nat. Bankr. N. 312, 1 Am. Bankr. R. 322, Referee William H. Hotchkiss, of the United States district court for the Northern district of New York, while holding that referees and trustees are not entitled to commissions on any payment made to a creditor entitled to priority under section 64b of the bankruptcy act, ruled that, if a secured creditor submits his security to the bankruptcy court, and is paid therefor by the trustee out of the funds of the estate, the referee and trustee are entitled to commissions on the sums so paid. In *Re Coffin*, 1 Nat. Bankr. N., 507, 2 Am. Bankr. R. 344, Referee F. B. Dillard, of the United States district court for the Eastern district of Texas, ruled that referees and trustees are entitled to commissions, not only on general dividends, but also upon the proceeds of property affected by liens, if such property is administered by the bankruptcy court or comes into the hands of the trustee. In *Re Gerson*, 2 Am. Bankr. R. 352, Referee Joseph Mason, of the United States district court for the Eastern district of Pennsylvania, ruled as did Referees Hotchkiss and Dillard in the *Sabine* and *Coffin* Cases, supra, but apparently treated the secured creditors, who were landlords entitled to rent, as creditors entitled to priority under subdivision "b" of section 64 of the act, and not as creditors protected under section 67, relating to liens, and so entitled to payment. In *Re Ft. Wayne Electric Corp.*, 1 Am. Bankr. R. 706, 1 Nat. Bankr. N. 301, 94 Fed. 109, the United States district court for the district of Indiana held that a payment to a secured creditor by a trustee is not a dividend within the meaning of the bankruptcy act, and that the referee is not entitled to commissions thereon. District Judge Baker, delivering the opinion of the court, said: "The 'dividend' which is claimed to have been paid in this case was really a payment pro tanto on a secured claim. Such a payment is expressly excepted from the definition of a 'dividend' as it is furnished by the bankruptcy law. The law provides that 'dividends of an equal per centum shall be declared and paid on all allowed claims except such as have priority or are secured.' Section 65a. It also provides that 'the value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.' In other words, 'dividends,' within the meaning of the law, are not declared and paid on secured claims. A 'dividend,' within the meaning of the law, is declared and paid on unsecured claims only." In *Re Barber*, 1 Nat. Bankr. N., 559, 3 Am. Bankr. R. 306, 97 Fed. 547, the United States district court for the district of Minnesota held that the word "dividend," as used in sections 40a and 48a, means a parcel of the fund arising from the assets of the bankrupt's estate rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors or in a different proportion, and whether the creditor has a security or priority over other creditors or is merely a general creditor. In his opinion District Judge Lochren said: "The word 'dividend' is a business term, applied to the division among stockholders of a fund arising from profits, or to the division among creditors of an insolvent of the fund arising from the assets of the insolvent's estate. In either case it is the fund that is divided and parceled out among those who are entitled, and the part of the fund so allotted to a stockholder or creditor is his dividend. Dividends upon profits may be apportioned at one rate to the holders of preferred stock and at another rate to the holder of common stock. So, in insolvency, a creditor having priority may be paid in full, yet such payment is just as certainly his dividend or share of the fund as is the small percentage on his claim which the general creditor may receive from the same fund; and unless there is something in the act requiring a different holding, the referee and trustee are entitled to commissions upon all such dividends. If the word 'dividend' could be construed as applying to a division of the debts, so that such commissions are to be allowed only in respect to such debts as are divided by being paid only in part, then, in a case like *In re Sabine*, 1 Nat. Bankr. N., 312, where, by good management of the referee and trustee,

every claim was paid in full, these officers would be entitled to no commissions. A dividend, in bankruptcy, is a parcel of the fund arising from the assets of the estate, rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors or in a different proportion. I think I have indicated the general understanding of the meaning of the word 'dividend,' and I fail to discover anything in the act tending to show that it is used in any different sense. Section 64, relating to debts which have priority, strengthens my conclusion. That provides that the trustee shall pay all taxes 'in advance of the payment of dividends to creditors.' This would exclude taxes from the category of dividends, but nothing else. The payment of debts having priority are payments to creditors from the fund arising out of the assets of the amount to which they are entitled, severally,—to each his proper dividend of the fund, under the terms of the act. Debts having priority must be examined by the referee upon proofs, and allowed or disallowed like other claims." If the referee were to follow the rulings in the Sabine, Coffin, Gerson, and Barber Cases, *supra*, as it is to his interest to do, he would allow himself and the trustee commissions on the debts of Rosenstock and Robinson.

Let us, however, pass on to the consideration of another, and the more important, question involved in this case. Is the bankrupt entitled to the homestead exemption claimed by him? If he is, then, as hereinbefore stated, the creditors Carrie Gardner, William H. Gardner, and the Jefferson County National Bank of Watertown, representing together claims aggregating the sum of \$1,818.66, will be entitled to no dividends, but the other creditors, whose claims aggregate the sum of \$298.91, and against which a claim of homestead is not valid, will be entitled to dividends,—indeed, to dividends which will pay these claims in full. If, on the other hand, the bankrupt is not entitled to the homestead exemption claimed by him, all of said creditors, said Carrie and William H. Gardner and said bank included, will be entitled to dividends, and the aggregate of these dividends will be several hundred dollars larger than those payable under the first hypothesis. In this state of things it is to the interest of the referee to decide that the bankrupt is not entitled to have his claim of homestead allowed. As the bankrupt's right to the poor debtor's exemption will not be affected by any view that may be taken as to his right to the homestead exemption, the referee practically has no interest in this question. Yet in certain cases that may be supposed the right to each exemption might depend upon the decision of the same question,—a state of things which does not exist in this case. The bankrupt might be entitled to the former, and not to the latter, exemption. Interested, however, as hereinbefore set forth, if subdivision "a" of section 40 of the bankruptcy act be, as assumed, a valid provision of law, the referee of course should decide no one of the several questions aforesaid, and he accordingly, without expressing any opinion upon any of them, reports them to your honor for decision, but in so doing deems it proper to express the opinion that said section of the statute, to the extent that it makes the referee's compensation, thereby prescribed, dependent upon his rulings on certain questions, is not valid, but unconstitutional and void. It is believed that the statute books of no country where our system of jurisprudence prevails furnish a precedent of a law creating an office, the incumbent of which must discharge judicial functions, however limited, and providing a plan of compensation for his services in discharging such functions which would give him compensation greater or less according to his decisions in certain cases coming before him.

That a referee in bankruptcy is an officer charged with judicial functions is not an open question. In *Coll. Bankr.* p. 241, the author says: "Although the duties of referees largely pertain to routine matters, and although every act of his is subject to review by the judge, his duties are judicial as well as administrative." Mr. Brandenburg in his work (*Branden. Bankr.* p. 220) says: "The referee under this act occupies an office corresponding to that of register under the act of 1867. To a limited extent he exercises judicial functions, and is essentially an assistant to the judge in the district for which appointed. He must take the oath prescribed for judges of the United States courts in section 712, Rev. St. U. S." The debates in both houses of congress, pending the consideration of the several bankruptcy bills from which was evolved the

bill finally agreed upon and passed, show that the referee was regarded as a judicial officer. Mr. Parker, of New Jersey, in the debate in the house of representatives on the 17th of February, 1898, said: "I am not quite satisfied that the referee should be forbidden to hold any office except that of notary public or master in chancery. The place is really not that of an officer, but of a person schooled in the law, to whom the case is referred for adjudication. There is no reason, in my judgment, why the judges of various state courts may not take such references. Such a judge might be the very person, because of his acquaintance with courts of insolvency, who could administer the insolvency business of a county under this act with the greatest speed and in the best manner." 31 Cong. Rec. p. 2078, c. 3. Senator Nelson, of Minnesota, the patron of the "Nelson Bill," in the senate, on the 27th day of June, 1898, spoke of the referee as "being practically a judge in chambers, attending to all interlocutory and default business." Id. p. 6298, c. 7. In *Re Northrop*, 1 Am. Bankr. R. 427, decided in August, 1898, Referee William H. Hotchkiss, of the Northern district of New York, granted an injunction staying a sale about to be made by a sheriff under a judgment of a state court, and by cogent reasoning sustained a referee's authority to do this judicial act. This ruling was followed by the same referee in *Re Sabine*, 1 Am. Bankr. R. 315, 1 Nat. Bankr. N. 45, decided in the same month, and by Referee Roswell R. Moss, of the Northern district of New York, in September, 1898, in *Re Adams*, 1 Am. Bankr. R. 94, 1 Nat. Bankr. N. 167. In the *Sabine Case* a sale of real estate about to be made under the judgment of a state court in a foreclosure proceeding was enjoined, and in the *Adams Case* the injunction was awarded to stay proceedings against the bankrupt in a state court. It is proper to note that these rulings were made before the supreme court of the United States promulgated its general orders regulating proceedings in bankruptcy, in one of which it was deemed necessary to expressly provide that applications "for injunctions to stay proceedings of a court or officer of the United States, or of a state, shall be heard and decided by a judge"; this language leaving the referee with power to hear and decide applications for injunctions not within the classes specially mentioned in the order. In *Re Styer*, 2 Nat. Bankr. N. 205, 3 Am. Bankr. R. 424, 98 Fed. 290, the United States district court for the Eastern district of Pennsylvania held that a referee, being a court under the provisions of the bankruptcy act, has power and authority to order the sale of the bankrupt's property and appoint appraisers therefor, except when the property is in the hands of a receiver before adjudication, when the district court only can make the order, but that the referee's order is subject to approval, and should not be made unless the referee is satisfied that the interest of the creditors will be advanced by so doing. McPherson, District Judge, delivering the opinion of the court in this case, said: "A question of practice was raised upon the argument of these exceptions which it may be desirable to settle, namely, whether a referee has authority to order a sale of the bankrupt's property. Clause 7 of the first section of the act provides that the word 'court' shall mean 'the court of bankruptcy in which the proceedings are pending, and may include the referee.' General order No. 18 (32 C. C. A. xx., 89 Fed. viii.), and forms 42, 44, 45, and 46 (32 C. C. A. lxxiii.-lxxv., 89 Fed. xlix.-li) show a construction of the clause by the supreme court in favor of the referee's authority upon the point in controversy. But any order made by the referee is subject to revision by the district court. Similar remarks may be made concerning the referee's authority to appoint appraisers. See form 13 (32 C. C. A. lviii., 89 Fed. xxxiv.). When the property is in the hands of a receiver before adjudication, the district court is, of course, the only tribunal that can appoint the appraisers or order a sale. The referee, therefore, had authority to make the order now under consideration, but I find myself obliged to disagree with his conclusion that the sale should be so ordered. Without deciding the question whether this court has power to sell a bankrupt's real estate discharged of liens, and assuming for present purposes that such power exists, it is clear the sale should not be ordered, unless the court is satisfied that the interest of the general creditors would not be injuriously affected. In the present case, I am not satisfied upon this point." The general order of the supreme court defining the duties of referees (No. 12 [32 C. C. A. xvi., 89 Fed. vii.]),

read in connection with the several forms (42, 43, 45, and 46 [32 C. C. A. lxxiii.-lxxv., 89 Fed. xlix.-li.]) mentioned in the foregoing extract from the opinion of Judge McPherson, leaves no room to doubt what, in the opinion of the supreme court, are the powers and duties of a referee. This general order is as follows: "(1) The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee. (2) The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform. (3) Application for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States, or of a state, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts."

Having the judicial powers, and charged with the duty of exercising these powers in certain cases, he is subject to the same disabilities to which any other officer of like character under like circumstances would be subject. Let us now examine the authorities applicable in such cases. "It is a fundamental rule in the administration of justice that a person cannot be judge in a cause wherein he is interested," says Broom in the chapter of Broom's Legal Maxims discussing the maxim, "*Nemo debet esse iudex in propria sua causa.*" Citing several authorities, among them Broom, Leg. Max., Bell, C. J., delivering the opinion of the court in *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114, says: "No man ought to be judge in his own cause," is a maxim aimed at the most dangerous source of partiality in a judge." In this case, an appeal from the decree of a probate court, the probate judge had been attorney for the decedent, and as such advised him in relation to, and wrote, the will offered for probate, and subsequently in his official character as probate judge admitted it to probate. This was a ground of objection to the decree complained of, and the appellate court sustained it. "It is a maxim in every code, in every country, that no man should be judge in his own cause," says Chancellor Sandford in *Insurance Co. v. Price*, Hopk. Ch. 1. "The learned wisdom of enlightened nations and unlettered ideas of ruder societies are in full accordance upon this point; and, whenever tribunals of justice have existed, all men have agreed that a judge shall never have power where he himself is a party." In this case the chancellor was a stockholder in the plaintiff corporation, and upon the calling of the case, so informing the counsel for the parties, stated that, according to the opinion he then entertained, he could not hear the cause, but desired that the question whether he ought to act as judge in the cause or not should be argued. The counsel declined to argue the question, and the chancellor gave the opinion from which the foregoing extract is taken, holding that, being a stockholder in the plaintiff corporation, he was, in substance, a party to the suit, and accordingly could not act as judge. Judge Cooley in chapter 7 of *Cooley's Constitutional Limitations* (5th Ed., side p. 175), having remarked that the assumption of judicial power by the legislature in a certain case is unconstitutional, because, though not expressly forbidden, it is nevertheless inconsistent with the provisions which have conferred upon another department the power the legislature is seeking to exercise, says: "And for similar reasons a legislative act which should undertake to make a judge the arbiter in his own controversies would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible authority, neither legislative, executive, nor judicial, and wholly unknown to constitutional government." In chapter 11 of the same work (side page 410) Judge Cooley says: "There

is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases: 'No one ought to be a judge in his own cause.' And so inflexible and so manifestly just is this rule that Lord Coke has laid it down that 'even an act of parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for "*jura naturæ sunt immutabilia*," and they are "*leges legum*,"' In a note to this paragraph the learned author says: "We should not venture to predict, however, that even in a case of this kind, if one could be imagined to exist, the courts would declare the act of parliament void. They would never find such an intent in the statute, if any other could possibly be made consistent with the words." In the next paragraph of his text the author says: "This maxim [that no one ought to be judge in his own cause] applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise." In a subsequent paragraph, having said that "it is very common, in certain classes of cases, for the law to provide that certain township and county offices shall audit their own accounts for services rendered the public, but in such cases there is no adversary party, unless the state, which passes the law, or the municipalities, which are its component parts and subject to its control, can be regarded as such," Judge Cooley says: "But, except in cases resting upon such reasons, we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people of a state, when framing their constitution, may possibly establish so great an anomaly, if they see fit; but if the legislature is intrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority."

Let us apply these sound principles expounded by this eminent text-writer and jurist. In Virginia we have an officer, known as a "commissioner in chancery," whose duties, to use the language of Moncure, J., delivering the opinion of the court in *Kraker v. Shields*, 20 Grat. 377, "are considered to be, generally, the same with those of a master in chancery in England, whose duties are set forth in the books of chancery practice of that country, as, for instance, in 2 Daniell, Ch. Prac. pp. 1345-1503, § 7." Referring to the commissioner in chancery, Staples, J., delivering the opinion of the court in *Bowers' Adm'r v. Bowers*, 29 Grat. 697, said: "His duties are of a grave and responsible nature. He is assistant to the chancellor. There is no question of law or equity, or of disputed fact, which he may not have to decide, or respecting which he may not be called upon to report his opinion to the court." As far as the limited powers of a referee in bankruptcy extend, he occupies, as we have seen, a position similar in many particulars to that of a commissioner in chancery. Like him, the referee is charged with the duty of deciding questions of law and equity, and questions of disputed fact. Suppose the legislature of Virginia were to enact a law fixing the compensation of a commissioner in chancery, whereby the officer would be given a commission upon the dividends distributed in cases referred to him under an order of court. Would any tribunal hesitate to declare such legislation violative of the fundamental principle that no one should be judge in his own cause, and therefore unconstitutional and void? That the courts would so hold cannot be doubted. If, then, a state legislature, possessing all powers not withheld by some provision of the constitution of the state or of the United States, cannot adopt such legislation, a fortiori congress, a legislative body of limited powers, possessing none not conferred upon it by the constitution of the United States, cannot pass a law of like character. Neither section 1 of article 3, which gives congress the power to establish a supreme court, and from time to time inferior courts, in which the judicial power of the United States shall be vested, nor the provision of section 8 of article 1, which gives it power to establish "uniform laws on the subject of bankruptcies throughout the United States," gives congress authority to vest in any officer having judicial functions power to decide any question wherein he has a pecuniary interest. No such extraordinary legislation could have been contemplated by the framers of the federal constitution. If congress is without power to pass such a law, it follows that the provisions of section 40a, giving referees commissions on

sums to be paid on dividends and commissions, is unconstitutional and inoperative in every case wherein a referee is called upon to decide a question, and the result of his decision will increase or diminish his compensation. Accordingly, in view of the provision of general order 12 (32 C. C. A. xvi., 89 Fed. vii.), adopted by the supreme court, directing that, after the reference of a case as thereby provided, "all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee," and, further, in view of the provision of section 39b that "referees shall not act in cases in which they are directly or indirectly interested," unless said provision of section 40a be regarded and treated, for the reasons aforesaid, as of no effect, referees, as in the case now under consideration, will be disqualified by interest from acting in the great majority of the cases which will come before them, and the judges of the district courts will have their hands full in deciding matters of controversy which it was the manifest intent of the framers of the statute to have decided and disposed of by referees, "subject, always, to a review by the judge," as provided by section 38a of the act defining the jurisdiction of referees. The well-understood intent of the framers of the act in providing by section 34 that the districts of referees should be designated, and from time to time changed, "so that each county, where the services of a referee are needed, may constitute at least one district," was that the administration of the law should be brought home to the people by the establishment of a local bankruptcy court in each county, if necessary, and the delay and expense incident to going before the district judge, to have him decide originally, and not by way of review, the questions that may arise in the proceedings of a case, that with more convenience to all parties concerned may be decided by a referee, might thereby be avoided. See opinion of Referee Hotchkiss in *Re Northrop*, supra, and that of Referee James M. Olmstead, of the district of Massachusetts, in *Re Murphy*, 3 Am. Bankr. R. 499. This object of the statute will be defeated, if section 40a is not to be treated as void to the extent hereinbefore suggested, and referees are accordingly, as in the case under consideration, to be disqualified from acting by reason of interest. If, however, the section be treated as not in harmony with, but repugnant to, the general purpose of the bankruptcy act, and inapplicable to any case wherein a question may arise before a referee the decision whereof may affect the quantum of dividends payable in the case, a serious difficulty is removed, and the decision of all such questions will not devolve upon the district judge.

Taking this view of the case under consideration, the referee has, of course, prepared no statement embodying any plan for the distribution of the fund under the control of the court, but will do this, and (as required by section 39a of the act) will prepare and deliver the proper dividend sheets as soon as your honor shall have decided the questions aforesaid, and given him instructions in the premises. In giving such instructions, if your honor be of opinion that the view taken by the referee of section 40a aforesaid is correct, and that for his services in this case, as disclosed by the record, he is entitled to some compensation beyond the fee of \$10 prescribed by said section, your honor is requested to allow a reasonable sum as such compensation, to be paid to the referee out of said fund as a part of the costs of administration.

The evidence taken before the referee and the proof of the claim of Mr. Richard B. Davis for an attorney's fee are transmitted to the clerk, along with this report, to be filed with the other papers in the case on file in his office.

Richard B. Davis, for petitioner.

Wm. B. McIlwaine, Hamilton & Mann, and Williams T. Davis, for creditors.

WADDILL, District Judge. Upon considering the questions raised by the referee's report filed herein on the 2d of May, 1900, I determine and decide as follows:

1. The claim of the bankrupt to his homestead is allowed, after deducting the costs of the case and such debts as the homestead exemption is not a bar against.

2. The fund should be distributed, upon a scheme and statement made for the purpose by the referee, as follows: (a) To costs remaining due, including an allowance to the referee, independent of his filing fee, for taking evidence and making report upon the claim for a homestead, of \$60, and to the trustee a commission of 3 per centum upon net proceeds of the sale of the property; the same, with the consent of the homestead claimant, having been converted into money and placed to the credit of the court, together with the attorney's fee of counsel for the bankrupt as proved. (b) To the payment of debts proved, against which the homestead cannot be claimed. (c) The residue remaining in hand to be paid to the bankrupt on account of his homestead claim.

3. The determination of the court to allow the homestead exemption makes it unnecessary to pass upon the interesting constitutional question so ably presented in the referee's report. The setting aside of the homestead exemption is not the making of a dividend, such as the referee is entitled to a commission for.

In re GANY.

In re LIPSCHITZ.

(District Court, S. D. New York. September 21, 1900.)

BANKRUPTCY—FALSE REPRESENTATIONS BY BANKRUPT—RECLAMATION OF GOODS BY SELLER.

It is not essential that false representations made by a bankrupt to secure goods on credit should have been the sole consideration of the credit, to entitle the seller to reclaim the goods; but it is sufficient if they were material, and the credit would probably not have been given otherwise.

In Bankruptcy. In the matter of the claim of a seller for a return of goods alleged to have been secured by the bankrupt by false representations.

Edward Kaufmann, for claimant.

Bullowa & Bullowa, for trustee.

Philip J. Britt, for sheriff.

BROWN, District Judge. The referee having found that the false representations were in fact made, as alleged by the creditor, in which finding I am inclined to agree with him, I feel bound to allow to the creditor the fair benefit of that element in the case. He swears he did rely on those representations. It is natural that he should do so; the mere fact that he also required the payment of the overdue bill of \$75 is not inconsistent with such reliance. He might well say: "If you don't pay the \$75 I won't deal with you any way. If that is paid, on your representation I will trust you for \$200." It is not necessary that the false representations should be the sole and exclusive consideration for the credit; but only that they were a material consideration, without which in all probability the credit would not have been given. The statement made would naturally induce credit,

and there is not sufficient ground, it seems to me, for disbelief of the creditor's testimony that it did so. I find the goods belong to the creditor and should be returned.

In re APPEL.

(District Court, D. Nebraska. June 28, 1900.)

1. BANKRUPTCY—COMMENCEMENT OF PROCEEDINGS.

Under Bankr. Act 1898, for jurisdictional purposes, so far as relates to the application of periods of limitation, proceedings in involuntary bankruptcy are commenced by the filing of the original petition, and not by the service of the order on the defendant.

2. SAME—SERVICE OF ORDER OUTSIDE OF DISTRICT—JURISDICTION.

Where service of the order on a petition in involuntary bankruptcy is made upon the defendant outside the district, without an appearance on his part, no order can be made which will apply to him in person, but the proceeding will affect only property within the district which can come into possession of the trustee.

In Bankruptcy. On objections to jurisdiction.

Sam Appel was in business in Fremont, Neb., and continued to reside there until August 29, 1899, on which date he removed to Chicago. On September 1, 1899, three creditors (Julius Herman & Co., Stern, Falk & Co., and Arnold, Louchheim & Co.) filed a petition against Sam Appel in bankruptcy. Subpoena was forthwith issued, but not served, as Sam Appel from and after August 29, 1899, had been a resident of Chicago, and continuously absent from the Nebraska district. On October 6, 1899, Keith Bros. & Co., Kohn Bros., and Sweet, Dempster & Co. filed in court proof of their respective claims against Appel. March 8, 1900, these interveners filed a petition in intervention, and on April 4, 1900, service was made of the original petition and petition of intervention upon Appel in Chicago.

William A. De Bord, for intervening creditors.

Courtright & Sidner, for bankrupt.

MUNGER, District Judge. This is a proceeding in involuntary bankruptcy. Defendant has made a special appearance, challenging the jurisdiction of the court upon the ground that he was neither a resident of, nor did business within, the district of Nebraska for the greater portion of six months preceding the commencement of this action. Certain alleged creditors of bankrupt filed their petition in this court to have the defendant adjudged a bankrupt within the period of time which would give this court jurisdiction. No subpoena was served upon said application. Subsequently other creditors intervened, asked to be made parties, and obtained an order for service upon defendant outside of the district. The question turns upon the proposition as to whether the action or proceeding was commenced by the filing of the original petition, or whether the commencement of the proceeding is to date from the order which was served upon the defendant. A careful reading of the bankruptcy law and the adjudications thereof leads to the inevitable conclusion that for jurisdictional purposes, so far as applying periods of limitations, the action was commenced at the date of filing of the original petition. Service of the order, however, having been made upon the defendant outside of

the district, it is equally clear, in my judgment, that, without an appearance upon the part of the defendant, no order can be made which will apply to the bankrupt in person. It can only proceed as a proceeding against the property of the bankrupt, if any, within the jurisdiction of the court, and which can come into the possession of the trustee. The special appearance will be overruled, and 20 days given the defendant to determine whether or not he will stand on the special appearance, or answer or plead further in the case.

CUNNINGHAM et al. v. GERMAN INS. BANK.

(Circuit Court of Appeals, Sixth Circuit. May 21, 1900.)

1. APPEAL—TRANSCRIPT—EFFECT OF OMITTING EVIDENCE.

Neither counsel for an appellant nor the clerk can determine conclusively what parts of the record are necessary to the hearing on appeal in the circuit court of appeals, and, where the certificate does not show that the record is a full and complete transcript of the entire proceedings, it should appear by stipulation or otherwise that it does include all that is necessary to a determination of the matters involved in the appeal; but it is desirable that it should contain no immaterial matter, and a failure to incorporate the entire record will not be held ground for dismissing the appeal, but the appellee should, if not satisfied with the transcript as filed, seasonably move the court to require the incorporation of such other papers and evidence as he deems necessary and points out.

2. BANKRUPTCY—RECORD ON APPEAL.

Where a referee in bankruptcy on petition of a party desiring a review by the judge of an order made by him, in accordance with the requirements of Bankr. Act 1898, § 39, subd. 5, and rule 27 of the general orders (32 C. C. A. xxvii., 89 Fed. xl.), has certified to the judge the question presented, "a summary of the evidence relating thereto, and the finding and order of the referee thereon," and the matter has been heard and determined by the judge on the record so made, the original evidence before the referee is no part of the record in the court, and cannot be required to be included in the transcript on an appeal from its decision.

3. SAME—MATTERS REVIEWABLE BY APPEAL.

Under Bankr. Act 1898, § 25, subd. 3, which gives a right of appeal "from a judgment allowing or rejecting a debt or claim of five hundred dollars or over," such an appeal includes as an incident any question as to the rank or lien of such debt or claim in the distribution of the bankrupt's estate; at least, where such question is one of controverted fact and law.

On Motion to Dismiss Appeal, and for a Rule to Require Appellant to Bring Up a More Perfect Record.

For opinion on merits, see 101 Fed. 977.

W. W. & J. R. Watts, for appellants.

O. A. Wehle, for appellee.

Before TAFT, LURTON, and DAY, Circuit Judges.

LURTON, Circuit Judge. Scanlon & Co., a corporation of the state of Kentucky, is an involuntary bankrupt. Proceedings for the purpose of distributing its assets are pending in the bankruptcy court for the district of Kentucky. This is an appeal, under section 25 of the bankruptcy act of 1898, from a judgment allowing a claim in favor

of the appellee, the German Insurance Bank, for \$35,000, and holding same entitled to priority under a mortgage made by the bankrupt to secure same. The matter comes on now to be heard upon several motions made by appellee: First, to dismiss the appeal because the transcript of the record filed by the appellant is not a properly certified and full transcript of the record in the district court; second, to dismiss the appeal in so far as it is thereby sought to review the judgment of the court below according to appellee the benefit of the security for his debt provided by a mortgage; third, to compel the appellant to complete the transcript by filing a transcript of certain documents, depositions, and other proofs averred to be necessary to the hearing of the appeal if the court shall deny the motion to dismiss same.

1. The defect in the certified transcript pointed out by counsel for the appellee is that the clerk has neither certified that it is a transcript of the entire record, nor of such parts as he has been directed by court or counsel to certify, but that it is a "true and correct transcript" of certain papers, orders, and proofs, which he recites. Counsel insist that, as the transcript does not purport to be a full record, nor a record composed of such parts of the record as had been agreed upon by stipulation or directed by the court, it is not a "legal record," and that the appeal should be dismissed upon the authority of *Meyer v. Implement Co.*, decided by the circuit court of appeals for the Fifth circuit, and reported in 52 U. S. App. 478, 29 C. C. A. 465, and 85 Fed. 874. In *Railroad Co. v. Schutte*, 100 U. S. 644, 25 L. Ed. 605, we find authority for a less rigorous rule. The transcript in that case had been made up of such papers and evidence as the appellant deemed necessary for the hearing of the matter involved by the appeal. The clerk certified that it was a transcript of such parts of the record as were "necessary on the hearing of the appeal prayed and allowed in said cause." It was urged by the appellee that much that was important had been omitted, and the court was moved to dismiss the appeal because no properly certified transcript had been filed. This the court declined to do, but ordered "that the appellees file with the clerk of this court, and with the counsel for the appellant, on or before the 1st day of February next, a statement of the papers, documents, and proofs used on the hearing below, and omitted in the transcript now on file; which they deem necessary for the proper presentation of the cause; and that unless the appellant shall, on or before the 15th day of March, file in this court, as part of the record, copies of such papers, duly certified by the clerk of the circuit court or his deputy, under the seal of the court, this appeal be dismissed. If in this way unnecessary papers are brought up, we will, on application, make such order in respect to costs as may, under the circumstances, be proper." It is desirable that a transcript sent to this court upon appeal shall contain no immaterial matter, and the third paragraph of the fourteenth rule of this court prescribes that "no case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in this court shall be filed." It is manifest that neither the counsel for the appellant nor the clerk can conclusively determine what parts are "necessary to the hearing in this court." When, there-

fore, the certificate does not show the record is a full and complete record of the entire proceedings, it ought to appear, by stipulation or otherwise, that it does include all that is necessary to a determination of the matters involved by the appeal; and, if the appellee is not content with the transcript as filed, he should seasonably move the court to require the appellant to complete the record by filing a transcript of such other papers and evidence as he deems necessary and points out.

2. Neither does the appellee make a case which would justify a rule upon the appellant to file a more complete transcript. In support of the motion for this purpose appellee has filed an affidavit describing certain papers, documents, and depositions which were in evidence at the hearing before the referee, and which appellee avers are necessary to a hearing upon the matters involved by this appeal. But it is not averred that this original evidence constituted any part of the record upon which the judgment of the district court was rendered. And this is the ground upon which the appellant has opposed the allowance of a rule by which such proofs are to be now made part of the transcript in this court. That the documents and proofs desired by the appellee constituted the original evidence upon which the referee made the findings and orders which were subsequently reviewed by the judge below is not denied. But that review, so far as appears from the transcript on file, or the affidavit which is the foundation of the motion now under consideration, was not made upon the original documents or other proofs which were before the referee, but upon a certificate of the questions presented, and a summary of the evidence which related to those questions, as provided by the twenty-seventh general order in bankruptcy (32 C. C. A. xxvii., 89 Fed. xi.). That order is as follows:

"When a bankrupt, creditor, trustee or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

This order is based upon the fifth paragraph of section 39 of the bankruptcy act of 1898, which, among other duties of the referee, requires that they shall make up records "embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judge." Following the practice prescribed by the twenty-seventh general order the appellants and appellee filed their respective petitions, setting out the errors complained of, and praying that the referee would certify the questions presented, "and a summary of the evidence relating thereto, and the finding and order of the referee thereon." This the referee did, and at the instance of the appellee he amended his certificate by certifying certain additional facts desired as part of the summary of evidence. This certificate and summary are found in the record as certified, and no exception appears to have been taken, either before the referee or court, to the sufficiency and completeness thereof. In the absence of some order of the court below, we must

presume that the hearing in the district court was upon the summary of the evidence thus certified by the referee, and that the original evidence now sought to be made part of the transcript constituted no part of the record in the court below. The clear purpose of the provision of section 39, set out above, was to avoid, as far as possible, the sending of the original proofs to the judge, and to substitute therefor, where the ends of justice would permit, a summary thereof. To effectuate this object is the purpose of the general order already referred to. Undoubtedly it was entirely within the competency of the judge at request of either party to have directed the filing of all or any part of the original documents or proofs which were on file with the referee. Nothing before us indicates that any effort was made, either before the referee or judge, to supplement the summary of evidence certified to the judge in accordance with the terms of the general order, and in this condition of things we think the present application should be denied.

3. The motion to dismiss the appeal in so far as it includes an appeal from the judgment according to the debt or claim of appellee the benefit of the lien of its mortgage must be also denied. This motion is based upon the suggestion that an appeal will not lie to this court from a judgment denying or allowing a lien or preference out of the bankrupt's estate, but that such a judgment can only be questioned by petition invoking the power conferred upon the court by section 24 of the bankruptcy act of 1898. The appellate jurisdiction of this court in bankruptcy proceedings is defined by section 25, Id. By that section an appeal, as in equity cases, may be taken in bankruptcy to this court in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; (3) and from a judgment allowing or rejecting a debt or claim of \$500 or over. Learned counsel say that a review of a judgment allowing or disallowing the lien of a debt or claim can only be had under the superintending and reviewing powers of this court granted by section 24, and that an appeal will not lie from such a judgment. If this be true, such a judgment can be reviewed only upon matters of law, and, when the lien allowed or denied depends upon a controverted question of fact and law, no review of the judgment is possible, inasmuch as the remedy afforded by section 24 is limited to matters of law. To this construction of the act we cannot assent. The appeal from a judgment allowing or rejecting a debt or claim includes as an incident any question as to the rank or lien of such debt or claim in the distribution of the bankrupt's estate. If the debt or claim, including its lien or preference, depend upon controverted questions of fact and law, the right of appeal is granted by section 25, above set out. The motions of appellee must be denied, and the costs of the motion taxed to it.

In re BRAGASA.

(District Court, N. D. Texas. April 12, 1900.)

BANKRUPTCY—RIGHT TO DISCHARGE—FAILURE TO KEEP BOOKS OF ACCOUNT.

The action of an insolvent in mingling money of his own with that of his wife, and depositing it together in banks in his wife's name, without keeping any books of account or records showing what portion of such deposits was owned by him, for the purpose of preventing his creditors from reaching it, when such practice was continued until he filed his petition in voluntary bankruptcy, constituted a failure to keep books of account or records with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, which debars him from his right to a discharge, under Bankr. Act, § 14b.

In Bankruptcy. On exceptions to report of referee.

W. B. Paddock, for petitioners.

B. J. Houston and John W. Wray, for bankrupt.

MEEK, District Judge. The application of James B. Bragasa, bankrupt, for his discharge is before me on the exceptions of the contesting creditors to the report of the referee (to whom a reference of the specifications filed in opposition to the bankrupt's discharge was had), which finds that the bankrupt is entitled to this discharge. There are a number of specifications filed by the contesting creditors, and of these I will only consider the fifth, which is as follows:

"That with the fraudulent intent to conceal his true financial condition and prevent his creditors from collecting their debts, the bankrupt, in contemplation of bankruptcy, conducted his banking business in the name of his wife, J. E. Bragasa; that he has deposited in the American National Bank and the Farmers' & Mechanics' National Bank, at Fort Worth, Tex., his earnings and income in the name of his wife, so intermingling his money and property with that which he claims was hers that it is impossible to distinguish how much of said deposits were his, he having kept no books, and how much belonged to some one else. Wherefore, by reason of such willful and fraudulent management of his affairs, he is now unable to make a clear and intelligible statement of his financial condition previous to or at the time of the filing of his petition in bankruptcy."

Bankr. Act, § 14, subd. "b," provides as follows:

"The judge shall hear the application for the discharge * * * and investigate the merits of the application and discharge the applicant unless he (1) committed an offense punishable by imprisonment, as herein provided; or (2) with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed or failed to keep books of accounts or records from which his true condition might be ascertained."

The referee, among other things, finds that Bragasa from the time of his failure in business, in 1897, up to the time of the filing of his petition, on June 10, 1899, kept his bank account in his wife's name, making deposits of both his own and his wife's in the same account. The referee, after considering the evidence concerning the bankrupt's failure to keep books of account or record, concludes that there has not been such failure to keep books in contemplation of bankruptcy as would prevent the discharge of the bankrupt in the present act. The record of the evidence discloses the fact that by reason of the manner in which the bank account at the American National Bank and the Farmers' & Mechanics' National Bank were kept it could not be ascertained how much of the money deposited

in the wife's name belonged to the bankrupt, and how much to the wife, both having and depositing money in the same account at intervals. The record further discloses that no books of records were kept by the bankrupt showing what funds he had, and what disposition was made of them; and the bank accounts, being kept in the condition in which they were kept, throw no light upon the true financial condition of the bankrupt. The only question remaining for disposition is: Did the bankrupt's failure to keep books of account or record from which his true condition might be ascertained arise from a fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy? The intent of the bankrupt must be ascertained from the circumstances surrounding his failure to keep books of account or record. After he failed in business, he had a number of business transactions, which resulted in his having money in his hands. Some of the money which came into his hands belonged to his wife, and some to himself. He deposited the larger part of it in two different banks in his wife's name. He testified that he did this to keep anybody from "jumping on it" before he had an opportunity to use it. He was concealing from his creditors that which might have been subject to the payment of their debts, could they have reached it. In view of his own affirmative testimony as to the purpose which moved him in concealing his funds, it is neither unjust nor harsh to presume that he failed to make any record of his receipts and disbursements for a similar purpose. It is but an incident to the concealment of funds from creditors to conceal or fail to keep trace of such funds through books of account or records. In this case the bankrupt kept banks with which he in reality did business from making any records of funds in his name. The pass books which were issued to him, the checks which he wrote, and the stubs which he kept told no story of any money belonging to him. Even to the extent that ordinary business dealings with banks would compel a record, he avoided making it. The bankrupt was certainly inspired with fraudulent intent to conceal his true financial condition in pursuing this course. It is also quite clear that this was done in contemplation of bankruptcy. He began keeping his bank account in his wife's name in 1897. This was before the bankruptcy law had been enacted. This course was then pursued in view of his insolvency, and because of his desire to handle money coming into his possession as he chose. The bankruptcy law was passed and became effective on July 1, 1898. He still continued to keep no books of account, no record of his receipts and disbursements, and still continued to mingle his own funds with those of his wife in the same accounts in the wife's name at two different banks, and he pursued this method up to the time he filed his voluntary petition in bankruptcy on June 10, 1899. When he first contemplated taking the benefit of the act no one knows but himself. However, it was necessarily before he filed his petition, and from that time forward, left in the consciousness of failing to keep even the records of his bank business in shape as to be of any assistance or avail in the attempted ascertainment of his true financial condition. The application for his discharge must be refused.

UNITED STATES v. WILLIAMS.

(District Court, W. D. Texas. May 19, 1900.)

No. 157.

1. CRIMINAL LAW—EVIDENCE—CONFESSION.

Defendant, after his arrest, charged with murder, made a confession to the officer, which was taken down by a stenographer, and afterwards written out in typewriting, and signed by the defendant before a magistrate. When introduced in evidence, such confession contained a number of interlineations made with a pen, all of which were inculpatory, and some, bearing on the degree of the offense, of a character to render it doubtful whether the language was that of defendant. Aside from the confession, there was no evidence as to the circumstances attending the killing, or that it was done by defendant. *Held*, that the admission of the confession for consideration by the jury in its entirety was error, which entitled the defendant to a new trial, in the absence of satisfactory evidence showing when or by whom the interlineations were made.

2. SAME.

A jury is not justified in disbelieving that part of a confession which tends to exculpate the defendant, or reduce the grade of the crime, when there is no other evidence tending to contradict such statements, or conflicting therewith.

3. SAME—INSTRUCTIONS.

Act Jan. 15, 1897, giving the jury in cases of murder the right to qualify their verdict of guilty by adding the words, "without capital punishment," leaves the exercise of such right entirely to the judgment and discretion of the jury, and an instruction which might be construed to require them to find palliating circumstances to authorize such qualification is erroneous.

Prosecution for Murder. The defendant was convicted at Laredo, Tex., April term, 1900. On motion for a new trial.

Henry Terrell and T. W. Dodd, for the United States.

Andrew Winslow and J. O. Nicholson, for defendant.

BOARMAN, District Judge (orally). On the trial of the case the evidence was not taken down. Much to the regret of the court, it was impracticable to secure the services of a stenographer. The court, in considering this motion, will have to rely upon statements of counsel on either side, together with my own memory as to the material facts developed in the testimony. The counsel agreed pretty well as to what the testimony was. According to my recollection, the testimony is much like the statements upon which the counsel agreed. The government offered the written confession of the defendant, which was taken down by a stenographer, soon after the defendant was arrested, at the instance of the deputy marshal who arrested him. It is conceded that the governor of the state of Texas offered a reward of \$250 for the arrest of the man that killed Hardesty. The government offered no testimony other than defendant's confession to show, or even suggesting, that defendant killed deceased. There was nothing said by any of the government witnesses in relation to the cause of the killing, or as to the matters or circumstances attending immediately the killing. The government relied alone for conviction upon the confession of defendant, supplemented by other testimony, which related to some material circumstances occurring after the homicide.

It seems, but for defendant's confession, neither the court nor the jury would have had any knowledge of the fact that defendant killed Hardesty, or of any circumstance attending the killing, antecedent thereto or subsequent to the killing. The confession is as follows:

"On Saturday morning, December the 9th, 1899, I was standing in Troy Johnson's saloon, about twelve o'clock. A young fellow by the name of Jack Hardesty came there. He was from Monterey. He was singing and drinking, and he left. I didn't drink any at all with him. It was some song that he sang concerning Kentucky. I went around to the National Depot about one o'clock, to see the train master, and came back to the saloon, and went to the I. & G. N. Depot to see the train come in, and there I met him again. He came up, and spoke to me, and asked me if I was going to town, and I told him 'Yes.' After the train came in, he and I walked to the post office, and I asked for my mail. There was no mail for me, and then he and I left from the post office, and went to the Jarves Plaza, and sat down there for fifteen minutes. There was passing some young white ladies, and they laughed at him and I sitting there, and he made some remarks, and I told him he ought not to do it, because the white people down there, who wouldn't do anything to him, they would punish me. We left the plaza, and went to the I. & G. N. Depot, and stood up there talking, and he told me he was going away next morning on the freight train. I and he were going together. He brought it up about those white ladies again, and asked me what rights did I have to take up for them. I told him I didn't have any rights, any more than it was wrong for him to make expressions that way; and he said again, if I thought I had any rights, I had better take some of the rights out of him. I told him I didn't want to have any fuss with him, because he might have the advantage of me. Then he walked up, and struck me, and called me a —, and then he said if I didn't like that to just go with him on the prairies, and he would finish it. We went, and got through the government post fence, and walked out in the reservation, and passed where lots of mesquite bushes were near a path, and just as he got behind the bushes he runs out with a big one-edge dirk knife, and he started toward me, and as he rushed upon me I caught the blade with my arm, and took the knife from him, and cut him, as he was coming to me, in the neck. When I cut him he said 'Oh, Lord!' and he turned and run away, and I followed after him, and cut him in the back. Kicked

I ~~cut~~ him in the head, and stamped him in the back, and then I threw the knife away, and jumped and run. He was a white man. As we was coming from the post office, he had a quart bottle of mescal in his pocket, and he asked didn't I want some, and I told him 'Yes,' and he drank some, and we went into a dry-goods store. On the street running west of Convrey's livery stable, on the corner on the same block,—a yellow painted house, a drug store on the corner. Both of us went in there to see some combs, and the clerk showed us some combs, and he bought one for fifteen cents, and he pulled out a ten-dollar greenback and two silver dollars, and gave it to me, and told me to keep until the freight train left next morning, as he and I were going off together. After I killed this man, I ran and went to the back of the Commercial Hotel, around to the kitchen, and I knocked on the window, and called Abe Temple, and he came to the window, and asked me if I wanted something to eat, and I told him 'No'; to hurry, and come out, because I was in trouble; and he asked me what was it, and I told him I had cut a man, and he told me to meet him at the plaza. I was going to get me some clothes, and I went to a dry-goods store, and bought me a pair of pants, and a pair of shoes, and a shirt, and then went back to the plaza, and sat there until Abe Temple came. When Abe came, we got a cup of coffee, and got in a hack, and went down to the river bridge, and we had a dispute with the hack driver about the fare, and then I gave him one dollar Mexican money, and we got the hack; and I changed \$7.00 with Mr. Navarro, the bridge keeper, and then we crossed, and went to some — houses; and the first crowd of — in there they made light of us, and called us negrones, and we left there and went down the streets, and met a policeman, and Abe asked the police-

man if he would take care of me that night, and feared I might get robbed. As the policeman was carrying me to the police station, and as Abe departed, I told him 'No'; to take me to the depot, so I could get that train going out that night. So the policeman took me to the depot, but the train had done gone. And then I went back in town, and struck up with another —, and I gave her one dollar Mexican money to stay with her all night; and then the next morning I went back to the depot, and got on the passenger train, and went to Monterey, and stayed in Monterey four hours, and got on the passenger train at Monterey, when a friend of mine that was portering on the road put me in a small room, and brought me to Eagle Pass. The porter's name was Will Kimble. After I got to Eagle Pass, I went up the post, and got dinner, and have been up in the post ever since until arrested. I was walking out Saturday morning, and went across the river, and a man asked did I want a job of work, and I told him 'Yes,' and he told me that I could come back. I asked him what time it was, and he said it was half past one, Mexican time, and I told him I had to be back at half past two; and I came back, and he gave me a paper, and it was on the paper these words: 'Put these two men to work at once, and to-morrow, if possible.' I went on across the railroad bridge, and went to the freight house, and asked for Mr. Vaughn. Mr. Vaughn wasn't in, and Mr. Dowe, the sheriff, asked me my name, and I told him 'Arthur Williams,' and he said, 'I have a warrant for you,' and I told him, 'All right,' and he brought me to the jail house, and put me in jail. I was arrested Saturday, January 6th, and put in jail the same day, Saturday 6, 1900. From 5 o'clock in the evening until 7 o'clock the evening of the murder, he and I drank a quart of mescal. He was very drunk, but I was not drunk."

The confession, taken as a whole, is sufficient, under the law, to inculcate defendant in the crime of manslaughter. The exculpatory statements therein, if true, forbid the conclusion that he is guilty of murder. On inspection of the typewritten statements which show the confessions of the defendant, it will be seen that pen and ink interlineations and additions appear therein at several places. There is nothing stated by the official before whom the confession was taken, and there is nothing in the paper itself, to show when, or at what time, or by whom such interlineations were made, or who made them. The words and sentences written in capital letters herein will call attention to the interlineations. It appears from the testimony that Deputy Marshal Hanson arrested defendant; and a shorthand writer, at his instance, took down the statements of defendant. These statements were afterwards transcribed into typewritten longhand, and in the typewritten matter appear the interlineations made with pen. After the statement of defendant was transcribed into typewritten longhand, it appears that defendant was taken before a justice of the peace, and that before such justice he stated under oath that the statements were true and correct, and that he made such statements of his own free will and accord, after being warned by Deputy Hanson "that the statements would be used against him, and not in his own favor." It is contended by counsel for defendant that the confession offered by the government should not be received, "because the admissions were made at a time and under circumstances when defendant's mind was oppressed by the calamity of the situation, and were made, if made at all, with the hope of reward, if not with the fear of punishment, for this: that the said defendant was then and there told by the said deputy marshal, at and before the time of making such alleged confession, that he (the said deputy) had dead proof against him (the said

defendant) showing that he (the said defendant) was the man that killed Jack Hardesty, and that it might be better for him (the said defendant) to make a voluntary statement in relation thereto, as he (the said defendant) might say something therein showing justification, or at least extenuating circumstances." It is agreed that the deputy marshal made such a statement, substantially, to the defendant. I think the confession was properly admitted, and given to the jury for what it is worth, because, though the circumstances and surroundings under which it was made by the defendant may have had a tendency to impose on or surround him with illegal conditions, yet it appears that the defendant, of his own free will and accord, acknowledged before a competent officer the truthfulness of such statement, made by him antecedently before the deputy marshal. The objection urged by counsel as to the interlineations, not being disposed of in this suggestion, will be further considered. If the interlineations and additions complained of were in the paper when it was read to defendant, if it was read at all to him, of course he is bound by them as he is bound by any other part of the confession. The justice of the peace whose jurat made the paper authentic was a witness on the trial. He said he knew nothing, of his own knowledge, about the interlineations; that, so far as he knew, they were on the paper when sworn to by the defendant. He himself did not make the interlineations, and could give no clear evidence one way or the other as to them. There was no evidence showing who made the interlineations, but one witness said he thought the stenographer who took the statement made them. The stenographer himself was not a witness in the case, and there was no witness who could give any satisfactory evidence as to who made the interlineations, or at what time they were made. It will be seen that the interlineations in, and additions to, the typewritten matter are all inculpatory, and that they are very damaging in their purport to the defendant in showing that he was actuated by malicious purpose in his acts and in the incidents occurring at the moment of the killing. There was no one present but himself and deceased at the time of the killing, and there are but few circumstances, if any, occurring at the time which would illustrate any material matters relating to the killing. At the place, or near to it, where Hardesty was found dead, the knife of deceased was found, and the ground showed evidence that a scuffle had taken place between the parties. There was nothing about the body of deceased to show that he had been robbed. The inculpatory words in the interlineations show a malicious purpose to kill, and they might (if other circumstances and facts in the evidence should warrant such a conclusion) show such express or implied malice as is an essential ingredient in the crime of murder. The sentence in the typewritten statement in which the first interlineation is made showing inculpatory confession made by the defendant reads, with interlineations left out, as follows: "When I cut him, he said, 'Oh, Lord!' and he turned, and run away, and I cut him in the back." With the interlineated words it reads as follows: "When I cut him, he said, 'Oh, Lord!' and he turned to run away, and I FOLLOWED AFTER HIM, AND cut him in the back." The second inculpatory interlineation is found in the sentence following

the one just quoted. With the interlineation it reads as follows: "I kicked him in the head, and stamped him in the back." The word "cut" is erased, and the word "kicked" interlined. At the end of the typewritten transcription made by the stenographer, a sentence, complete in itself, in pen and ink, is added, as follows: "FROM FIVE O'CLOCK IN THE EVENING UNTIL SEVEN O'CLOCK IN THE EVENING OF THE MURDER HE AND I DRANK A QUART OF MESCAL. HE WAS VERY DRUNK, BUT I WAS NOT." It will be seen, without further comment on the interlineations, how damaging they were to defendant in disclosing the malicious animus which must have, if the interlineated words be correctly written, attended, immediately, the homicide. The last sentence, which closes defendant's statement, is written with pen and ink. The sentence makes two lines, and the lines are close together, and the words are written close together. Surely, these lines show an after-thought either of defendant or of the author of the lines. The sentence itself does not relate to anything said by the defendant in the context of the latter part of the admissions. It shows the use of the word "murder" by the defendant, and suggests that he is making against himself a confession of murder. Nothing else in the confession conveys the suggestion that the defendant used words purporting to admit that he committed any acts which in themselves would make out a case of murder against him. The sentence written in pen and ink further shows that the defendant confesses that he killed a man who was very drunk, while he himself was not drunk. Without discussing just now by whose hands the interlineations were made, or at whose instance or at what time they were made, I think it is very questionable whether or not the defendant voluntarily used the word "murder" in making his confession. The suspicion imposed on the paper by the interlineation was not cleared up by "satisfactory" evidence. It appears by the confession that the defendant met the deceased about 12 o'clock of the day of the killing, in a barroom, and that he (the deceased) was drinking and singing. If the last sentence referred to states the truth, the killing itself must have occurred after 7 o'clock at night on December 9th. The time between 12 o'clock, when the defendant met the deceased, and 7 o'clock p. m., when they had finished drinking a quart of mescal, is not definitely accounted for in the confession, or by any other evidence. The defendant, having met Hardesty at 12 m. in the barroom, left him there. Later on, defendant went to the National Depot, and from there to the International & Great Northern Depot to see the International & Great Northern train come in, and there met Hardesty again. After the International & Great Northern train came in, defendant and deceased went to the Jarves Plaza, and sat down a few minutes. He says: "We left the plaza, and went to the I. & G. N. Depot, and stood up there talking, and he told me that he was going away next morning at 4 o'clock on the freight train." He says while they were talking (he and deceased) deceased "brought up the matter about the white ladies, and asked me what right I had to take up for them. I told him I had no other rights than that it was wrong for him to make expressions that way, and he said again that if I thought I had any rights I had better take some

of the rights out of him." "Then he walked up, and struck me, and called me" vulgar names, "and then he said if I did not like that to just come with him on the prairies, and he would finish it." The defendant and deceased left the depot, and went near by, through the government fence to the grounds of the reservation, and the killing occurred on the reservation, presumably shortly afterwards. So far as the confession shows how the time was spent after 12 o'clock m. until the killing, the sentence added in pen and ink to the confession to the effect that defendant and deceased drank a quart of whisky between 5 and 7 seems not to be true. On the trial of the case I was not so much impressed with the importance of the matter as to the time shown in the last sentence as I was in my purpose and endeavor to learn how, and when, and at whose instance the interlineations were made, and if they were made before or after they were shown to or read to the defendant. But on further consideration of the pen and ink sentence—the sentence in which the defendant seems to have confessed that the killing was murder—I find it more difficult to determine, from the oral evidence, at what time or by whom the interlineations were made. My attention during the trial was not called to the time, stated in the pen and ink addition, in which the deceased and defendant drank a quart of mescal. If the statement made in the last sentence, or the purport of it, was in the language of the defendant himself, it certainly was inculpatory, and very damaging, before the jury to the defendant. On the trial, evidence was given to the jury by the government with a view of showing at what time, and by whom, and at whose instance the interlineations were made in the typewritten statement. My recollection is that the evidence thereon left these pertinent matters in grave doubt. On the trial I directed that the whole confession, as now appears, should go to the jury. I am not now satisfied that my conclusions then were free from error. None of the witnesses offered by the government seemed to have any knowledge as to the interlineations which would have enabled them to give positive testimony on that important matter. It is probable the stenographer is the only man who could have given satisfactory testimony as to the interlineations.

Considering the want of connection between the context of the latter part of the confession and the sentence which was added with pen and ink, and the purport of such sentence, it seems very probable, in the absence of a better character of evidence, that the words in the last pen and ink sentence, which purport that the defendant called the killing of deceased "murder," and which suggested the killing itself could not have occurred before 7 o'clock, were either unwarrantably interlined by some one, or that the language of the defendant was not correctly taken down. Putting aside for the moment the criticism I have just made as to the purport of the words in the pen and ink sentence in the interlineations, it appears that, if the words themselves be true, the killing could not have occurred until after 7 o'clock at night,—about one hour and a half after dark. One witness for the government said he saw the defendant talking to Jack Hardesty, deceased, about 4 p. m., at the International & Great Northern Depot; that he had also seen them together during the day, before that time.

Another witness for the government saw Hardesty at the depot about 4 o'clock,—about the time the International & Great Northern train usually comes in,—but did not see defendant with him. The killing occurred presumably a few minutes after defendant and deceased left the depot and went on the reservation grounds. If they remained together at the depot, drinking, from 4 o'clock until they went through the government fence by the depot, it seems that some persons about the depot would have seen them together.

The defendant's counsel urges another reason for a new trial. He says the court was in error in charging the jury as follows:

"That it was in their province to consider the whole of this confession, and believe such parts thereof as they might think true, and disbelieve such parts as they might believe untrue, or inconsistent with the other facts in evidence before them."

Counsel contends this was error on the part of the court, because there was no evidence, direct or circumstantial, before the jury, upon the trial of this cause, that inculpated the defendant as the guilty man, other than the evidence found in his said confession, introduced by the prosecution, and that, therefore, such instructions, unsupported by any evidence, were illegal. The charge given by the court was, substantially, as stated in the counsel's objection. In giving the charge, substantially stated, however, the court added that they (the jury) must take the confession as an entirety, and they could believe such parts thereof as they might think true, and disbelieve other parts; but, if they disbelieved any part of the confession, their disbelief thereon should be grounded on their opinion that the testimony showing the facts and circumstances of the whole case satisfied them that the discredited part is not true. The court conveyed to the jury the thought that they might believe some part of the confession and disbelieve other parts, and that, if they disbelieved some part of it, such disbelief as to that part should come into their minds because of some evidence, circumstantial or direct, which in itself led them to believe the discredited part of the confession was not true. I think that the counsel's objection to the charge on that matter was not so much as to what the court said as it was that there was no evidence, either circumstantial or direct, before the jury, which contradicted or put in question the truth of any statement made upon material issues in the defendant's confession. Taking this view of the merits of the objection, I think his objection is well founded, because, in my recollection of the evidence, there was no evidence, direct or circumstantial, introduced by either side, that contradicted or conflicted with the statements made by the defendant as to any material facts relating to the essential matters directly in judgment. The jury had no evidence before them as to the killing, or as to the animus or purpose of the defendant in killing Hardesty, except such evidence as is contained in the language, or is fairly deducible therefrom, of the defendant's confession, which contradicted the truthfulness of the statements made by the defendant on the material issues. It appears, without contradiction, that the defendant and the deceased, before they left the International & Great Northern Depot to go through the government fence to the reservation, had some ugly talk or quarrel,

and that they both went willingly together to the reservation, out of sight of everybody, either in the daytime or at nighttime, for the purpose of finishing their quarrel. It appears, too, that the deceased was the only one of the two persons who had a weapon of any kind or arms in his possession. The knife with which deceased was killed belonged to Hardesty, and presumably was on his person when they went to the reservation. Among other things, in charging the jury, I stated that the confession of defendant, if true, and taken as a whole, showed that he was guilty of manslaughter; that is, if they took his confession as true, he was guilty of manslaughter. But if they found in the evidence either direct or circumstantial proof of facts which forbid them to believe the exculpatory statements made by defendant, and they further believed from such established facts or circumstances—so contradicting the exculpatory statements—that when the defendant and the deceased left the International & Great Northern Depot he intended to take his (Hardesty's) life, defendant may be guilty of the crime of murder; that is, if they discredited, or could not, under all the evidence, believe, the parts of the confession which were exculpatory of defendant, it became their duty then, as far as was practicable, to ascertain and determine for themselves at what moment, or at what time, the actuating intention to kill Hardesty came or entered into the mind of defendant; that no conclusion by them as to whether defendant was guilty of manslaughter or of the crime of murder could be reached satisfactorily to the ends of justice until they were, in their deliberation on the circumstances and facts of the whole case, able to fix the time, and say beyond a reasonable doubt what time the actuating intention or purpose to kill Hardesty put in motion the acts of defendant, which resulted in Hardesty's death. Along this line the court stated to the jury: "If you conclude, beyond a reasonable doubt, from all the evidence illustrative of the purpose of defendant in killing Hardesty, that the actuating purpose or intent to kill him was in defendant's mind at the time he started with the deceased, or that deliberate purpose to kill came into his mind before the assault began which ended in Hardesty's death, the defendant would be guilty of murder;" that is, "If, in your conscientious effort to fix the time in question, you should find, as a resultant of all the evidence, proof, free from reasonable doubt, which forbids you to believe defendant's exculpatory statement in relation to the quarrel which he said he had with the deceased at the railway depot, and as to what occurred after they had gone on the reservation grounds, then you may be authorized to find that defendant killed Hardesty with malice expressed or implied. If, on considering the whole case, you find any facts or circumstances shown in the evidence before you to disprove the exculpatory statement made by defendant as to the quarrel he said he had with the deceased at the depot, then the state of case would or may show manslaughter, and not murder." The court, in commenting on the evidence illustrating the important issues, drew the attention of the jury to the circumstance that the defendant was without arms, and the only weapon about which we know anything was the dirk knife with which deceased was killed, and which was, presumably, on the person of deceased when they went towards

the reservation. I stated then to the jury, as I think now, "that the circumstance or fact that the white man was armed and the negro defendant was not would be valuable to the jury in illustrating the animus of either party, or to show the purpose for which, at the time, they presumably willingly left the depot to finish their quarrel." It seemed to me then, as it does now, a strong circumstance to show that the purpose on the part of the defendant to kill the deceased may have entered into his mind after they got upon the grounds of the reservation. And further, I thought then, as I think now, it was a circumstance in itself, in the absence of any direct proof as to the acts of either party immediately before or after the assault began, to show that the motive to kill came into the mind of the defendant in hot blood that may have been engendered in or from some acts occurring after they had begun their movements to the reservation grounds. Or, at any rate, the circumstance just mentioned, I think, should have suggested a reasonable doubt upon the question of whether or not all the facts or circumstances disclosed in the evidence showed a case of manslaughter or of murder. If, in such a state of case, a reasonable doubt should have come into the mind of the jury, then the verdict against the defendant should have been for manslaughter, rather than for murder.

A further objection urged by counsel for defendant is that the court was in error in instructing the jury as follows:

"The law, in its humane provisions, gives you the right, in the event you find the defendant guilty, to say in your verdict, 'Guilty without capital punishment.' Then the sentence under the law would be that the defendant be confined to the penitentiary for life. Such merciful provision in your verdict, to say the least of it, would be indicative of some palliative fact or circumstance or doubt which you might entertain in relation to the degree of guilt of the defendant in committing the homicide."

The defendant's counsel urges, in discussing the court's alleged error, that the defendant was entitled to an instruction to the jury to the effect that they were authorized and fully empowered, in the event they found the defendant guilty, to say in their verdict, "without capital punishment," regardless of the existence or nonexistence of any palliative facts, circumstances, or doubts in the case. It may have been that the language used by the court in its charge, though it was not just such language as stated in the objection of counsel, was misleading, and damaging to the interest of defendant, because it did not fully state that the jury might find a verdict "without capital punishment," even though there were no mitigating or palliative circumstances shown in his favor by the evidence. It seems that the right to qualify a verdict of guilty by adding the words "without capital punishment" is conferred by the law—by the act of January 15, 1897—upon the jury in all cases of murder:

"That the act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right, but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court or the jury is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment."

Under the view announced by the supreme court in the case of *Winston v. U. S.*, 172 U. S. 313, 19 Sup. Ct. 212, 43 L. Ed. 460, the language of which I have just quoted, it seems that the objection urged by defendant's counsel is well founded, because the language used in the charge by the court may have had the effect of limiting the power vested in the jury in the trial of such cases. New trial granted.

Ex parte GLENN.

(Circuit Court, D. West Virginia. September 22, 1900.)

FEDERAL COURTS—HABEAS CORPUS—STATE PRISON.

Where a person has been regularly indicted for the violation of the criminal statutes of a state, and is in the custody of the state authorities, he will not be discharged before trial by a federal court, on habeas corpus, on the ground that he was forcibly and illegally brought within the jurisdiction, but he will be required to submit his rights under the federal laws for adjudication, in the first instance, to the courts of the state.

On Petition for Writ of Habeas Corpus.

C. T. Caldwell, J. G. McCluer, and J. D. Wolverton, for petitioner.
J. F. Laird and C. M. Showalter, for the State of West Virginia.

JACKSON, District Judge. Ellis Glenn, the petitioner in this case, has applied to this court for a writ of habeas corpus to discharge her from the custody of the authorities of the state. The petitioner alleges that she never has been a citizen of the state of West Virginia, and never was in the state previous to the time that she was forcibly seized and removed from the state of Illinois to this state without due process of law. She is indicted in this state for a violation of one of its penal statutes, and it appears from the evidence in this cause that the governor of this state issued a requisition upon the governor of Illinois, under the act of congress, asking for her surrender to the authorities of this state to answer an indictment against her pending in the criminal court of Wood county, and that the governor of Illinois issued his warrant for her delivery and extradition to the agent of this state. The warrant was directed to a legally authorized officer of the state of Illinois, but was never received or executed by such officer, but was delivered to the agent of the state of West Virginia, who, by physical force, seized the petitioner in the nighttime, and removed her from the state of Illinois to the state of West Virginia pending an application of a petition for a writ of habeas corpus in the state of Illinois to inquire into the cause of her detention. This action of the agent of this state was little, if anything, less than kidnapping. He had no right whatever by force to remove the petitioner. His duty was to have delivered that warrant to an officer of the state of Illinois, whose duty it was to execute the warrant, and deliver the prisoner to him. It appears from the evidence that, to prevent the petitioner from having a hearing of her petition before a judge of one of the courts of Illinois, the agent of the state, on or about midnight, took her from the jail of the county in which she was confined, with the

connivance of the jailer, and by force transferred her to a railway station, and put her upon a train, and brought her to this state. Such action upon the part of the agent of the state of West Virginia was an outrage upon the rights and liberty of this citizen, and should not be countenanced by the courts of the country.

But for the fact that there is now pending in a court of this state, of competent jurisdiction, an indictment against the petitioner for a violation of one of the penal statutes of the state, I would be inclined, under the circumstances in this case, to discharge the petitioner. I have heretofore considered this question in the case of *Eaton v. West Virginia*, which was affirmed and reported in 34 C. C. A. 68, 91 Fed. 760, in which case I held that, where the party was properly and regularly indicted and tried and convicted, a federal court would not interfere unless it appeared that there was some right of the citizen violated that was protected by the federal constitution. We must in this case suppose that the court before whom this party is to be tried will justly administer the law, and see that all the rights of this petitioner are protected. If upon the trial of the case any rights of the petitioner protected by the federal law are violated, then an application for a writ of habeas corpus will be proper, and her rights as fully protected after the trial as before. The supreme court of the United States in several cases, and particularly in the case of *Kerr v. Illinois*, to be found in 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421, held that it is the province of the state courts to decide, upon a case of this character, how far a forcible transfer of a defendant, to bring the party within the jurisdiction of the state court where the offense was committed, may be pleaded in the state court, and it is the province of the state court to decide whether or not the party has been surrendered to the authorities of the state for trial according to the provisions of section 5278 of the Revised Statutes of the United States. From the view that I take of the facts in this case, I feel constrained, under the decisions of the supreme court of the United States, to refuse to discharge the prisoner as prayed for in her petition, and as a consequence must remand her to the custody of the state authorities. It is therefore ordered that the marshal of this district deliver her on the first day of the approaching term of the criminal court of Wood county to the custody of the sheriff of the county, to be taken before that court, and then and there to be dealt with as the judge of that court thinks right and proper in her case.

KURSHEEDT MFG. CO. v. NADAY et al.

SAME v. ADLER et al.

(Circuit Court, S. D. New York. August, 1900.)

1. PATENTS—INVENTION—COMBINING OLD DEVICES.

The incorporation of a device known in the prior art, but used by hand, into a machine also known in the prior art, where it performs the same function as before, without any change in the mode of operation, does not involve invention, but merely mechanical skill.

2. SAME—CONSTRUCTION OF CLAIMS.

The fact that neither the claim nor the specification of a patent mentions a function which is later claimed by the patentee to constitute an important feature of his invention is significant, and makes against the construction contended for.

3. SAME—INFRINGEMENT—PLAITING MACHINE.

The Panse patent, No. 595,728, for a plaiting machine, in which the only features claimed to be novel are the peculiar shape of the knife or blade, and the manner of permanentizing the shape given to the fabric, if sustainable at all, is entitled to only a very narrow construction, and relates only to what are known as "side-plaiting machines," in which there is a vibratory motion of the knife and a step-by-step movement of the rolls, and is not infringed by a machine which has neither of such movements.

In Equity. Suit for infringement of a patent. On final hearing.

Briesen & Knauth, for complainant.

Benno Loewy and Hector T. Fenton, for defendants.

TOWNSEND, District Judge. Hearing on usual bill and answer raising questions of patentability and infringement of the first claim of complainant's patent, No. 595,728, granted December 21, 1897, to it as assignee of F. W. Panse, for a plaiting machine. Said claim is as follows:

"In a machine for forming wavy-edged plaiting, the combination of a blade for forming the plaits, the plait-forming edge thereof being of a continuously-undulating outline, and the waves in the edge being of such depth as to impart a wavy edge to the plaits, and means for permanentizing the plaits imparted to the fabric by the said edge."

This claim was originally rejected in the patent office, on the Storm patent. It was finally allowed only upon the insertion of the following language insisted on by the examiner, namely:

"The plait-forming edge thereof being of a continuously-undulating outline."

The issue should be decided in favor of the defendants, for the following reasons:

1. The complainant's expert is forced to admit that the machine only differs from the well-known machines of the prior art in "the peculiar shape given to the knife or blade." This peculiar shape, described in the patent as being of a "continuously-undulating outline, and the waves in the edge being of such depth as to impart a wavy edge," etc., only differs from the ordinary machine-plaiting blades of the prior art in having its edges alternately convex and concave. The blade is given this shape merely in order to produce a specific form of wavy plait, instead of other prior forms of plaits. It involves nothing more than a change of the surface in order to cause a corresponding change in the shape of the fabric which is plaited.

2. Such a blade, having a similar wavy surface, was known in the art of hand-plaiting machines. Whether it was used in an operative machine or not is immaterial, because it sufficiently disclosed the element claimed to constitute invention herein. The most that can be claimed by complainant is that the patentee put the blade of the hand-plaiting machine of the prior art into the well-known side-plaiting machine of the prior art, without any change in the mode of operation. In that event the case of *Stimpson v. Woodman*, 10

Wall. 117, 19 L. Ed. 866, is exactly in point. The patent in suit was for a machine for pebbling leather. There "the only difference between the prior machines and the plaintiff's is that the metallic roller in the former had a smooth, and in the latter a figured, surface. * * * This figured revolving roller was old, and the use of it in pebbling leather was also old and well known. The same pebbled grain * * * had already been produced on leather by subjecting it to pressure while rolling over the table on which the leather was placed. But this pressure was produced by means of hand devices." The court held that the change involved simply mechanical skill. This case has been repeatedly cited and followed by the supreme court of the United States.

3. The sole substantial claim of patentable novelty asserted by complainant is that this form of blade distorted the fabric, and thus, in connection with the heated roll, permanentized such changed shape of the fabric. The permanentizing feature, however, was old in all the plaiting machines of the prior art. The claim of a new function by which the fabric was distorted is nowhere even hinted at in the patent, and appears to be due to the inventive genius of the expert and counsel for complainant, rather than to that of the patentee. "If this feature be an advantage, as now claimed, it is strange that no allusion is made to it in the specifications." *Fastener Co. v. Kraetzer*, 150 U. S. 111, 116, 14 Sup. Ct. 48, 49, 37 L. Ed. 1019, 1021. As Judge Colt, delivering the opinion of the court of appeals, says in *MacColl v. Loom Works*, 37 C. C. A. 346, 95 Fed. 982:

"In the construction of a patent, the omission of the patentee to point out or refer in his specification or claims to the special feature which he subsequently maintains is the most important part of his invention is very significant, and should be carefully scrutinized."

Other cases to the same effect are cited in said opinion.

4. The alleged invention relates to what are known as "side-plaiting machines," in which there is a vibratory motion of the knife and a step-by-step motion of the rolls; said motions being characteristic of side-plaiting machines. The defendants do not use side-plaiting machines. They use chain-fluting machines, which have no vibratory or step-by-step movement at all. The expert for complainant is forced to admit that there is a radical difference in construction and operation between side-plaiting and chain-fluting machines. It is clear from the patent that the patentee had in mind the application of this particular shape of knife blade to a machine having a vibratory and step-by-step motion. The language of the specification and claim distinctly shows that there must be two such distinct motions of the two distinct parts of the machine, which must have certain definite motions in order to form a plait. The patentee says:

"The operation of the machine shown is as follows: When the shaft, a, is rotated, the rollers receive a step-by-step motion through the medium of the lever, m, and its connected parts, and the blade, s², is given a vibrating movement by the vibrating link, s³, and its connected mechanism."

In each of these two cases the defendants use one machine only. If the patent can be sustained upon the limited construction permissible in these circumstances, the defendants do not infringe.

In view of the conclusion reached upon the foregoing consideration, it is unnecessary to discuss the further arguments of defendants based on the fact that one of the defendants saw in Paris a machine like the one he now uses, and ordered the machine now alleged to infringe nearly a year before the date of the patent in suit, and on the contention that the patent is so indefinite that an essential part of the claims is left to be determined by experiment, and that defendants used, not plaiting machines, but fluting machines. Let the bill be dismissed.

WESTINGHOUSE ELECTRIC & MFG. CO. v. NEW ENGLAND GRANITE CO. et al.

(Circuit Court, D. Connecticut. August 29, 1900.)

No. 919.

1. PATENTS—INVENTION AND INFRINGEMENT—ELECTRO-MAGNETIC MOTORS.

The related Tesla patents, No. 381,968, for an electro-magnetic motor, No. 382,280, for the electrical transmission of power by the method described in No. 381,968, and No. 382,279, for a specific construction of motor embodying the invention of the other two, which is, broadly, a system of electrical distribution and transmission by means of alternating currents, were not anticipated, but mark a distinct advance in the art, in which the utilization of the alternating current for the transmission of power was not only previously unknown, but believed to be impossible by eminent electricians. Said patents also construed, and *held* infringed.

2. SAME—INVENTION.

The production of a new, or nonanalogous, or unexpected result by the substitution of one element for another, although they were theoretically known equivalents, may involve invention.

In Equity. Suit for infringement of patents.

Frederic H. Betts and Kerr, Page & Cooper (Leonard E. Curtis, on the brief), for complainant.

Mitchell, Bartlett & Brownell, for defendants.

TOWNSEND, District Judge. Final hearing on bill and answer raising questions of patentability and infringement of complainant's three patents granted to Nikola Tesla May 1, 1888, namely, Nos. 381,968, 382,280, and 382,279. No. 381,968 is for an electro-magnetic motor. No. 382,280 is for the electrical transmission of power by the method of operation described in No. 381,968. Patent No. 382,279 is for a specific construction of motor embodying the invention of the other two patents. It is not claimed that the defendant Batterson has infringed, and as to him the bill may be dismissed. The patents in suit relate to the art of electrical transmission of power by the use of mechanically generated alternating electric currents. It is, of course, understood that the real nature of electricity is still unknown, and that the nomenclature used herein, such as "currents," "flowing," etc., are merely convenient technical terms to indicate certain known results. The electric current induced by a mechanical generator—a dynamo—is necessarily alternating in character; that is, alternating in direction, so that the current, acting on an armature,

first tends to actuate it in one direction and then reverses said effect, and neutralizes such actuation. Such a current flows uninterruptedly and regularly, but rises in intensity from zero to maximum, and falls from maximum to zero, and then repeats said variations in the opposite direction. Its curve of increase or decrease of strength is indicated by a wave line or sine curve. Every mechanically generated current is naturally and originally an alternating current. Formerly it was not considered practicable to use mechanically generated currents until their alternations were straightened out by means of commutators, which reversed the direction of the current so as to make it flow continuously through the conductors. A current which is periodically reversed by a commutator which thus breaks the current between the changes in direction and takes off the current in sections, is known as a "reversed" or "alternated" current. This distinction between an alternating and an alternated current should be carefully noted. An alternating current continues to act in opposite directions as originally generated. An alternated current has been so reversed that the whole flows in one direction, and is then known as a "continuous" current. When so reversed by commutators as to become continuous, the current loses certain characteristics essential to its highest efficiency. Prior to the Tesla inventions, only reversed or alternated electric currents were used for the transmission of power. The application of this system for the transmission of power was limited, for various reasons; among others, because a large current could not be safely used at sufficiently high pressure for long distances. On the other hand, the pure alternating current was practically unlimited in volume and pressure, and a change of pressure could be economically effected by the use of a transformer. Prior to Tesla's inventions, however, these rapid alternations of the alternating current prevented the motor from starting its revolution, and interfered with its continuing in operation, except when in synchronism with the generator. It was, therefore, impracticable for varying loads.

The problem which was presented to Nikola Tesla, and which he successfully solved, was, how to overcome the difficulties attendant upon the use of the alternating currents so that their inherent vitality and untrammelled energy might be utilized for the unlimited transmission of power. In an electric motor the tendency of the armature is always towards the pole or point of maximum magnetic intensity. If a loosely-pivoted or freely-moving magnetic bar or armature be suspended midway between two coils of insulated wire wound in opposite directions on a soft iron bar, and one of the coils is electrically energized, north and south poles will be formed at the ends of the soft iron bar, their location depending upon which coil is energized; but, if both coils be equally energized, the two poles will neutralize each other, and cause a resultant north pole midway between the coils. If, now, the current in one coil be made weaker than in the other, said pole will move towards the coil of greater electrical energy. The magnetic bar or armature will follow the shifting position of the pole, and by thus gradually varying the energy in the coils the armature may be alternately caused to move from the pole of one coil along towards the pole of the other coil. The alternating current generated

by an electrical machine, as before stated, constantly varies from maximum intensity to zero in one direction, and then from zero to maximum intensity in the opposite direction. In the invention of the patents in suit Tesla availed himself of this characteristic feature of alternating currents in the following way: In constructing a motor he arranged on an annular soft iron core two pairs of magnetizing coils, each pair at right angles to the other,—that is, one coil of one pair at the top, and one at the bottom,—and one coil of the other pair at each opposite side of said core, and mounted an armature in the center. Then, connecting them with an alternating current generator, he caused a current from one pole of said generator to pass through one pair of coils and a current from the other to pass through the other pair. If the cycles of alternating currents be regarded as divided into 360 degrees, then, as shown in the Tesla illustrations, they will have a relative displacement of 90 degrees. In such position the lines of magnetic force traversing the two coils will be at maximum in one while at minimum in the other. This relative displacement marks the differing phase or time relation of the two currents. The effect of passing two equal currents through said coils would be to cause the pole of maximum intensity to pass midway between the poles of the respective pairs of coils. But the effect of the ordinary operation of the generator, as before explained, was to cause the current in each pair of coils to vary from zero to maximum and to zero, and then to shift in the opposite direction; the intensity of the current flowing to one pair of coils being at maximum, while that of the other was at zero, and one increasing while the other decreased, and the result being to shift said poles so as to make them travel entirely around said core.

Fifteen days after the issue of the patents in suit Tesla read before the American Institute of Electrical Engineers a paper entitled "A New System of Alternate Current Motors and Transformers," in which, *inter alia*, he said:

"The transmission of power has been almost entirely confined to the use of continuous currents, and notwithstanding that many efforts have been made to utilize alternate currents for this purpose, they have, up to the present, at least as far as known, failed to give the result desired. * * * The subject which I now have the pleasure of bringing to your notice is a novel system of electric distribution, and transmission of power by means of alternate currents, affording peculiar advantages, particularly in the way of motors, which I am confident will at once establish the superior adaptability of these currents to the transmission of power, and will show that many results heretofore unattainable can be reached by their use; results which are very much desired in the practical operation of such systems, and which cannot be accomplished by means of such continuous currents. Before going into a detailed description of this system, I think it necessary to make a few remarks with reference to certain conditions existing in continuous current generators and motors, which, although generally known, are frequently disregarded. In our dynamo machines, it is well known, we generate alternate currents, which we direct by means of a commutator, a complicated device, and, it may be justly said, the source of most of the troubles experienced in the operation of the machines. Now, the currents so directed cannot be utilized in the motor, but they must—again by means of a similar unreliable device—be reconverted into their original state of alternate currents. The function of the commutator is entirely external, and in no way does it affect the internal working of the machines. In reality, therefore, all machines are alternate current machines, the currents appearing as continuous only in the external circuit during their transit from generator to motor. In view simply of this fact,

alternate currents would commend themselves as a more direct application of electrical energy, and the employment of continuous currents would only be justified if we had dynamos which would primarily generate, and motors which would be directly actuated by such currents. But the operation of the commutator on a motor is twofold: Firstly, it reverses the currents through the motor; and, secondly, it effects automatically a progressive shifting of the poles of one of its magnetic constituents. Assuming, therefore, that both of the useless operations in the system—that is to say, the directing of the alternate currents on the generator and reversing the direct currents on the motor—be eliminated, it would still be necessary, in order to cause a rotation of the motor, to produce a progressive shifting of the poles of one of its elements, and the question presented itself how to perform this operation by the direct action of alternate currents. I will now proceed to show how this result was accomplished.

In the first experiment a drum-armature was provided with two coils at right angles to each other, and the ends of these coils were connected to two pairs of insulated contact-rings, as usual. A ring was then made of thin insulated plates of sheet iron, and wound with four coils, each two opposite coils being connected together, so as to produce free poles on diametrically opposite sides of the ring. The remaining free ends of the coils were then connected to the contact-rings of the generator armature, so as to form two independent

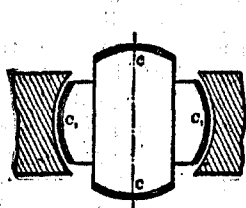


Fig. 1.

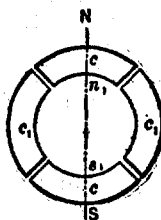


Fig. 1a.

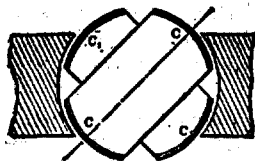


Fig. 2.

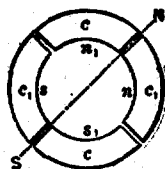


Fig. 2a.

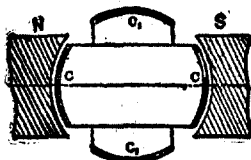


Fig. 3.

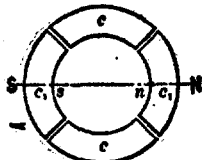


Fig. 3a.

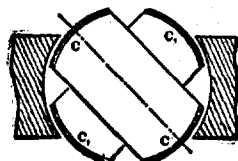


Fig. 4.

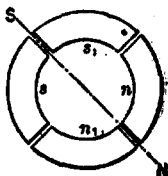


Fig. 4a.

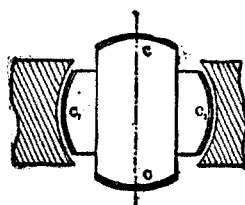


Fig. 5.

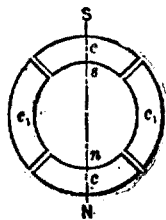


Fig. 5 a.

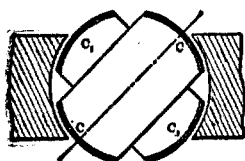


Fig. 6.

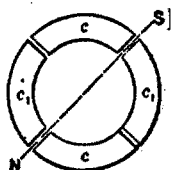


Fig. 6 a.

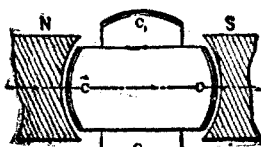


Fig. 7.

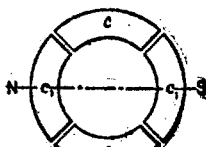


Fig. 7 a.

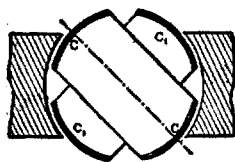


Fig. 8.

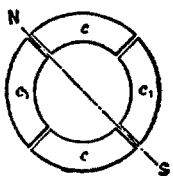


Fig. 8 a.

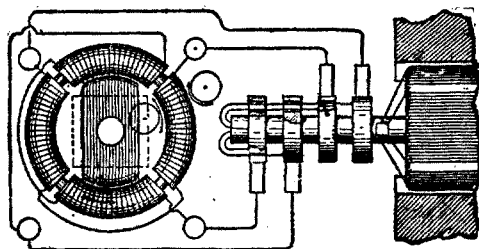


Fig. 9.

circuits, as indicated in Figure 9. It may now be seen what results were secured in this combination, and with this view I would refer to the diagrams Figures 1 to 8a. The field of the generator being independently excited, the rotation of the armature sets up currents in the coils C, C₁ varying in strength and direction in the well-known manner. In the position shown in Figure 1 the current in coil C is nil, while coil C₁ is traversed by its maximum current,

and the connections may be such that the ring is magnetized by the coils C_1 , C_1 , as indicated by the letters N, S, in Figure 1a, the magnetizing effect of the coils, c, c, being nil, since these coils are included in the circuit of coil C.

"In Figure 2, the armature coils are shown in a more advanced position, one-eighth of one revolution being completed. Figure 2a illustrates the corresponding magnetic condition of the ring. At this moment the coil C_1 generates a current of the same direction as previously, but weaker, producing the poles n^1 , s^1 , upon the ring. The coil C also generates a current of the same direction, and the connections may be such that the coils c, c, produce the poles n, s, as shown in Figure 2a. The resulting polarity is indicated by the letters N, S, and it will be observed that the poles of the ring have been shifted one-eighth of the periphery of the same. * * * A reference to the diagrams will make it clear that during one revolution of the armature the poles of the ring are shifted once around its periphery, and each revolution producing like effects, a rapid whirling of the poles in harmony with the rotation of the armature is the result. If the connections of either one of the circuits in the ring are reversed, the shifting of the poles is made to progress in the opposite direction; but the operation is identically the same. Instead of using four wires with like result, three wires may be used, one forming a common return for both circuits. * * * In applying this principle to the construction of motors, two typical forms of motor have been developed: First, a form having a comparatively small rotary effort at the start, but maintaining a perfectly uniform speed at all loads, which motor has been termed 'synchronous'; second, a form possessing a great effort at the start, the speed being dependent on the load."

The claims in issue in patent No. 381,968 are as follows:

"(1) The combination, with a motor containing separate or independent circuits on the armature or field-magnet, or both, of an alternating current generator containing induced circuits connected independently to corresponding circuits in the motor, whereby a rotation of the generator produces a progressive shifting of the poles of the motor, as herein described."

"(3) The combination, with a motor having an annular or ring-shaped field magnet and a cylindrical or equivalent armature, and independent coils on the field magnet or armature, or both, of an alternating current generator having correspondingly independent coils, and circuits including the generator-coils and corresponding motor-coils in such manner that the rotation of the generator causes a progressive shifting of the poles of the motor in the manner set forth."

That of patent No. 382,280 is as follows:

"(1) The method herein described of electrically transmitting power, which consists in producing a continuously-progressive shifting of the polarities of either or both elements (the armature or field magnets or magnets) of a motor by developing alternating currents in independent circuits, including the magnetizing coils of either or both elements, as herein set forth."

The claims in issue of patent No. 382,279 are as follows:

"(1) The combination, with a motor containing independent inducing or energizing circuits and closed induced circuits, of an alternating current generator having induced or generating circuits corresponding to and connected with the energizing circuits of the motor, as set forth.

"(2) An electro-magnetic motor having its field magnets wound with independent coils and its armature with independent closed coils, in combination with a source of alternating currents connected to the field coils, and capable of progressively shifting the poles of the field magnet, as set forth.

"(3) A motor constructed with an annular field-magnet wound with independent coils and a cylindrical or disk armature wound with closed coils, in combination with a source of alternating currents connected with the field-magnet coils and acting to progressively shift or rotate the poles of the field, as herein set forth."

Complainant's theory of the Tesla invention is shown by the following citation from the brief:

"It will be observed that to produce a shifting of the magnetic pole in one case, and a consequent movement of an armature corresponding thereto, each coil A and B must be traversed by a current of variable strength, and, in order to secure uniformity of the movement of the pole or resultant, it follows that the variations in strength of current in the two coils must be gradual, and preserve definite relations to each other throughout the cycle of variation in strength which the two currents undergo. This principle lies at the foundation of Tesla's brilliant discovery, the gist of which was the utilization of the alternating currents generated by an alternating current dynamo or generator for effecting such shifting of the magnetic poles or resultant attractive forces upon the armature of a motor, and thus causing such armature to rotate in response thereto. His broad invention was the production in a motor of a progressively shifting magnetic field (or pole) by means of two or more independent alternating currents, differing in phase, and circuits which preserve the independent character and phase relation of such currents."

Defendants' position is shown by the following extract from their briefs:

"Referring further to the apparatus of Tesla, Waterman says: 'Briefly, then, the apparatus consists of a ring field magnet having one set of coils tending to magnetize it on one diameter and another tending to magnetize it on a diameter at right angles to the first, and these sets of coils or circuits are so connected to a proper generator as to be traversed by currents such as would be generated by two coils at right angles to one another rotating in a two-pole field.' It will be seen from this that complainants claim a broad discovery and a broad invention based thereon. Defendants, on the other hand, contend that the alleged discovery was old, that its application was old, and that since the days of Arago there was never any room for a broad invention in the 'obvious' application of the alleged 'discovery'; and that the present state of the art has been developed from the earlier art including Arago's rotation by the mere application of engineering skill possessed by skilled electricians who have applied their knowledge as the progressive demands of the times called for it, supplemented by inventions special to the motor, or the generator, or the connecting circuits severally, and in no way entitling Tesla or any other patentee to prevent the sale of generators and motors through the ownership of an all-controlling patented 'system.'"

The well-known Arago rotation is described as follows:

"Arago's method of producing rotation in a copper disk consists of suspending it by its center so as to make it lie horizontally above the poles of a horseshoe magnet, and then rotating the magnet about a vertical axis. The rotation of the disk is due to that of the magnetic field in which it is suspended; and we should expect that, if a similar motion of the field could be produced by any other means, the result would be a similar motion of the disk."

The chief contention of defendants is that there is no substantial difference in character between alternating and reversed currents, and that the art of electric lighting illustrated in the alleged anticipations showed such an analogous use of reversed currents that the substitution of alternating for reversed currents did not involve invention. Defendants further contend that the principle of reversibility was well known in the art, and, as the inventors of electric lighting apparatus state that by a reversal of their action power may be produced, Tesla is deprived of all claim to the exercise of the inventive faculty; that is, that the same apparatus may be used as a generator or dynamo-electric machine, or may be reversed, and used as a motor or electro-dynamic machine. (This word "reversibility" has no relation, in this connection, to the word "reversed" as applied to currents.) In support of their contentions defendants chiefly rely upon four prior publications, namely, the Baily article of 1879,

the Siemens patents of 1878, Deprez' article of 1880-84, and the Bradley application of May 9, 1887. The subject of Baily's paper was "A Mode of Producing Arago's Rotation." He says:

"Possibly the rotation of the magnet may be the only practicable way of producing a uniform rotation of the field, but it will be shown in this paper that the disk can be made to rotate by an intermittent rotation of the field, effected by means of electro-magnets."

The text and drawings describe and show four pairs of magnets arranged in a circle. By successively energizing one diagonally opposite pair after another by means of a commutator making and breaking the current the disk was caused to travel about in said circle. As to this device defendants' expert says:

"The field magnets, with their energizing circuits and copper disk, constructed and operated as Baily shows and describes, constituted a two-phase alternating current motor, the copper disk or armature of which was operated by a rotating magnetic field. The lines of force of the rotating magnetic field cut through the copper disk, and set up therein electromotive forces, which cause currents to flow in close induced circuits formed by the continuous metallic mass of the disk."

Baily merely showed how to apply a series of successive impulses to the disk by an intermittent rotation of the field, and thus produce Arago's rotating field with stationary magnets instead of a moving magnet; and he showed how the motion of the disk could be reversed. That he conceived the idea of a uniform rotation by a manifestly impossible and impracticable construction appears from this statement:

"In one extreme case—viz. when the number of electro-magnets is infinite—we have the case of a uniform rotation of the magnetic field, such as we obtain by rotating permanent magnets."

But Baily did not claim to have established a continuous rotating field, or to know any way in which a uniform rotation could be produced. He did not use alternating currents, but reversed currents. He was not dealing with the subject of the transmission of power. Defendants' expert admits that his paper merely describes a laboratory experiment. As complainants say in their brief:

"The action of the Baily intermittent field in propelling the disk may be compared to propelling a boat with oars hung on pins so as to be incapable of feathering, and which are held rigidly in the water for a considerable time after each stroke before they are advanced for the next. It is evident that this method of propulsion would involve a large waste of power, since the oars would act alternately to propel and to stop the boat, and the method would be practically useless. Using the same analogy, the action of Tesla's continuously rotating field would be like that of the ordinary screw propeller, in which all the power is applied in a continuous push forward."

The Siemens British patent No. 3,134 of 1878, for improvements in apparatus for the dynamical production and application of electricity, and for its regulation when applied for illumination, "relates to apparatus applicable as dynamo-electric apparatus for the conversion of mechanical power into electricity, or as electro-dynamic apparatus for the application of electricity to produce motive power," but describes apparatus "as of the dynamo-electric kind, whereby mechanical power applied to drive it is converted into electricity." But the patentee states that "with suitable modifications these apparatus are generally applicable also as electro-dynamic machines,

their rotary parts being caused to revolve and give out mechanical power when electricity is applied to them." The patentee also says:

"The machines described with reference to the figures in sheets II., III., and IV. of the accompanying drawings may obviously be arranged in an inverted manner; that is to say, the electro-magnets might be made to revolve round a stationary coiled armature. Also the machines described, as well as that shown in sheet I., instead of being driven by mechanical power so as to generate electricity, may be made to give out mechanical power by exciting their coils by electricity from an external source."

Counsel for defendants describe this apparatus as follows:

"This Siemens apparatus consists of a stationary field magnet having inner and outer polar projections, C, C¹, energized by a continuous current supplied through an outside source, or through the commutators, G. Within the circle between these polar projections lies the cylindrical portion of a dish-shaped armature, J, carrying two sets of coils. These coils are offset, as shown in Fig. 4, so that the current of one set is displaced by 90 degrees from the current of the other set. The two terminals of one set of coils are connected respectively to two of the collector rings, H, H, while the two terminals of the other coils are respectively connected to the other two rings."

And as to said apparatus complainant's expert makes the following admission:

"It is, of course, quite easy now to see that some of the machines that were known in the art prior to Tesla's invention—such, for example, as the Siemens and Gramme multiple-circuit machines—could, by properly taking off their currents, have been used as polyphase machines, and also that, if any one had coupled two of these properly arranged machines in a certain way, and used them in a certain way, the system so produced would have involved the use of the invention afterwards made by Tesla."

Claim 4 of said patent is as follows:

"The construction of a dynamo-electric or electro-dynamic machine, wherein for the disk referred to in the preceding claim there is substituted a cylindrical shell carrying coils, and revolving between the poles of interior and exterior radiating electro-magnets, substantially as herein described with reference to the figures in sheet IV. of the accompanying drawings."

Counsel for defendants therefore claim:

"That any generator, be it straight current or alternating current, single-phase, two-phase, or what not, may be reversed, and used as a motor. Supply it with currents such as it generates, and it will operate as a motor, * * * [and that] the reversing of such apparatus as Siemens or Bradley is all that there is to the so-called Tesla invention. The art knew it could be done, and how to do it."

They therefore contend that "this [Siemens] patent is a full disclosure of the subject-matter in issue in" the first and second patents in suit.

This patent is chiefly for means to convert motive power into electricity. It does not specifically relate to, or describe, or fully show a system of apparatus for the transmission of power. It not only fails to refer to any difference of phase, or to point out how the armature and overlapping coils are to be coupled together to produce such phase, but it repeatedly describes the use of commutators in order to create a continuous or direct current. At this date it was not known that an alternating current machine could be used as a motor. Motors then were operated only by a direct or continuous current, so far as the record shows. The "suitable modifications" to change this machine into a motor are nowhere described. In view of the repeated reference to commutators, the modifications must

be presumed to relate to such continuous current machines; and in view of the then state of the art such suitable modifications would have required such a series of experiments, and such a departure from the existing theories, and such development and application of devices in unexpected and nonanalogous ways as would in themselves have constituted invention. Siemens himself, as late as 1884, and Alteneck, the other inventor of said Siemens patent, in 1881, admitted that they did not know that alternating currents could be used as motors. This evidence was objected to on the ground that the publications containing said statements are not duly proved, but the fact is established by other sufficient evidence. The statements in the German Siemens patent are quite as favorable to complainant as to defendants, and will not be discussed.

May 9, 1887, about six months before the filing of the Tesla application, Charles B. Bradley filed his application for a dynamo-electric machine—that is, a generator—for converting power into electricity as in Siemens. Counsel for defendants say:

"In this application a two-phase machine is shown. The armature consists of a simple Gramme ring having its common winding connected to four collecting rings, c, d, e, f, as shown in Fig. 2. From these rings alternating currents of different phase are transmitted to be used as desired. The two phases of the alternating currents were clearly explained. The potential at one pair of terminals being maximum when the other is zero, so that when the connections are made between the respective terminals two currents will flow, but the 'second' current will differ from the first by exactly half a phase; that is, when the first current is at maximum, the second will be zero, and, conversely, when the first is zero, the second will be maximum. Bradley, after having fully explained his construction, and pointed out the two-phase feature, states: 'It is obvious that my machine may be used as a motor as well as a generator, and that it may, when so used, be fed or actuated either by continuous or alternating currents, or both.'"

The claims in said application cover an alternating current generator. Defendants chiefly rely on the foregoing statement in the original application. And on the third claim of the patent, which is as follows:

"(3) An alternating current dynamo-electric machine, in which the armature winding or conductor is connected to two pairs of contact rings or equivalent contact devices at points of said winding, which differ in phase by one-quarter of a period, one pair being at or about the maximum difference of potential when the other pair is at or about the same potential, substantially as described."

The single specific object of Bradley's construction stated in said specification was to obviate "difficulties and limitations" in prior constructions wherein the machine was idle during a part of the time. He suggests that this may be done by rectifying one of the alternating currents by a commutator, and then combining the two or by connecting each with a separate circuit. He does not show how he would use them in the latter case to operate a motor, nor did he indicate any combination of the alternate currents for a single motor, or show that he had any conception of their use, if at all, otherwise than separately in single-phase motors. A comparison of the Bradley application prior to Tesla with the Bradley patent issued subsequent to Tesla shows that in the former he described a method and illustrated an apparatus designed to obviate the objections to a two-phase alternating current by combining both currents in one

by means of a transformer, while from the latter he omitted this description and method, and inserted figures which, while strikingly suggestive of the apparatus shown by Tesla, failed to show that he conceived the Tesla idea, or sought to secure the object of Tesla's invention. For this reason, and further because Bradley's application is limited in scope, and ambiguous and indefinite; because it fails to show that he had any conception of the Tesla idea of "the utilization of the motor for the purpose of progressively shifting the magnetic poles of a plurality of alternating currents by circuits which preserved the independence and differing time relation of their phases"; because, even if the idea had been first conceived by Bradley, it was not sufficiently described to disclose the principle or method of operation; because Tesla was the first to reduce this principle to practice,—Bradley does not anticipate or limit.

Defendants' chief reliance is on the Marcel Deprez publications of 1880-84, and rightly so, for Deprez not only disclosed the principle which Tesla utilized, but he gave a mathematical demonstration of the rotating field. Complainant's expert's admission on this point is as follows:

"The article demonstrated mathematically the fact, which is also stated in the Tesla patents, that the polar line of an annular magnet may be shifted about through the entire circumference of the ring by the action of two magnetizing forces properly related."

On this point counsel for defendants say:

"The motor is a device which Deprez invented in 1881, and to which he gave the name 'annular comparer.' It is substantially the same as the motor described in the patents in suit, and shown in Figs. 1a to 8a, and Fig. 9. This also is admitted by complainant's expert, Waterman, where he says: 'The structure consists of a ring wound with four coils in a manner similar to the ring of Fig. 9 of patent No. 381,968.' And again: 'It [the Deprez comparateur] takes advantage of the theory of the parallelogram of forces to produce a resultant magnetic field by winding coils upon a ring in a manner similar to the ring field of Fig. 9 of the Tesla patent No. 381,968.'"

The foregoing article was entitled as follows:

"Electricity.—On the Electrical Synchronism of Two Relative Motions, and its Application to the Construction of a New Electrical Compass. Essay by Mr. Marcel Deprez."

Deprez then says:

"Having given two bodies, each animated by a distinct motion of rotation about the same axis, to find the means of reproducing their relative displacement at a distance and at any number whatever of different points at once by obtaining an absolute synchronism, such is the problem that we have set out to solve by the following process: 'Imagine a ring, Pacinotti kind, arranged between the poles of a magnet, as in the ordinary magneto-electric machines, with this difference: that, in place of being stationary, the magnet can revolve about the axis of the ring. Moreover, four brushes are keyed two by two at right angles on the collector, whose circumference they divide into four quarters. Their distance apart remains unchanged, but we can displace the system around the axis of the coil. Finally, the two brushes situated at the extremities of the same diameter are connected to the entrance and exit of a device that I had invented towards the end of 1881, and to which I gave the name of 'annular comparer of currents.' It is a stationary ring of iron, which carries two windings, divided up in such a manner that there is alternation between the sections belonging to each of the two different circuits. It follows therefrom that, taking one of the sections as a point of departure, if

we number successively each of the following ones, all those that are affected by a number of the same parity are connected together, and the whole forms thus two windings which end each at the extremities of two diameters perpendicular to each other. We perceive, then, that if we throw into them two currents simultaneous, but of different strength, there will tend to be formed on the circumference of the ring four poles, whose lines of junction would be perpendicular; but the magnetic actions, which are exerted in their direction, are combined according to a resultant, whose position will depend on the ratio of the currents, and not on their absolute strength. A magnetized needle arranged in the center of the device will set itself according to this polar line, which will thus be plainly marked."

Counsel for defendants further say as follows:

"Deprez then describes the generator, and shows how, when the brushes are stationary, and there is no relative movement between them and the field magnet of the generator two currents are generated, which are transmitted to the motor, and set up a stationary field, on account of which 'the needle of this latter takes then a position that we shall consider as initial.' The initial position having been determined, Deprez says: 'Let us then revolve the magnet, leaving the brushes stationary. To each angle described by the polar line there will correspond a definite value of the ratio of the two magnetic components, and consequently of the two currents sent into the comparer; a ratio that will increase from zero up to 1. This last value will be reached when the line of the poles of the magnet shall be a bisector of the angle of the line of brushes. The two currents which traverse the comparer having become equal, the needle will make an angle of 45 degrees with its initial position. To sum up, the arc described by the needle will be the same as that of the magnet of the ring for each eighth of a revolution.' Now, whenever the field magnet is moved as indicated, the currents generated and transmitted to the motor are alternating currents, having a difference of phase of 90 degrees. If the movement is through only part of a circumference, the alternations are not complete cycles, but the currents are none the less induced alternating currents, and are conveyed to the motor to set up a progressive-shifting magnetic field. If the field magnet makes a complete revolution, the resultant field makes a complete revolution, and so also does the motor armature. The apparatus which constitutes Deprez's complete electrical system is shown below, being taken from an article describing the same, contained in 'Centralblatt für Electrotechnik.'

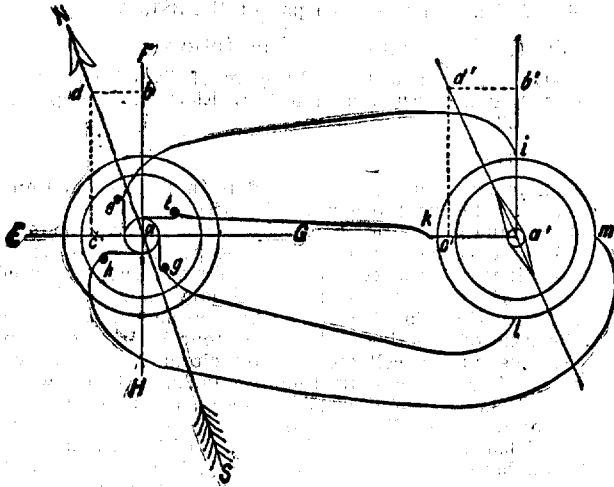


Fig. 231.

"In this article, referring particularly to Fig. 231, shown above, Deprez says: 'One winding has its poles at l, the other at k, m. These poles are

connected with e, g, f, h.' This having been done, and the apparatus put in operation, the article says: 'A current will then flow through g, l, i, e, whose intensity is proportional to the component a, b, and a current will flow through h, m, k, f, whose intensity is proportional to the component a, c. The component of the magnetization in the comparer will be produced accordingly, and the position of the needle will correspond thereto. It will be evident from what has been said that the needle of the comparer will always show the relative movement of the electro-magnet towards the brushes.' "

The only result suggested by Deprez of his solution of his problem is the following:

"I have thought out, as a practical application of this process, a new electric compass. It is sufficient, in order to realize this device, to place vertically the axis of the revolving ring, and to suppress the permanent magnet that served as indicator. Its action is then replaced by that of the earth, which is sufficient to reproduce the phenomena that we have just analyzed. The resultant of the terrestrial magnetic actions at one point can really be decomposed into two components, of which one is its projection on a horizontal plane, and coincides with the magnetic meridian, and the other directed according to the vertical line. This latter, parallel to the axis of the ring, can exercise no inductive effect on the induced wire, while the action of the first component is similar to that of the magnet of the preceding arrangement. From that time, the brushes remaining stationary, every displacement, however small it be, of the magnetic meridian, will be disclosed by an identical displacement of the needle of the comparer, which thus fulfills the role of the most sensitive compass. In order to avoid all disturbing influence due to the proximity of metallic pieces, we shall arrange on top of the mast of the ship the revolving ring, to which we shall communicate its motion of rotation by such means as we shall judge most simple. This motion is not in any manner obliged to remain uniform, since the angles traversed by the needle of the comparer are a function, as has already been said, only of the ratio of the two currents that traverse it,—a ratio entirely independent of the speed of rotation. As to the graduation of the apparatus, the details given above are sufficient to make understood how it should be brought about."

All that Deprez demonstrated, therefore, was, that if a field was made in which the field magnet varied relative to the brushes, or vice versa, the angle of variation would be indicated by the needle in another machine, which would move quickly or slowly as the brushes and magnets shifted relative to each other, and would indicate the new angle subtended between the brushes and the magnet. The only useful, practical application of this device was to attach it to a machine which would produce currents, and to use the earth or a ship to indicate the shift of position by means of a needle on top of the mast. This apparatus failed to teach any one that alternating currents could be used as a source of power in a motor. It was a mere indicator. It did not involve the utilization of two alternating currents differing in phase as a source of power in producing a continuous magnetic field. It did not depend upon any constant, regular, progressive currents; and, so far as the evidence shows, it was like the apparatus of Baily, confessedly a mere laboratory experiment. That Deprez did not conceive of the Tesla idea of utilizing regular, progressive, constant alternations of current is conclusively shown by his own statement in 1884, after the publication of this paper, and after the invention of the Golard and Gibbs alternating current systems for lighting, when he published another paper, in which he criticised the system, and stated that one of the most serious objections to it was that it was not applicable to the trans-

mission of power, and adds: "I must further remark that alternating currents are of no use in the transmission of power. They are suitable only for lighting purposes." In fine, the evidence shows that, as Prof. Sylvanus Thompson says in his work on this general subject: "Deprez's theorem bore no fruit. It remained a geometrical abstraction." The underlying thought disclosed and applied in the Tesla patents is such a use of the rapidly successive opposing alternations of the alternating current regularly and constantly recurring in such differing phases as would not only prevent the alternations from stopping the armature, but would become a source of power. It was essential, to the practical development of this idea, that the alternations should rise and fall and succeed each other progressively and constantly, and should be arranged, as counsel for complainant puts it, "like the crank on a locomotive in which there is no dead center, but one crank is always pushing forward." Tesla's invention, considered in its essence, was the production of a continuously rotating or whirling field of magnetic forces for power purposes by generating two or more displaced or differing phases of the alternating current, transmitting such phases, with their independence preserved, to the motor, and utilizing the displaced phases as such in the motor. Baily does not describe the use, with alternating currents, of displaced phases. He only describes the producing of intermittently shifting poles by means of a commutator or reverser, which is just what Tesla disclaims. Neither Siemens nor Bradley describes the utilization of such displaced phases of alternating currents with their independence preserved in a motor. Deprez describes a parallelogram of forces, and its application to indicate at any given moment the angle between two parts of a source of current. He did not contemplate the use of alternating currents, nor utilize their continuous and constant movement, nor did he utilize said current to produce power, nor did he have any idea of a whirling field of forces to propel a motor.

What, then, was the status of the art in 1887, when Tesla filed these applications? Nine years had elapsed since the grant of the Siemens patent, which, according to counsel for defendants, "is a full disclosure of the subject-matter in issue in patents Nos. 381,968 and 382,280," and its "references, * * * at the hands of the skilled electrician, * * * would naturally, and as a matter of course, have resulted in an organization of elements constituting a system for the electrical transmission of power, and embodying essentially the system" of said patents. Eight years had elapsed since Baily. It was four years since Marcel Deprez's article, according to defendants' counsel, "described the very thing that complainant claims is Tesla's discovery, and explained the theory of operation" of an apparatus which "is an operative two-phase alternating current generator supplying two-phase alternating currents to produce a rotating field in a motor" similar to the Tesla motor. Prior to Tesla's invention, no alternating current motors were in use. Although there had been an urgent demand for some practical means of utilizing alternating currents for transmission of power, none had been found. The continuous and unparalleled development of the electric art had

for years increasingly emphasized the want of an electric motor capable of distributing power for long distances, and had vainly called for the solution of the problem of the use of alternating currents for this purpose. The leading electricians of the day concurred with Deprez in his declaration, after he had devised his compareur, that alternating currents could not be utilized in the transmission of power, and that the future belonged to continuous currents. In these circumstances Tesla patented his invention, and thus first disclosed the method and apparatus now generically known as the "Tesla polyphase inventions," and introduced a new method, a new means, and a new terminology into the art. Six months later he read his paper before the American Institute of Electrical Engineers, and announced that previous efforts to utilize alternate currents had failed; that he had brought forth a novel system for the transmission of power; and explained its theory and demonstrated its operation by exhibiting a working motor; and no one of the electricians present questioned his claim or criticised his apparatus. The statements made by electricians at said meeting are supported by abundant quotations from the contemporaneous literature of the day, and it does not appear that the recognition of Tesla as an original inventor of said system and of the means for its practical application was ever disputed until this suit was brought. There is nothing in the record to detract from the claims then made. Tesla did not discover the parallelogram of forces; he did not discover the rotary field; but he was the first to explain how to do practically what Baily had said could be done by an impracticable infinity of magnets, and others had said could be done, but without showing how it could be done. He harmonized the hitherto opposing alternations, while preserving their character and power. Since the date of the Tesla patents in suit there has been a revolution in the art, due to the utilization of the means therein described.

The contention that the transfer from the electric light art to the electric power art did not involve invention cannot be successfully maintained. Even if it be assumed that the art of electric lighting is, in a sense, analogous to that of electrical transmission of power, the result was new and unexpected. It has been already shown in what respects a reversed current differs from an alternating current. The question as to how far they are alike is of minor importance, because it is admitted that the reversed or broken current is not the same for the practical purposes to which this invention is especially adapted. Therefore, although Deprez, in one of his publications, suggested that his system might be used for an impracticable and almost infinitesimal amount of power, the fact that these currents had never been practically used for any such purpose, and cannot, even now, be practically used for currents of high potential, shows that it required invention to select from an art that particular kind of current which was necessary for the production of the best results, and to adapt the mechanism of an art, analogous or non-analogous, to its practical application. The very fact that all the earlier electricians assumed or asserted that reversed and alternating currents were the equivalents of each other was one of the errors

which retarded the Tesla discovery, and the practical application of the polyphase principle.

The view most favorable to the contention of the defendants upon all the evidence presented may be fairly stated thus: Prior inventors had stated that electric light machines could be so reversed as to furnish power, although it is not proved that any one had shown a method for their use, or the practical application thereof, or had ever made such practical application. No prior publication explained how to utilize this alleged well-known reversibility, and no prior machine applied it. To the question why, if it was so obvious that the operation of the apparatus might be reversed, and alternating currents then used, such method was not put in practical operation, the only answer of defendants is that "there had been, up to 1885, no commercial system of distribution of alternating currents." But, if this is so, is it not because the foremost electrical experts throughout the world had united in the opinion, after repeated futile experiments, that alternating currents were useless for the transmission of power, and that the future belonged to continuous currents? "The apparent simplicity of a new device often leads an inexperienced person to think that it would have occurred to any one familiar with the subject, but the decisive answer is that with dozens, and perhaps hundreds, of others laboring in the same field, it had never occurred to any one before." *C. & A. Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275. Siemens, chiefly relied on to support this contention, does not describe any mode of using alternating currents; does refer to the use of commutators, and only refers to the use of said apparatus as an electro-dynamic machine "with suitable modifications," which are nowhere described. The impracticability as motors of reversed currents induced by commutators shows that Siemens, Baily, and others did not discover the Tesla invention. They were discussing electric light machines with commutators. Tesla first stated the discovery how these alternations could be thus utilized, and showed the machine and method adapted for this purpose. He is entitled to a patent for this discovery, as were the discoverers of the use of anthracite coal instead of bituminous coal, or of the hot blast instead of the cold blast in the manufacture of iron, or of the practical application of electricity to the telegraph or telephone. Judge Blatchford once sustained a patent for insulating electric wires by means of gutta-percha, and said:

"The gist of the invention is the discovery of the fact that gutta-percha is a nonconductor of electricity, and the application of that fact to practical use. The claim is valid, even though a metallic wire covered with gutta-percha existed before the plaintiff's invention, if it was not known that gutta-percha was a nonconductor of electricity, and could be used to insulate the wire." *Colgate v. Telegraph Co.*, 6 Fed. Cas. 86.

It is not necessary to go to this extent in sustaining these patents. The complainant may safely rest its case on the general principles laid down in the various decisions of the supreme court, and extended and developed in *C. & A. Potts & Co. v. Creager*, *supra*.

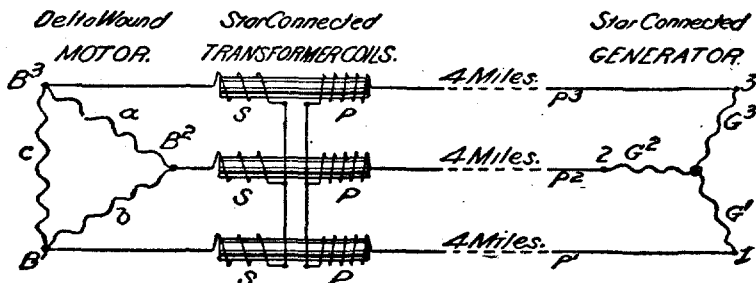
But, if the evidence already considered be disregarded, and it should be assumed that alternating and alternated currents were

theoretically known equivalents, even then the argument of counsel for defendants does not appear to be sound. They contend that a superior result, by reason of the substitution of one known equivalent for another, does not constitute invention. But the first substitution or application of such theoretical equivalent to produce a new or nonanalogous or unexpected result may involve invention. Tesla applied the alternating current to do what the alternated current had never before done, namely, to produce a new, unexpected, and practical system of transmission of power. A careful study of the evidence has led to the conclusion that Tesla made a new and brilliant discovery. But, even if this be incorrect, it is proved that by a new combination and arrangement of known elements he produced a new and beneficial result never attained before.

The technical defense of noninfringement by reason of the fact that defendants use only a motor, and that there is no allegation or proof of conspiracy with the owners of the plant which supplies the power, was not pressed on the argument, and, as six days were spent in the discussion of the questions on the merits, this point will not be considered. If any amendment is necessary, it should be allowed.

The contention of defendants that Tesla does not describe an operative machine is not satisfactorily proved. It is proved that in fact various practical motors have been manufactured according to his invention. The model of the particular patented construction selected to prove defendants' contention, and claimed to correspond most nearly to defendants' construction, failed to show a capacity of self-starting, and, when once started, revolved in either direction; but complainant showed on the hearing various differences between the construction shown in the drawing of the patent, and the model, which, it was claimed, accounted for the failure.

The defendants use a three-phase transmitting system, comprising a three-phase generator, three transformers, and a three-phase motor. The argument based on the use of transformers was not pressed. The following diagram represents said system:



Mr. Clarke, defendants' expert, describes the construction and operation of said apparatus as follows:

"In said exhibit diagram G is a conventional representation of the generator, in which F is a stationary field magnet excited from an external source by means of a continuous current dynamo. A is a revolving armature, and G^1 , G^2 , G^3 , are three induced circuits on the armature, in which, respectively, are generated three alternating currents of differing phase. Said in-

duced circuits of the generator are interconnected by joining together one end of each circuit, as shown on the diagram at the center of the armature. The other ends of said generator circuits are, respectively, connected with three terminals, T^1 , T^2 , T^3 , as illustrated; diagrammatically, of course. C^1 , C^2 , C^3 , represent the transformers located some four miles from the generator, each of which consists substantially of a laminated iron core, x , a primary coil P , and a secondary coil S . One end of each of the primary coils of the transformers, C^1 , C^2 , C^3 , is connected, respectively, with the generator terminals T^1 , T^2 , T^3 , and hence with corresponding generator circuits G^1 , G^2 , G^3 , by means of the conductors P^1 , P^2 , P^3 . And the other ends of said primary coils are simply connected with one another, as shown. One end of each secondary coil, S , of the transformers C^1 , C^2 , C^3 is connected, respectively, with the secondary conductors, S^1 , S^2 , S^3 , which, in turn, are connected with the terminals B^1 , B^2 , B^3 , of the Cushman motors M^1 , M^2 , M^3 . The interconnected field magnet circuits of said motors are represented by a , b , c , and the revolving armatures by L . The remaining three ends of the secondary coils are connected, respectively, with three conductors going to the motors. Said manner of connecting the secondary coils together is known in the art as a 'Y' connection, on account of its fancied resemblance to the three arms of the letter Y, and is also known as a 'star' connection. It will be seen that the primary coils, P , of said transformers, and likewise the three inducing circuits G^1 , G^2 , G^3 , of the generator, are star-connected. As will be observed from the diagram of Concord system, the field-magnet circuits a , b , c , of the Cushman motors are not star-connected, but that all the ends of said coils are interconnected in the manner shown in the diagram; and said manner of connecting the field-magnet circuits of the motors is known as a 'delta' connection, from its diagrammatical resemblance to the Greek letter of that name. The rotation of the armature, A , of the generator, G , within its field magnet, F , sets up three alternating currents of differing phase, which flow in the inducing circuit G^1 , line wire P^1 , and primary coil, P , of the transformer C^1 ; and in the inducing circuit G^2 , line wire P^2 , and primary coil, P , of the transformer C^2 ; and in the inducing circuit G^3 , line wire P^3 , and primary coil, P , of the transformer C^3 , respectively. The connecting together of the inducing circuits of the generator and the primary coils of the transformers star-fashion, as before explained, results in such an interconnection between said inducing circuits and primary coils and their connecting line wires as to make them all interdependent, so that the line wires P^1 , P^2 , P^3 not only serve as conductors, each for one of the alternating currents referred to, but also as conductors or parts of circuits for the other two currents; and also so that no one of the primary coils, P , of the transformers C^1 , C^2 , C^3 receives current exclusively derived from or generated by any one of the inducing circuits of the generator, but in fact receives current which is due to more than one of the generator circuits. In other words, in the Concord system, and as shown in the diagram thereof, the generator does not have independent inducing circuits connected with corresponding and independent transformer primary coils by means of separate and independent conductors or line wires, and so that each primary coil derives current only from a corresponding generator circuit, and by means of conductors serving as parts of circuits for the current due to a corresponding generator circuit only. The alternating currents which are developed by the generator and flow through the line wires and primary coils of the transformers connected therewith do not flow through any circuit of the motors, or, in fact, go further than the transformers; for, as shown in the diagram, no circuits or devices connected with the motors are connected with any circuits or devices that are in electrical communication with the generator. The currents for operating the motors are produced as follows: The alternating currents from the generator, which flow through the primary coils of the transformers, cause the magnetism or lines of force in the iron cores x , x , x to vary in strength and alternately in direction, whereby three electro-motive forces differing in phase, and acting in alternately opposite directions, are set up in the three secondary coils S , S , S , respectively, of the transformers C^1 , C^2 , C^3 , and thereby three alternating currents of differing phase are caused to flow respectively through the three field-magnet circuits a , b , c of the motors. Said currents in the motor

circuits set up rotating magnetic poles in the field magnet of the motor, and a rotating magnetic field, whereby currents are induced in the closed coils of the armature, I, and which is set in motion by the reaction between the last-mentioned currents and the magnetic field, as hereinbefore described. Three ends of the secondary coils of the transformers being connected star-fashion, and the other three ends being connected respectively by three conductors each to one of the three terminals B¹, B², B³ of the field-magnet circuits of the motor, which are delta-connected, said secondary coils, motor circuits, and connecting wires are interdependent, so that no one field-magnet circuit of the motor receives current exclusively from any one secondary coil, but receives current from more than one of said coils. And no one of the connecting wires S¹, S², S³ serves solely as a conductor of current for any one motor circuit, but answers as a conductor of current for more than one of said circuits."

In this construction no circuit consists of two conductors specially devoted to any one of the differing phase currents. In the patented apparatus each one of the independent circuits is especially devoted to a single one of the differing phase currents. The serious question raised in this branch of the case is as to the construction of the word "independent" in the patents. Counsel for defendants contends that "the word as used in the patent evidently refers to the physical relations which exist, and not to any result produced." Counsel for complainant contends that Tesla's "broad invention * * * was the production in a motor of a progressively-shifting magnetic field by means of * * * independent alternating currents differing in phase, and circuits * * * which preserve the independent character and phase relation of such currents." The specifications and drawings of said patents describe and show six independent transmitting wires which are repeatedly referred to as constituting independent circuits, and the claims emphasize this independency. In defendants' motor the coils of generator and motor are so interconnected that each line wire not only serves as a conductor for its own phase, but also for the other currents. Defendants' contention is fairly stated by counsel for complainant as follows:

"The defendants contend that currents of electricity belonging to each of the circuits are, therefore, at times all flowing in the same wire or wires, and that at certain instants in the operation of the same—i. e. when each of the single transmission wires is, for an incredibly short period, transmitting no potential (i. e. change from plus to minus)—two of the coils of the motor are supplying current to the third. * * * They cite the admission of Mr. Waterman that 'analytically' it is perfectly true that currents of electricity of differing phase may be at times regarded as simultaneously flowing in the same circuit."

This statement of Waterman, however, should be read in connection with his further statement, as follows:

"The net result of it all is that, in a manner more or less complex to follow, these electro-motive forces so cancel out that there is in each circuit a current differing in phase by 120 degrees from the current in each of the others, so that in the motor it is not possible to tell how the current got there, or over what kind of a circuit (i. e. whether over a three-wire or a six-wire circuit)."

Counsel for defendants argue:

"That the term 'independent,' as used by Tesla, means such separation as is consistent with having the complete circuits traversed by the same currents, —currents which at any and every point are of the same quantity, intensity,

and phase,—so that, as Mr. Clarke puts it, each motor circuit receives its current from a corresponding generator circuit, and from no other. It cannot refer to circuits which are interdependent in such sense that two of the circuits are at times strictly in series with one another and in multiple with the third, and so are not 'independent' in any sense. The whole system is an interdependent, and not an independent, system."

The following significant statement, however, is found near the end of the specification of the first patent No. 381,968:

"By 'independent' I do not mean to imply that the circuits are necessarily isolated from one another, for in some instances there might be electrical connections between them to regulate or modify the action of the motor without necessarily producing a new or different action."

The claims, therefore, confessedly cannot be read as requiring isolation of the circuits, but at most only such independence as is necessary for the purpose of producing a rotary field; that is, the connections must be such as not to interfere with the independency of the circuits which operate to shift the poles. The only practical result from defendants' use of three conductors instead of six is an improvement "to regulate the action of the motor," which result was anticipated by Tesla, as above; and it is proved that it was known in the prior art that one of these arrangements was a substitute for the other. Inasmuch as the defendants have not invented any new idea, but have adopted an old contrivance which performs the same result in substantially the same way by a formal and unsubstantial change in means, and by circuits which, while in some sense interdependent, are operatively independent, and which preserve and utilize the vital element, independence of phase, these circuits must be held to be the equivalents of the independent circuits of the patent, the word "independent" being interpreted to mean operatively independent, so as to embrace the true spirit and essence of the Tesla invention. This conclusion is supported by a great number of illustrations of similar uses of such independent conductors in the general field of the arts. As the expert for complainant has pointed out, in railroads, cash carriers, and electric telegraphs, the tracks, the earth, or a single wire will serve as common but independently acting conductors. It does not seem necessary to further discuss this contention based on a technical verbal distinction. Defendants' three wires are operatively independent; they are actually independent while in action; they are independent enough to do the required work.

This case involves a diversity of complicated questions of the scope and effect of certain language, of the prior art, and of the operation of electrical apparatus. All these questions have been exhaustively discussed with singular ability and learning by the able counsel herein. If the contentions of defendants as to the scope of the patents in suit are proved, the question of infringement of the patented independent circuits is not free from difficulty. If "independence" means "isolation," the patents are valueless. But if complainant's contention is correct, and if Tesla is entitled now to the broad claim which no one denied when he announced it to the American Institute of Electrical Engineers as his "novel system of electrical distribution and transmission of power by means of alternate cur-

rents * * * which will at once establish the superior adaptability of these currents to the transmission of power, and will show that many results heretofore unattainable can be reached by their use," then there can be no question that defendants have infringed. The foregoing language has been again quoted in order to emphasize how consistently, at the end of 10 years, after a review of all possible questions, Tesla stands upon his original statement of his invention.

Infringement of the first claim of patent No. 381,968, necessarily implies infringement of the method patent No. 382,280. The finding that the circuits of the defendants are independent, in the sense of the Tesla patents, is decisive against the defendants as to the infringement of the first and second claims of patent No. 382,279; and the field magnet of defendants' motor, while differing in some respects from that of the third claim of No. 381,968, is annular, or ring-shaped, within the meaning of said claim, and infringes it.

At the close of the defendants' brief is printed the "decision of the imperial court of Germany on Tesla patent." The only reference thereto in said brief is in the statement that in said suit, "brought to obtain a cancellation of Tesla's patents, a German patent to one Haselevander (including the rotary current system employed by defendants) was partially annulled because of the publication of this American patent to Bradley," and in the following statement:

"It should also be mentioned that the imperial court held that the system employed by defendants does not infringe the German Tesla patent corresponding to the patents involved in this suit; that court holding with us that our system is a dependent system, and not having the independent circuits of the Tesla patents and inventions."

It is somewhat difficult to determine, from said opinion, the scope of the issues involved; but it appears that some German firm had applied to have two Tesla German patents canceled on the ground that they had not been worked, but "have only been used to the disturbance of the electro-technical industry in Germany." Tesla, as defendant, admitted that he had not actually worked his invention, but had fulfilled his duty by a license to a firm which had pledged itself to work the patents; and, furthermore, that certain alleged infringers, by using a rotary-current three-wire system, which seems to have been substantially like that of defendants herein, had "worked" his invention, and thereby saved him from the statutory penalty. The court held as follows:

"By 'independent' is not meant to be expressed that the circuits are necessarily isolated from each other, since in single cases electrical connections can exist between them, in order to regulate the working of the motor, without necessarily producing a new or another manner of working. Then also nothing is gained for him thereby. Entirely disregarding the fact that after the striking out of the sentence, which clearly occurred in order to avoid uncertainty, the independence of the circuits is only so to be understood as is shown from the drawing and description, namely, as conditioned by a completely independent outgoing and return conductor, there would also never be able to be read into the stricken-out sentence that therein the linking of the circuits in the meaning of the rotary-current system had been thought of, for this linking removes the independence of the circuits, while the erased sentence will only admit such connections as permit the independence of the circuits to exist."

But this statement is a mere obiter dictum. The explanatory language relied upon by complainant in the patent in suit had been stricken out of said German patent. The decision was upon two patents not shown to be the same as those in suit herein. The applications therefor were not filed until May, 1888, and not until after the Tesla invention had been described in a printed publication. But, even if this decision is to be construed as insisting upon a construction unfavorable to that here contended for by complainant, it should only be considered in connection with the foregoing facts. Here the question of independence is directly presented on a different issue, in view of a different state of the art, upon a different patent, from which the explanation of the word "independent" has not been erased. No sufficient reason has been shown why the conclusion of the German court should be followed in determining the question of infringement herein.

The search lights shed by defendants' exhibits upon the history of this art only serve to illumine the inventive conception of Tesla. The Arago rotation taught the schoolboy 50 years ago to make a plaything which embodied the principle that a "rotating field could be used to rotate an armature." Baily dreamed of the application of the Arago theory by means of a confessedly impossible construction. Deprez worked out a problem which involved the development of the general theory in providing an indicator for a ship's compass. Siemens failed to disclose the "suitable modifications" whereby his electric light machine might be transformed into a motor, and Bradley is almost equally vague. Eminent electricians united in the view that by reason of reversals of direction and rapidity of alternations an alternating current motor was impracticable, and the future belonged to the commutated continuous current. It remained to the genius of Tesla to capture the unruly, unrestrained, and hitherto opposing elements in the field of nature and art, and to harness them to draw the machines of man. It was he who first showed how to transform the toy of Arago into an engine of power, the "laboratory experiment" of Baily into a practically successful motor, the indicator into a driver. He first conceived the idea that the very impediments of reversal in direction, the contradictions of alternations, might be transformed into power-producing rotations, a whirling field of force. What others looked upon as only invincible barriers, impassable currents, and contradictory forces, he brought under control, and, by harmonizing their directions, taught how to utilize in practical motors in distant cities the power of Niagara.

A decree may be entered for an injunction and an accounting as to all the claims in suit.

IDEALITE CO. et al. v. PROTECTION LIGHT CO.

(Circuit Court, S. D. Ohio, W. D. August 20, 1900.)

No. 5,390.

PATENTS—VALIDITY OF REISSUE—HYDROCARBON BURNERS.

Claims 1 and 2 of the Brough reissue No. 11,657 (original No. 559,670), for a hydrocarbon burner, which were not included in the original patent, are void, because it does not appear that the original patent was inoperative or invalid by reason of their omission, and because including these claims the reissue is not for the same invention covered by the original patent.

In Equity. Suit for infringement of reissue patent No. 11,657, to Thomas J. Brough (original No. 559,670), for a hydrocarbon burner. On demurrer to bill.

Geo. B. Parkinson and A. E. Georgi, for complainants.
Hosea, Knight & Jones, for defendant.

THOMPSON, District Judge. The bill sets up a reissue patent, alleges that it has been infringed by the defendant, and prays for an injunction, the assessment of damages, and an account of profits. The defendant demurs to the bill, and the assignments of the demurrer are: (1) Want of equity; (2) want of novelty; (3) original patent not inoperative nor invalid; (4) the reissue patent not for the same invention. It is urged in support of the demurrer that it is not shown in the bill, nor does it appear from an examination of the original and reissue letters patent, of which profert is made by the bill, that the original patent was inoperative or invalid, nor that the reissue patent is for the same invention, but that, on the contrary, it does appear therefrom that the original patent was operative and valid, and that the reissue patent covers claims not within the contemplation of the original patent. The new or additional claims of the reissue patent read as follows:

"(1) In a hydrocarbon burner, the combination with the burner outlet orifice, a valve, a cylindrical sizing and cleaning stem carried by the valve, and adapted to extend through said orifice and to size and clean the same, said stem having a diameter equal to that of the orifice. (2) In a hydrocarbon burner, the combination with a valve casing having a burner outlet orifice, a valve seat, a valve plug and stem in said casing, of a cylindrical sizing and cleaning stem, integral with and extending beyond the valve, of a diameter equal to that of the orifice referred to, and adopted to pass through, size, and clean said orifice for the purpose specified."

The clauses of the specifications explanatory of these claims, and which are not found in the specifications of the original patent, read as follows:

"This case (see Figs. 4 and 5) is screw-threaded interiorly at its lower end to receive a screw-threaded plug, C¹, which is turned by a handle, C², to advance or withdraw the stem in the case. The case, C, is enlarged, or the stem, C¹, slightly reduced at its upper end, a¹, to allow the oil from pipe B¹ to pass around it, and the upper end of the case is formed with a conical seat, a³, terminating with an outlet. The upper end of the valve stem has a pin, a, the straight part of which is the exact diameter necessary for the full size of the vapor outlet. This pin protrudes through the outlet in the case, and has a shoulder, a², which, when the valve is shut, bears against and tightly

fits with a ground joint against the conical surface of the seat, a^3 . This seat, a^3 , may have a single straight taper, as in Fig. 4, or it may have two different tapers at an angle, as in Fig. 5. In either case the pin, a , passes through the outlet in the case, guides the valve stem and the straight part, a , sizes and cleans the vapor outlet, while the shoulder, a^2 , tightly closes, and shuts off the escape of vapor or oil by coming to a tight bearing against the conical seat, a^3 . * * * I am also aware of the various forms of stems and needles in use in other vapor generators, none of which, to my knowledge, perform the function of mine in maintaining a uniform size for the gas or vapor outlet against deposit of carbon, accumulation of dirt," etc.

The clauses of the specifications of the original patent relating to the valve plug and stem read as follows:

"This case (see Figs. 4 and 5) is screw-threaded interiorly at its lower end to receive a screw-threaded plug, C^1 , which is turned by a handle, C^2 , to advance or withdraw the stem in the case. The case, C , is enlarged, or the stem C^1 slightly reduced at its upper end, a^1 , to allow the oil from pipe B^1 to pass around it, and the upper end of the case is formed with a conical seat, a^3 , terminating with an outlet. The upper end of the valve stem has a pin, a , which protrudes through the outlet in the case, and has a shoulder, a^2 , which, when the valve is shut, bears against and tightly fits with a ground joint against the conical surface of the seat, a^3 . This seat, a^3 , may have a single straight taper, as in Fig. 4, or it may have two different tapers at an angle, as in Fig. 5. In either case the pin, a , passes through the outlet in the case, and guides the valve stem, and also regulates the size of the circular film of vapor, while the shoulder, a^2 , tightly closes, and cuts off the escape of vapor by coming to a tight bearing against the conical seat, a^3 ."

It will be seen that the function of cleansing the burner outlet orifice was not claimed for the valve-plug stem in the original patent, nor was it alluded to, suggested, or hinted at in the specifications or the drawings of the original patent, nor, as counsel well say, does it inhere in the valve stem, but must be realized through special construction, of which there is no suggestion or description in the original patent. There was no omission, however, to describe its other functions. They were fully described and set forth, especially those of the pin, needle, or protruding stem, which, it is stated, were to guide the valve stem, and regulate the size of the circular film of vapor. It seemed to the court during the early consideration of the case that this clause might, by fair construction, include cleansing the burner outlet orifice as part of the process of regulating the size of the circular film of vapor, and counsel were given an opportunity to be heard upon that question. But after further and more careful consideration it is clear that this clause has reference to fixing and maintaining a normal size of film, and does not contemplate or provide against obstructions which may arise in the course of use to impede its movement. The removal of dirt and deposits of carbon which obstruct the flow of the vapor is a distinct and independent operation having no necessary connection with the other. The cleansing function of the valve stem, therefore, is not found within the contemplation of the original patent. The functions attributed to pin, a , and described with so much particularity in the specifications, preclude any such interpretations of the original patent. During the nearly two years which elapsed before the reissue, the new function may have been developed by use or in the course of improvement, and the reissue sought

for the purpose of incorporating it with the original invention. The court finds that claims 1 and 2 of the reissue patent are void, because it does not appear that the original patent was inoperative or invalid by reason of their omission, and because, including these claims, it is not for the same invention covered by the original patent. The demurrer will be sustained.

AMERICAN SULPHITE PULP CO. v. BURGESS SULPHITE FIBRE CO.
et al.

(Circuit Court, D. New Hampshire. July 11, 1900.)

No. 302.

1. PATENTS—PRELIMINARY INJUNCTION—EFFECT OF PRIOR ADJUDICATION.

In granting a preliminary injunction against the infringement of a patent which has been sustained by the circuit court of appeals in contested litigation against other defendants, a circuit court is not making any new adjudication, but is merely protecting an established right, and is precluded from considering many grounds of defense which otherwise might properly be urged against such application.

2. SAME.

The rule that, to entitle a plaintiff to a preliminary injunction against infringement of a patent, his right must be established by prior adjudication or long acquiescence or beyond doubt, applies not only to the validity of the patent, but to the question of infringement.

3. SAME.

A judgment of the circuit court of appeals sustaining the validity of a patent will, ordinarily, be considered as conclusive by a circuit court on a motion for a preliminary injunction in a subsequent suit against a different defendant, although all the issues involved in the prior suit were not specifically passed on in the opinion of the court.

4. SAME—ANTICIPATORY MATTER.

New matter of anticipation offered on a motion for preliminary injunction, to avoid the effect of a prior judgment sustaining the patent, must be of a very substantive character.

5. SAME—INFRINGEMENT—WOOD-PULP DIGESTERS.

The Russell reissue, No. 11,282 (original No. 445,235), for improvements in wood-pulp digesters, claim 1, *held* not anticipated, and valid, on a motion for a preliminary injunction, following prior adjudications, and infringed by certain digesters in use by defendant, and not infringed by another.

In Equity. Suit for infringement of a patent. On motion for a preliminary injunction, heard July 10 and 11, 1900.

The following are the affidavits for complainant:

Affidavit of William E. Jolbert.

William E. Jolbert, of lawful age, being duly sworn, deposes and says: I reside in Berlin, N. H., and am a mason by trade. I worked at the mill of the Burgess Sulphite Fibre Company at Berlin, N. H., and worked upon the lining of all the digesters now in use in that mill. These digesters are ten in number, and all constructed of an outer shell of steel plates, about one inch in thickness. Six of these ten digesters are all lined alike, and in the following manner: First, a coating formed of a mixture or thick paste of Portland cement, ground slate, and silicate of soda, from an inch to an inch and a half thick, was laid directly upon the inner surface of the steel shell of the digester by workmen, and pressed onto the same with hands, so as to make a continuous adhesive coating or lining of the mixture all over the interior of the shell. This coating was then dried by heat applied to the outside of the

shell. Upon this coating was applied another similar paste or mixture of the same ingredients, but with less cement, and more ground slate and silicate of soda, being somewhat more soft or plastic than the first mixture named, and about one inch to an inch and a half thick. This coating in like manner was continuous all over the interior of the digester, and was put on by hand and in the same manner as before. On this second or interior coating there was then set a layer of blocks made of a mixture of Portland cement, ground slate, ground glass, and silicate of soda. To make these blocks the mixture was poured into molds of various sizes and shapes, corresponding to the different parts of the digester, and about two inches thick, and the blocks thus formed were subsequently dried. These blocks were set in place by pressing them against the inner surface of the paste layer before mentioned, and, where there were spaces behind or between the blocks, these spaces were filled up by pouring in a grout of the same mixture as above. Over this layer of blocks there was then applied with a trowel a layer of a mixture of Portland cement and sand mixed with water, about one and one-half inches to two inches in thickness, and this was faced up or lined on the inside with a layer of hard-burnt brick, laid with a mortar of Portland cement, sand, and water, in the ordinary manner. Digesters 7, 8, and 9 are lined in the same manner as Nos. 1 to 6, except that the layer of Portland cement, sand, and water next to the blocks is omitted, and the facing bricks are laid up from one-half inch to an inch from the blocks, and the intermediate space filled by grouting in a mixture of Portland cement, ground slate, ground glass, and silicate of soda. In lining digester No. 10, the first two coats or layers of material were applied by hand to the shell in the same manner and to the same thickness as previously stated. Upon the inner face of the inner layer is set a layer of hard-burnt brick, the same being pressed into place by hand, and over this layer a second layer of hard-burnt brick is set, at a distance of about one-half inch, on wedges, and the spaces between filled up by grouting in a mixture of Portland cement, ground slate, ground glass, and silicate of soda.

William E. Jolbert.

[Oath November 9, 1899.]

Affidavit of Charles C. Springer.

Charles C. Springer, of lawful age, being duly sworn, says: I reside at Boston, Mass. I am manager of the pulp works at Mt. Tom, Mass., and have been so for the last nine years, and am also treasurer of the American Sulphite Pulp Company, complainant, and have been so for the last fourteen years. I am well acquainted with the art of lining pulp digesters, and I testified as an expert on the questions of substantial identity and difference of lined pulp digesters in the suit (mentioned in the bill) by the complainant against the Howland Falls Pulp Company, in which the court of appeals for the First circuit held the George F. Russell reissue patent (here in suit) to be valid, and to be infringed by the linings applied to the Howland Falls Pulp Company's digesters by Curtis & Jones. These Curtis & Jones linings, as appears by the testimony in that case, were as follows: A layer of cement mixture was applied with a trowel directly to the shell, and blocks of cement mixture were set up at a distance from this first layer, and cement mixture grouted into the space between them, thus making three coverings of cement mixture, viz. (1) the plaster layer, (2) the grouted layer, and (3) the block layer; the total thickness of cement mixture being about six inches. The cement mixture used for all layers—plaster, grouted, and blocks—was Portland cement, ground quartz, and silicate of soda. Of this lining Judge Putnam, in his opinion in the circuit court, said: "If the patentee (Russell) was entitled to his patent at all, the defendant's method of obtaining a continuous lining of cement is plainly within its scope, and it differs so unsubstantially from the method described in the patent that it has the appearance of a mere evasion, easily devised when sought for, and plainly within the rules touching equivalents." And the court of appeals, in its opinion in favor of the plaintiff, quoted this language, and said: "In this we fully agree." Comparing this Curtis & Jones lining with that described in the affidavit of William E. Jolbert as the lining of the digesters of the defendants in the present case, I find that the defendants have ten digesters, all having an outer shell of steel, lined with a cement mixture of Portland cement, ground slate, and silicate of soda. Of these ten digesters six are lined thus: One to one and a half

inches of the cement mixture applied by hand to the inner surface of the shell, and dried by heat. To this dried coating there is applied "another similar paste or mixture of the same ingredients, but with less cement, and more ground slate and silicate of soda, being somewhat more soft and plastic than the first mixture, and one to one and a half inches thick." Upon this second coating there was set "a layer of blocks made of a mixture of Portland cement, ground slate, ground glass, and silicate of soda, * * * about two inches thick." Over this layer of blocks there was then applied with a trowel a layer of a mixture of Portland cement and sand mixed with water, in which was set a layer of hard-burnt brick. Three of the ten digesters were lined in the same manner, except that the facing brick, instead of being set in the mixture of Portland cement, sand, and water, was set in about one inch, and the space filled by grouting in a cement mixture like that previously applied. One of the digesters was lined thus: The first two coats or layers of cement mixture were applied by hand to the shell, in the same manner and to the same thickness as previously stated, giving a total thickness of about three inches, and on this was applied burnt brick in two successive layers, with a space about one-half an inch between them, which was filled in with a grout of Portland cement, ground glass, and silicate of soda. The last-named one of these ten digesters has, it will be noted, a thickness of about three inches of cement mixture next the shell. This is just about (rather more than) the thickness of a Russell cement lining which was applied by the plaintiff on a digester of Wilkinson Bros. at Sheldon, Conn., some years ago, and which gave very good practical results. In my opinion, all of the ten linings of the present defendants are substantially the same as the Curtis & Jones lining used by the Howland Falls Pulp Company, and, like them, they have the lining described in the Russell reissue patent; that is to say, "on the interior of the shell is formed a continuous lining or coat of acid-resisting material of the nature of a cement, composed of a mixture of materials which is acid-resisting, and capable of being made plastic and adhesive to the shell of the digester, and so compact as to prevent the acid solution from reaching the shell under the high steam pressure required in practice." This is the "continuous lining or coat of cement, as described," recited in the first claim of the Russell reissue patent. Furthermore, there is in each of the said ten digesters "an interior lining of tiles, C," as recited in the second claim of the said patent, to prevent mechanical abrasion of the cement lining.

[Oath November 13, 1899.]

Charles C. Springer.

Affidavit of George W. Russell.

George W. Russell, of lawful age, being duly sworn, says: I reside in Boston, and am the president and general manager of the American Sulphite Pulp Company, complainant in this suit. On the 24th of last month the plaintiff, through me as its president and general manager, addressed and mailed to the Burgess Sulphite Fibre Company a letter in the following terms:

"Boston, October 24, 1899.

"The Burgess Sulphite Fibre Co., Berlin, N. H.—Gentlemen: Under date of February 9, 1899, we wrote you in reference to your infringement of the Russell patent owned by us for cement-lined digesters, and demanded of you a payment of royalty, and stated, if the same was not paid, we should proceed against you legally. Having received no reply to this letter, we now notify you that unless we receive from you, on or before the 1st day of November, 1899, payment of royalty at the rate of \$500 per ton daily capacity of your mill, in cash or its equivalent, we shall at once proceed against you by bill in equity for an injunction and accounting.

"Yours, respectfully,

American Sulphite Pulp Company,

"By George W. Russell, President."

This letter was inclosed in one of our business envelopes, having our name and address printed thereon in the usual way to insure return to the sender if the person addressed does not receive the letter. I have not had the letter returned, and have no doubt that it was duly received by the Burgess Sulphite Fibre Company. No answer to it has been received. This letter was only the last step in a long history of negotiations with the Burgess Sulphite Fibre Company for the purpose (on our part) of inducing them to recognize the

validity of the G. F. Russell reissue patent, and to pay the royalty charged by the company. The practice of our company, and the manner in which alone we have undertaken to make use of the Russell reissue patent owned by us, on which this suit is founded, is to grant licenses to pulp manufacturers on royalty. The rate of these licenses, to infringers has been, and is, not less than \$500 per ton daily capacity of production of sulphite pulp of the plant or mill proposed to be licensed in each instance. In a few cases we have accepted less than this in cash, but our regular rate has been, and is, \$500 per ton, as stated. That this is a reasonable rate appears from the fact that we have received it from infringers and others to the number of about thirty concerns. The defendants have been offered a license at this rate of \$500 per ton, but they have refused to accept the offer, and are continuing their infringement in defiance of our rights under the patent. Geo. W. Russell.

[Oath November 13, 1899.]

The following extracts from the brief of defendants describe the digesters as made by defendants:

Defendants' Digester Linings Herein.

For the purposes of this motion, the statements in the affidavits filed on the part of the defendants, as to exactly what the linings of their digesters were, which statements are made with great detail and minuteness, must be accepted as the defendants' structures of digester linings before the court, and on comparison of which with the first claim of the Russell patent the question of infringement shall be decided. It is true that the complainant has not had the benefit of cross-examining the persons who make affidavits in this respect for defendants, but this is incident to the method necessarily pursued in relying on affidavits on such a motion as this. Complainant has had an opportunity for filing rebuttal affidavits, and, while these rebuttal affidavits raise a few points of difference, these points are not really material, and even these points are to a great extent controverted by defendants' affidavits in rebuttal. It is impossible, within the proper limits of this brief, to set forth the allegations of the respective parties in detail. We shall present a brief statement of defendants' construction of linings, and show—First, that it is not the construction of lining contained in the Howland Falls digesters, and, therefore, has never been the subject of any adjudication by the courts; and, second, that it is not in any event a construction of lining which can be held to infringe the Russell first claim; and, third, that, in any event, the question presented, in view of the state of the art and proper construction of that claim, is of such doubt that it should not be resolved as against the defendants on a preliminary motion of this kind, especially in view of all the other considerations heretofore adverted to in this case.

Linings of Nos. 1, 2, 3, 4, 5, and 6 Digesters.

The outer digester shell of all the defendants' digesters is made of steel plates about one inch in thickness and riveted together at the joints. These six digesters were then lined, next their shells, as follows: (1) The interior of the shell was painted with a coat of graphite paint about one-sixteenth of an inch thick. (2) Next came about one-quarter inch of composition, made of slate, Portland cement, and silicate, put on in slabs, noncontinuously, and baked on before the application of the next layer. (3) Next came about one-quarter inch of composition, made of slate, Portland cement, and silicate, put on in slabs, breaking joints with layer No. 2. (4) Next came about one-quarter inch of composition, made of slate and silicate, and containing no cement, which was also put on in slabs, breaking joints with the last previous layer. (5) Next came a coating about one inch thick of home-made brick or tiles, made of slate, Portland cement, glass, and silicate, and set in place by grouting behind and between them with a plastic mixture of the same material. These bricks are special in shape, to fit different parts of the digester at curves and openings. (6 and 7) Next was applied another layer of facing, composed of regular vitrified bricks, about eight by eight inches, and about two inches thick, which were entirely impervious to the acid used in the digester. These vitrified bricks are also special in shape, to fit different parts of the digester at curves and openings. "They were grouted into place,

and laid up one by one, and one row after another, imbedded in a roughly-applied layer of material, consisting of a mixture of 50 per cent. Portland cement, 50 per cent. of sand, and of nothing else, and mixed in water, instead of silicate of soda. Finally, all of the joints between the vitrified bricks were carefully filled and pointed up with a lead paste, consisting of 90 per cent. litharge (oxide of lead) and 10 per cent. white lead (carbonate of lead), mixed with enough glycerine to serve as a binding material. All of these joints were and are carefully filled and pointed with lead paste, and the lead and glycerine in the paste form a chemical union, and produce, when the matter is hardened, an intensely hard and acid-resisting material, and form a most durable joint between the vitrified brick. We were led to use this lead paste for pointing up the joints above described because we found that the acid used in the digesters rapidly ate and disintegrated the cement between the bricks. The linings thus constructed, with their inner face of vitrified brick pointed up with lead paste, have many times the durability under the action of acid that is possessed by any form of Portland cement and sand mixture known to me, and are absolutely unattacked by acid."

Linings of Nos. 7, 8, and 9 Digesters.

These three digesters "are lined in precisely the same manner as those above described (viz. Nos. 1-6), except that the painting of the shell with graphite paint has not been practiced. The other layers of the lining are all applied in the same way and in the same order, and the only layer with which the sulphite liquor comes in contact is the continuous layer of vitrified brick with all the joints pointed up with lead paste."

Lining of Defendants' Digester No. 10.

This digester was lined in a way somewhat different from the other nine already referred to. The reasons for so lining it are stated as follows in the affidavit of T. P. Burgess: "This last form of digester lining was put in about two years ago at the suggestion of counsel, who had acted in the former litigation against the Howland Falls Paper Company, with a view of constructing a digester lining in exact accordance with what is disclaimed in the original patent of Russell, and in the following words: 'I am aware of the use heretofore of a digester lining comprising a layer or coat of masonry or brickwork laid in cement, and make no claim thereto. Such linings I believe to be objectionable. In fact, they are heavy, and require, in many forms of digester, special forms of tile or brick to be constructed to fit various portions of the digester shell, especially around openings and so forth. Furthermore, they are expensive, by reason of requiring to be laid with great care and skill to prevent defective joints through which leakage may take place.'" Digester No. 10 was lined as follows: First, a backing was put in next the shell, composed of a first coat of ground slate and Portland cement, mixed with silicate of soda, rolled into slabs, noncontinuously, and baked on, as before, and over this was a second coat of the same material as the first, also rolled into slabs and put on top of the other, and so put on that the slabs of the second coat broke joints with those of the first. The third coat of this backing was of a different mixture, namely, ground slate and silicate alone, with no cement mixed in. This was put on about one-quarter of an inch thick. Next came a course of vitrified brick, about eight by eight by two and a half inches, made in special forms to fit the digester. These vitrified brick were laid up and squashed into the soft paste precisely as a mason would do it, which resulted in the joints between the brick being partially filled with the pasty layer into which they were squashed. The balance of the joint of this vitrified brick layer was then filled up with a mixture of glass, slate, Portland cement, and silicate. The second course of vitrified brick, the same kind of brick as those used in the first course, was made up in rows, and grouted behind the brick and between the joints with the same material above mentioned,—namely, the composition of glass, slate, cement, and silicate of soda,—and the joints between the vitrified bricks of this inner layer were pointed up with a lead paste, consisting of litharge, lead, and glycerine.

Causten Browne, for plaintiff.

Betts, Betts, Sheffield & Betts, for defendants.

PUTNAM, Circuit Judge (orally). I can see no reason why I should not dispose of this case now. I am sure it will be for the convenience of counsel for me to do so; and, so far as the propositions of law are concerned, I have considered every one of them within a very short time, and would gain nothing by investigating the authorities which have been cited. So far as questions of fact are concerned, I am satisfied I should lose more than I would gain by postponing the consideration of them for an investigation of the record at some future day.

Some reference has been made by the respondents to *Westinghouse Air-Brake Co. v. Burton Stock-Car Co.* (C. C.) 70 Fed. 619. I always have an unpleasant sense of responsibility with reference to the granting of a preliminary injunction by a single judge, and I am unwilling to grant one when the settled rules of practice do not absolutely require me to. In that case I could not see that the complainant's market was in any way in danger, or anything of substantial value which the complainant would gain by an injunction. Therefore I refused the injunction; and the circuit court of appeals sustained the circuit court,—not on that ground, but on a somewhat different one. 23 C. C. A. 174, 77 Fed. 301. That decision was laid aside in *Bresnahan v. Leveler Co.*, in which the opinion was passed down on June 5, 1900, by the circuit court of appeals (102 Fed. 899), as a very peculiar one; and I cannot, in view of the expressions of the circuit court of appeals, give it any weight here.

This application has been spoken of by counsel for the respondents as asking for judgment at an early stage of the case. In view of the settled practice of the various circuit courts of appeals, as fully recognized in this circuit, it is not asking a judgment; it is asking execution, after a full consideration and adjudication by the circuit court of appeals, although against different parties. The view which I take of the decisions, and of the line of practice as established by the circuit courts of appeals in the various circuits, and especially in this circuit, requires me, against what may be my own personal convictions, to grant an injunction here, so far as nine digesters are concerned.

Much has been said here, and well said, in regard to the question of laches. If this case were one of first impression (that is, one in which the patent had not already been sustained), the suggestions thus made would be quite conclusive on the application for an injunction. But, where we are called on to give effect to a prior decision on a patent, after litigation of the conclusive character described in various opinions of the circuit courts of appeals, the position is entirely different, and the equities which usually reach applications for interlocutory injunctions have very little place. The court to which an application is made for an interlocutory injunction, although against new parties, is simply asked to protect an established right, and not to render a new adjudication.

Of course, equities of a special character may arise in any case which the courts cannot disregard. As, for example, one equity in this case is the fact that an injunction granted in a radical manner,

and without proper provision for the protection of the parties, might do the respondents irremediable injury, far beyond any advantage which would come to the complainant. I think, however, the case will be found, before we get through, to so shape itself that there will be no danger on this score.

The rules with reference to granting interlocutory injunctions in patent causes have been fully explained in this circuit in *Wilson v. Store-Service Co.*, 31 C. C. A. 533, 88 Fed. 286, and in *Hatch Storage-Battery Co. v. Electric Storage-Battery Co.* (C. C. A.) 100 Fed. 975. The practice is now settled in this circuit in patent causes according to the old rules applied in other suits. The right of the complainant must be established by prior litigation or by long acquiescence or beyond doubt. This applies to all the issues; it applies not only to the question of the validity of the patent, but to the question of infringement, as was fully explained in the case last cited. So far as the patent at bar is concerned, its validity and construction have been settled by the circuit court of appeals in *American Sulphite Pulp Co. v. Howland Falls Pulp Co.*, 25 C. C. A. 500, 80 Fed. 395, and in such way that I am bound by that case. It is true that all the questions which might be raised, and which perhaps will be raised, on the final hearing,—among the rest, the validity of the re-issue, and the question of anticipation as applied to the patent as construed by the circuit court of appeals,—have not been passed on by that court. But they were before the court; they were in the record; and the respondent had the right to maintain the decree of the court below on any ground on which it could maintain it, irrespective of the positions taken by the complainant, and irrespective of the complainant's assignment of errors. So it could have availed itself of every one of these defenses, and brought them to the attention of the circuit court of appeals, and sought the judgment of that court on them. Therefore the fact that the circuit court of appeals did not pass specifically on certain issues does not relieve me from acting in accordance with its final determination. Otherwise, there would be no end, and, every time it could be suggested that there was some issue on which the circuit court of appeals had not passed, this court, on a new bill between other parties, would be powerless to act. Theoretically, every question which could have been raised in the circuit court of appeals in the prior litigation has been determined by it. Of course, if, as a matter of fact, certain questions were not determined there which may be hereafter determined, it might be my duty, under some circumstances, to shape the injunction in such way as not to put the parties respondent in a position of urgency until the questions were passed on. But the mere fact that they have not in truth been passed on does not relieve this court from giving effect to the judgment on appeal, nor from giving the complainant relief. The condition here is not extraordinary, and therefore every question which has been raised here, except that of infringement, I must accept as having been already determined.

The new anticipatory matter which has been brought to my attention may, on revision of the case on final hearing in the circuit

court of appeals, in connection with like matter in the prior case, be of importance; but it is, to my mind, subject to the same criticism as like German publications before me in that case. It is merely suggestive and experimental, and not of that full, frank, and practical character which the decisions of the supreme court require in anticipatory publications. I do not see in them, or in the patents which have been brought to my attention, anything of that clear character which would justify me in avoiding the decision in the prior suit. A late case in the circuit court of appeals for this circuit (*Bresnahan v. Leveller Co.*, 39 C. C. A. 508, 99 Fed. 280) holds very emphatically to the rule that new matter, for the purpose of avoiding the effect of an earlier judgment, must be of a very substantive character. So I think that, in everything except the question of infringement, I am practically bound by the prior decision.

On the question of infringement, I have no doubt with reference to the digesters 1 to 9. I have no doubt that the various layers of cement constitute the substance of the lining of those digesters. If, instead of having the layers built up in what Mr. Burgess calls a composite manner (that is, by breaking joints), they were made of a solid mass of cement, it would be at once apparent that there was infringement. To my mind, the building up of these strata or layers by breaking joints is, in the patent law, equivalent to a solid mass of cement; and the whole structure, I have no doubt, is the same as that pointed out by the second claim of the patent in suit. I say this without undertaking to hold that the second claim has any validity, because I do not think it has. I refer to it for the purpose of making clear my view that, in the first nine digesters, the addition of the vitrified brick is purely incidental to a structure consisting of the two elements combined as set out in the first claim of the patent in suit; that is to say, the shell of the digester, and a mass of cement capable of performing the necessary functions of an interior lining.

Without undertaking to go at length into the nature of the lining of the tenth digester, and reserving my views about that until a final hearing, all I need say with reference to it is that it involves too much doubt on the question of infringement to justify me in issuing an injunction against it. The points of doubt are: First. Whether, after all, the real substance of this construction is not that described by the respondents as a purely, bona fide, composite lining. If it is a purely, bona fide, composite lining, fairly so termed, it certainly does not come within the claims of the patent in suit, because the very essence and gist of those claims is that Russell was able to get rid of everything except the shell of the digester and the lining of cement. That is the very pith of his invention. Second. I have doubts whether this digester really shows anything more than is shown by the Pierredon patent,—lava bricks laid in a heavy course of cement; and what is shown in that patent the public has the right to use, independently of any question whether Pierredon saw all the advantage coming from having a heavy cement course under his lava bricks. Third. The testimony

with reference to the substantial advantages and comparative relations of the various parts of the lining of digester 10 are too conflicting to justify the court in basing an interlocutory injunction upon it. On the whole, it is enough for me to repeat that the question of infringement as to digester 10 is too doubtful to justify this court in using the power of a temporary injunction with reference to it.

The decree which will be entered will be in substance as follows: An injunction to issue against digesters 1 to 9, inclusive, to take effect in three months from the entry of the decree; but, in the event there is an appeal, the injunction to take effect in three months from the coming down of the mandate. As to digester 10, the decree will state that an injunction is denied. I name the three-months period because I imagine that will be sufficient to enable the digesters to be relined. If the respondents think three months will not be sufficient, I will enlarge the time.

DENE S. S. CO., Limited, v. MUNSON et al.

(District Court, S. D. New York. July 18, 1900.)

1. SHIPPING—CONSTRUCTION OF CHARTER—INJURY TO SHIP FROM CARGO OF ASPHALT.

Under a time charter of a steamer to be employed in such lawful trades between ports of the United States and the West Indies or Caribbean Sea as the charterers might direct, the owners warranting her to be "tight, staunch, and strong, and every way fitted for the service," the owner cannot recover from the charterers for injury to the vessel from bringing a cargo of asphalt from Trinidad, which was loaded under direction of the master; for, while such cargo is peculiar and requires special fittings, and subjects the surrounding parts of the vessel to more than the usual lateral pressure when shipped in bulk, it is not only lawful merchandise, but constitutes one of the chief articles of export from the island, and was clearly within the terms of the charter, which placed the risk of the sufficiency of the vessel upon the owner.

2. SAME—INJURY TO CARGO IN LOADING—LIABILITY OF SHIP.

A provision of a charter requiring the charterer to supply the slings for loading cargo is complied with by furnishing the proper rope from which the slings are made, and the vessel is liable for an injury to the cargo in loading caused by improper splicing of the slings by the seamen, who are furnished by the owner.

In Admiralty. Suit against charterers for injury caused to vessel from cargo of asphalt.

Convers & Kirlin, for libellant.

Wheeler & Cortis and Chas. S. Haight, for defendant Munson.

Goodrich, Whitney & Hagen, for defendant Trinidad Shipping & Trading Co.

BROWN, District Judge. The above libel was filed by the owner of the British steamship "Olivedean," of 2,100 tons gross register, to recover for damages to the steamer resulting from the carriage of asphalt in bulk from Trinidad to New York in the spring and summer of 1898.

The steamer was chartered to the defendant Munson for the term of six months, at the rate of £725 per month, to be employed "in such lawful trades" between ports of the United States and the West Indies and or Caribbean Sea and or various other ports named, "as charterers or their agents shall direct." The owners were "to provide and pay for all provisions and wages of officers and crew, pay for insurance on the vessel and for engine room and deck stores, and to maintain her in a thoroughly efficient state in hull and machinery for the service"; the charterers were "to provide and pay for coal and other charges."

By the eleventh clause, the charterers had "the option of subletting the steamer, if required by them."

The steamer was delivered to the charterer Munson on January 24, 1898; but after one voyage for him from Philadelphia to Cuba and back to New York, he executed a subcharter of the steamer on February 16, 1898, pursuant to the option given him, to the Trinidad Shipping & Trading Company, for the term of five months or until the expiration of the original charter, at the rate of £800 per month, the other terms being substantially the same as in the original charter. All the damages claimed in the libel occurred while the steamer was in the employ of the subcharterers, and the latter were accordingly brought in as additional defendants under the fifty-ninth rule, on the petition of Munson, the original defendant.

The Trinidad Shipping & Trading Company has for a number of years past run several steamers, some of them its own, and others chartered, between New York and Trinidad and other West Indian ports. Asphalt in bulk has usually formed the major part of its cargoes from Trinidad, and that is one of the chief and ordinary articles of export from that island. From its waxy, viscous nature, its lateral pressure when carried in bulk is a somewhat severe test of the strength of whatever it presses against. On the first return voyage from Trinidad under the subcharter about 800 tons of asphalt were stowed in the lower hold of No. 2 compartment, and the severe pressure bent the forward bulkhead of that compartment in the middle about 5 inches forward out of line. The cross bulkheads in that compartment were also somewhat sprung. Seven hundred tons of asphalt were also stowed in the lower hold of compartments Nos. 3 and 4, which were not separated. The shaft tunnel running through the middle of these compartments was covered by asphalt, and on the port side the plates of that tunnel were bent in about 4 inches and the riveting injured for about 30 feet of its length, and a number of the angle frames cracked. The repair of this damage, with the detention of the steamer, amounting in all to \$1,293.02, forms the principal item of the damages claimed. The respondents were notified of the injury before the next voyage, and that they would be held responsible for the damage and for any future damage arising from the carriage of asphalt without suitable fittings.

Three subsequent voyages were made under the subcharter after the repairs. On each return trip from Trinidad asphalt was stowed in No. 2 hold, but none in Nos. 3 and 4. On the second and third voyages about 1,000 tons were loaded, and on the fourth about 1,100. On

these three last trips no damage was done to the bulkheads after the repair; but a hatch beam was bent, and some other damages are claimed for injuries caused by careless handling.

1. I do not think that the libelant has established any legal claim for the first item of damage. The ship was let for "such lawful trades as the charterers might direct." The West Indies ^{and} or Upper South American ports were among the ports first named in the charter. Trinidad is an important one of these ports, and the carriage of asphalt was not only a "lawful trade," and asphalt "lawful merchandise," but it was one of the principal ordinary exports of that island. It was, therefore, clearly, within the written contract of the charter; and "for such lawful trades as the charterers might direct," the steamer was warranted to be "tight, stanch and strong and every way fitted for the service." So far, therefore, as the written contract goes, not only was the carriage of asphalt within the right of the charterer or subcharterers, but the risk of the sufficiency of the vessel therefor was upon the owner. *The Edwin I. Morrison*, 153 U. S. 199, 210, 14 Sup. Ct. 823, 38 L. Ed. 688; *Hine v. New York & Bermudez Co.* (D. C.) 68 Fed. 920.

In negotiating the charter there were no statements or representations of any kind to limit the employment of the vessel to any special business, or otherwise than in any "lawful trade." Mr. Munson was not himself in the asphalt business; but he dealt largely in the subchartering of vessels previously chartered by him, which would itself naturally exclude any limitation of the vessel's employment different from the provision of the written charter. The charter therefore was the entire and only contract between the parties.

The master testifies that he had never before carried asphalt, and that he was ignorant of its peculiar qualities. But the subcharterers were not responsible for that, and there is no intimation in the evidence that they even knew of his ignorance about it. The agents of the owner who chartered the vessel had sufficient knowledge of asphalt cargoes, and that asphalt and sugar were the ordinary cargoes from Trinidad; and the master had ample means of informing himself on arrival at Trinidad and before loading. There was no misrepresentation or concealment of any kind on the part of the charterer or subcharterers. The stowage and distribution of the asphalt "was arranged," as the master says, "between me and the Trinidad representative." It was put in the two holds "because they would hold the quantity, and the proportions were according to the trim of the ship"; and sugar in bags was put in No. 1 compartment, but not immediately against the bulkhead, "lest it should injure the iron." Had the bags been stowed with dunnage against the bulkhead, the bulkhead might not have been bent. For the mode of stowing the sugar the ship was responsible and not the subcharterers.

No doubt asphalt is a peculiar cargo and requires special fittings. *Hine v. New York & Bermudez Co.* (D. C.) 68 Fed. 920, 922, 20 C. C. A. 63, 73 Fed. 852, 855. These consist in lining the ship's sides in order to prevent the asphalt from sticking to the ship and to enable proper cleaning of the ship on discharge to be readily made. As this is a duty of the charterers, the custom, as the evidence shows, is that

in charters made specially for the carriage of asphalt, the charterers for their own protection procure a clause to be inserted requiring the owner to provide these fittings at his expense; otherwise the charterer, it would seem, should provide them, though the evidence is quite indecisive on this point. In this case the subcharterers did provide the fittings. It was a mode of performing their own duty to deliver the ship in a proper and reasonably clean condition. This had no bearing, however, on the duty of strengthening bulkheads or the ship's tunnel, which pertain to the sufficiency of the ship herself for the service engaged. Evidence without restriction as to the practice in this regard was taken, though under respondents' objection to its competency. I do not see how a custom, even if it prevailed, could be admitted to supersede the express provision of the charter, and make the charterer, instead of the owner, take the risk of the ship's sufficiency or bear the burden of repairing her weakness. The evidence, however, fails to establish any such custom. At most it shows only that bulkheads and shaft tunnels are sometimes braced or protected, i. e. when thought necessary; but no customary obligation of the charterer is shown to determine for himself the ship's sufficiency, and to shore up the bulkhead and tunnel, or omit to do so at his peril. Some ships require extra strengthening, others do not. This vessel was originally more strongly built than usual, and it is to be inferred that no additional strengthening was thought necessary. Before the lower holds in compartments 3 and 4 were fully loaded, the shaft tunnel was found to be bending in. It was at once shored up inside by the engineer, carpenter and subcharterers' representative. The master says he was not informed of this until after the loading was completed. This is scarcely credible; but if true, it must have been through his absence or fault. The shaft was strengthened, it must be inferred, so far as thought necessary; since not only was no removal of the asphalt asked for, but the residue of the loading was afterwards completed without objection. And this is further presumptive evidence that no strengthening of the main bulkhead was deemed necessary; since there was still opportunity to shore it up if desired. It was not until after the first trip was made and further damage found done, that asphalt was objected to, and a demand made that the charterer and subcharterers should strengthen the ship at their peril. But as I have said, I do not find any ground for this demand in the contract, or in the evidence. The libel states no such obligation, either by contract, by custom, or by legal duty; but only that asphalt was not ordinary cargo. The employment of the vessel, however, was not restricted to ordinary merchandise, but to lawful trades, i. e. lawful merchandise. To exclude asphalt, that should have been excepted in the charter. I have no doubt that in truth the bulkheads and tunnel were deteriorated and weakened through age, beyond the knowledge or the supposition of the master. The ship was 17 years old, and these had never been renewed. The repair after the first trip was not made, according to the testimony, with any reference to special strengthening for carrying asphalt. Yet on each of the three succeeding trips from 1,000 to 1,100 tons were stowed in compartment No. 2 without damage to the bulkhead; whereas on the first trip only

800 tons had been stowed there. The fair inference is that the bulkhead during these 17 years had become more deteriorated and weakened than was supposed.

2. The claim for similar damage to the hatch beam on the second trip, is disallowed for the same reason, and also because it was suffered to remain after its removal had been suggested by the defendants' representative.

3. The claim of \$60.90 for one-half of winchman's overtime is admitted, and I think the damage to the winch rail and ladder by negligence to the amount of \$60.50, is also established.

4. A claim of \$151.35 is made for expenses of the proper cleaning of the ship after August 1st, and of \$293.02 for detention of the ship after that date. The last item must be disallowed. The charter had expired; the intention to surrender the vessel on August 1st was fully known. The owners had her put upon the dry dock on that day for repairs and to have her bottom cleaned and scraped for a new charter; and from that time they had full possession and control of her. The master indeed stated that he should refuse to accept the vessel from the charterers until she was further cleaned, and the damages to her repaired. But the chief officer on August 2d, not only stated that he was satisfied with the condition of the holds, but gave the subcharterers a certificate by letter that "the linings were taken down and everything done to his satisfaction." There were no such obligations resting on the charterers for repairs as required them to hold the vessel; and as I have said, the owners took her themselves on August 1st for their own uses. All the further cleaning required might have been done while the vessel was on dry dock for the owners' benefit. There was, therefore, no necessary detention of the vessel after August 1st.

From the evidence I have no doubt that the asphalt on August 1st was not altogether cleaned off. The master says that he paid \$151.35 for the subsequent cleaning, including the cost of one barrel of lime and one of cement. The work, he says, was mostly done by his crew on Sunday, August 7th. But from the other testimony of the subcharterers' witnesses, I am not warranted in charging the defendants with any such amount for cleaning properly belonging to them to do, though no doubt the master paid the sum stated for getting the ship in readiness for delivery the following Tuesday under the new charter. On August 6th there was some asphalt adhering to web frames and stringers; but the mate had stated that they would clean this themselves; and Capt. Chamberlain, the defendants' surveyor, testified that the asphalt cleaning that remained on August 6th, could be done by a half dozen men in half a day or a day. Mr. Butler testifies that the master told him the cleaning cost \$18, which he offered him, with \$50 additional for taking down the linings, which the master refused. The master testifies that the offer was on August 6th for the cost of doing the cleaning that still remained to be done. Upon this conflicting testimony I find that the sum offered by Mr. Butler, viz., \$68, will be ample compensation for the cleaning.

5. Sugar damage to the amount of \$224 is claimed by the respondents against the libellant, caused by an accumulation of water in the

bilges in compartment No.1 during unloading. The accumulation arose from unloading first at the stern, giving the ship about 4 to 5 feet greater depth forward, and from the stoppage of the suction pump, which prevented carrying the water off. The defendants charge unseaworthiness of the ship as respects the pumps; but the evidence negatives this, since it appears that the vessel had been an equal amount down by the head in Trinidad without injury to the cargo. The inference, therefore, is that the stoppage was an incident and accident of the voyage, and not through any fault of the ship; so that the risk of the method of discharge adopted by the subcharterers or by the consignee, whoever was the actual director, lay upon them and not upon the libellant. The fact that no claim for this damage had been made upon the subcharterers, tends to confirm this conclusion. I disallow this item.

6. I think the libellant is answerable for the item of \$20.60 for the loss of four bags of sugar while loading, due to bad splicing by the seamen of slings supplied by the charterer according to the agreement. The ropes were new, and bad work in splicing was the only cause of the accident. By supplying "slings" is meant the rope for making them. The subcharterers should, therefore, be credited with this item.

Decree against the respondents for \$168.80 and interest from August 6, 1898, and costs, with directions to collect first from the Trinidad Shipping & Trading Company, and next from the defendant Munson any balance not collectible by execution from that company.

In re MERRITT & CHAPMAN DERRICK & WRECKING CO.

(District Court, D. Connecticut. August 17, 1900.)

No. 1,226.

1. COLLISION—SUIT FOR DAMAGES—FINDINGS OF MASTER.

The findings of a master as to the cost of restoring a vessel injured in collision, based on conflicting testimony, will not be disturbed unless there is a clear error or mistake.

2. SAME—MEASURE OF DAMAGES.

Where the owner sold a vessel injured in collision in her damaged state he is not entitled to recover damages, in a suit for the collision, because she was not restored to her former condition by the repairs made by the purchaser, when it appears that the reason was because the repairing was not properly done.

In Admiralty. Suit for collision. On exceptions to report of commissioner awarding damages.

Avery F. Cushman and Samuel Park, for petitioner.

Benedict & Benedict, for claimant.

TOWNSEND, District Judge. The facts herein are found in 100 Fed. 134. The petitioner's steam tug collided with and sank the claimant's steam yacht, was found solely in fault, and was sold for \$8,525, which amount was deposited in court. The question of damages to said yacht was heard by the commissioner. An award was

made of \$7,000 in favor of claimant, and the matter now comes before this court on exceptions by both parties to the commissioner's report.

The contentions on these exceptions raise various questions as to whether the commissioner has given due weight to certain testimony in cases where the evidence was conflicting, and whether the amounts allowed for repairs and depreciation were or were not reasonable. The evidence has been carefully examined. It amply justifies the commissioner's report. It is clear that the claimant has received all the damages to which he is entitled. After the collision he sold the boat to Testare and Priore for \$3,000. Competent surveyors, after a survey, offered to guaranty to replace everything damaged, and to put the yacht in as good condition as before, except upholstery and decorations, for \$3,000. The purchasers refused this bid as too high, did the work themselves, failed to do it so as to restore the yacht to its former condition, and failed to produce any sufficient account of their expenditures, and yet claimant insists that he is entitled to an award, based on said alleged expenditures, of the whole fund in court, amounting to more than \$8,000. The rule that the person damaged is entitled to the cost of a *restitutio in integrum* has no application under this evidence. The offered restitution was declined. The attempted restitution was not properly done. The claim of expenses incurred was not sufficiently proved. The commissioner finds that the evidence as to said expenditures was unsatisfactory, because, while Testare and Priore purchased the materials, and employed their own workmen thereon, "no books or vouchers of any kind for this part of the work were produced, and the testimony as to most of the expenditures was substantially a matter of recollection." The commissioner attaches a list of claimed expenditures and says: "I find, however, that these expenditures, so far as they relate to a portion of the work, and particularly that of the painting, were excessive, and that the work was done in a needlessly expensive manner. I find from all the evidence that a reasonable allowance for this work would be the sum of \$4,045." Other allowances for articles lost or ruined, amounting to \$1,955, making \$6,000 in all, were also made by the commissioner.

The exceptions on the part of the claimant are overruled. It is not clear that said total of \$6,000, found by the commissioner, is not greater than would seem to be allowable from reading over the testimony. But the conclusions of a master as to matters of fact which depend on conflicting testimony should not be disturbed unless it is clear that there is error or mistake. *Panama R. Co. v. Napier Shipping Co.*, 9 C. C. A. 553, 61 Fed. 409. There is one point, however, in which the commissioner seems to have been in error. He says:

"I further find that the repairs and expenditures above allowed do not place the yacht *Fra Diavolo* back in the condition in which she was at the time she was sunk. I find that, as a result of the collision, the *Fra Diavolo* is out of line and hogged on the port side, and that this, with the weakness of the vessel caused by the breaking in of her sides, has caused permanent depreciation in the value of the yacht, and that a reasonable and fair allowance therefor would be the sum of \$1,000."

John Lane, a witness for claimant, an experienced surveyor, testified that he took part in the original survey on this yacht, and that he then made as thorough a survey as possible; that he inspected her after the repairs, to see whether the recommendations in the survey had been carried out; that he found the repairs had not been properly done, and, as a consequence, on account of weakness, she was losing her shape, and hogging. This permanent depreciation, then, is confessedly due to a considerable extent to the failure to use ordinary skill and diligence in making said repairs, and is not damage resulting directly from the collision. Whether or not the repairs were properly made does not affect this claimant, inasmuch as he sold the boat in its damaged condition. The commissioner finds that \$6,000 was the sum which would be necessarily expended in placing the yacht back "in the condition in which she was at the time she was sunk." Damage caused to the purchasers by improper work is no loss to this complainant. However, as the yacht would probably have been worth less than before, even if the work had been properly done, something should be allowed therefor. I think \$500 would be a fair allowance on this ground. The report may be so modified as to reduce said \$1,000 item to \$500, or the question of permanent depreciation may be referred back to the commissioner, in order to enable him to take further testimony, if necessary, thereon.

MEMORANDUM DECISIONS.

THE ASIATIC PRINCE. (Circuit Court of Appeals, Second Circuit. July 9, 1900.) Appeal from the District Court of the United States for the Southern District of New York. On application for leave to take further proofs. See 97 Fed. 343; 103 Fed. 676. John N. Lewis, for the motion, J. Parker Kirlin, opposed.

LACOMBE, Circuit Judge. It is absolutely impossible to form any opinion as to the 44 letters and telegrams, since no copy of any one of them is before the court. If they are part of a correspondence already partly proved, they might with propriety be admitted. When copies of them are furnished, and the letters and telegrams already in evidence are printed, so that an examination and comparison can be made, the question will be passed upon. As to the statutes, decrees, articles of the Commercial Code, and custom-house regulations of Brazil, the full text of those of which the numbers are set out in the moving papers may be put in. The application to recall libellant seems to be intended practically to secure his re-examination on the whole case, and must be denied.

GAVIN v. POLLOCK. (Circuit Court of Appeals, Fourth Circuit. May 18, 1900.) No. 369. On Petition to Superintend and Revise from the District Court of the United States for the Eastern District of North Carolina. In bankruptcy. McNeill & Bryan, for petitioners. Petition withdrawn.

INDIANA NOVELTY MFG. CO. v. SMITH MFG. CO. (Circuit Court of Appeals, Seventh Circuit. June 18, 1900.) No. 631. Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin. John W. Munday, for appellant. H. G. Underwood and E. H. Bottum, for appellee. By stipulation of counsel the same decree was entered as in No. 630 (Indiana Novelty Mfg. Co. v. Crocker Chair Co. [C. C. A.] 103 Fed. 496). See 90 Fed. 488.

LYMAN v. KANSAS CITY & A. R. CO. et al. (Circuit Court of Appeals, Eighth Circuit. September 10, 1900.) No. 1,484. Appeal from the Circuit Court of the United States for the Western District of Missouri. C. H. Nearing, for appellant. Lathrop, Morrow, Fox & Moore and Kenneth McC. De Weese, for appellees. Docketed and dismissed, pursuant to stipulation of parties; each party to bear the costs already paid by each, and the unpaid costs to be equally divided. See 101 Fed. 636.

NEEPER v. BRISCOE. (Circuit Court of Appeals, Eighth Circuit. September 10, 1900.) No. 1,422. Appeal from the District Court of the United States for the Eastern District of Missouri. Robert E. Collins, Dorsey A. Jamison, and Edwin A. Chappell, for appellant. Reuben F. Roy and C. T. Hay, for appellee. Dismissed, without costs to either party in this court, pursuant to the stipulation of the parties.

CONVERSE et al. v. PARMLY. (Circuit Court, S. D. New York. July 2, 1900.) Demurrer to Complaint in an Action at Law. Randolph Parmly and Arthur H. Masten, for demurrer. Charles A. Deshon, opposed.

LACOMBE, Circuit Judge. The complaint apparently declares upon a primary agreement of defendant to respond for losses, and not a guaranty that Prescott & Brooks shall respond for them. Indeed, no indebtedness of Prescott & Brooks to plaintiff for such losses is alleged, nor is there sufficient in the complaint to warrant such a holding. When the proofs are in the case may present a different aspect, but on the pleadings alone the demurrer must be overruled. Leave to answer within 20 days.

COOPER v. PRATT. SCHIFFER et al. v. SAME. (Circuit Court, N. D. New York. July 10, 1900.) L. A. Stebbins and George Lawyer, for plaintiffs. Charles E. Patterson and Charles C. Van Kirk, for defendant.

COXE, District Judge. These actions are barred for the reasons stated in the foregoing decision (Bank v. Pratt [C. C.] 103 Fed. 62), and in each the complaint is dismissed with costs.

WEST v. MORTON BOARDING STABLES et al. (Circuit Court, S. D. New York. May 12, 1900.) George E. Waldo, for the motion. Richard T. Greene, opposed.

LACOMBE, Circuit Judge. Where there is such sharp conflict between the statements of the respective parties on the most important issues raised by the motion, complainant should not take judgment before trial, and that would be the practical result of granting the relief for which he prays. The brief submitted by complainant's counsel, with its many references to the statutes of this state touching the administration of corporations, most strongly con-

frms the impression formed on the argument that, if the facts really warrant the conclusion that the defendant corporation should be wound up and its assets distributed to creditors, the state court is the proper forum.

UNITED STATES v. JUE YET. (District Court, D. Vermont. April 19, 1900.) James L. Martin, U. S. Atty. P. F. McManus, for respondent.

WHEELER, District Judge. The testimony in this case stands like that in U. S. v. Jue Wy (D. C.) 103 Fed. 795, and upon the same considerations seems sufficient. Appellant discharged.

END OF CASES IN VOL. 103.